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# **Scotland's Challenge to Parliamentary Sovereignty: Can Westminster Abolish the Scottish Parliament Unilaterally?**

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## **Abstract**

The question of the contemporary status of parliamentary sovereignty is a significant and vexed one. The doctrine's status in Scotland has been a vexed academic issue for centuries. It has been further problematized by the inception of the Scottish Parliament and the recent Scottish Independence Referendum. The central question of this work is: can Westminster abolish the Scottish Parliament unilaterally? This issue will be explored in five parts. The first section will consist of a broad discussion of sovereignty, focusing on the classical debates regarding Westminster's sovereignty and the question of whether Scotland possessed a distinct tradition of popular sovereignty prior to entering the Union. The work will then examine the events of the 1980s and 1990s and argue that it represented a constitutional step change in Scotland. The work will then explore the constitutional and political meaning of referendums, before the theories of constitutional unsettlement and constitutional moments.

The central contention of this work is that, whilst a distinctly Scottish approach to sovereignty did not exist until the 1990s, the political rupture created by the Conservative government of the 1980s and 1990s acted as a constitutional moment, crystallized in the 1997 Referendum on Devolution, which politically entrenched the Scottish Parliament's status in the Scottish and British constitutional orders. The 2014 Referendum confirmed the political necessity for recourse to popular sovereignty on profound constitutional issues. This, however, has not been reflected in law. Westminster retains the theoretical capacity to abolish the Scottish Parliament. In reality, this is an almost meaningless power, but the power cannot be removed without destroying parliamentary sovereignty itself. The state of constitutional unsettlement that the United Kingdom continues to exist in means that there is little hope for formal settlement of this issue, even taking into account the impending legislative confirmation of the Scottish Parliament's political permanence.

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### *Declaration*

I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Signature \_\_\_\_\_

Printed name \_\_\_\_\_

## Chapter 1: Parliamentary Sovereignty in Scotland Today

*“Lord have mercy upon my poor countrey that is so barbarously oppressed!”*<sup>1</sup>

*“It will be a decisive shift in the balance of power in Britain, a long overdue transfer of sovereignty from those who are governed, from an ancient and indefensible Crown sovereignty to a modern popular sovereignty.”*<sup>2</sup>

The constitutional accommodation of Scotland within the United Kingdom has been an issue for as long as there has been a United Kingdom. More recently, the constitutional status of the Scottish Parliament is an issue of significant contemporary importance. It formed part of the debate surrounding the recent Scottish Independence Referendum and was included as one of the Smith Commission’s proposals, incorporated in the Draft Scotland Clauses proposed by the UK Government.<sup>3</sup> Similarly, sovereignty – and, in particular, parliamentary sovereignty – is an increasingly contested concept within the United Kingdom and internationally.<sup>4</sup>

The UK has traditionally been regarded as a unitary state, as opposed to a federal one.<sup>5</sup> The origins of parliamentary supremacy as well as the relationships between the Crown, courts and Parliament, were somewhat different in pre-Union Scotland and England.<sup>6</sup> Both countries entered the union voluntarily and negotiated their terms of entry. These terms make clear that Scotland possesses its own distinct civic society, and, most importantly, its own courts and legal system. MacCormick is right to say that there “is no doubt that we have a single state, but it is at least possible that we have two interpretations, two conceptions, two understandings, of the constitution of that state.”<sup>7</sup>

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<sup>1</sup> Andrew Fletcher quoted in ‘Letters of Andrew Fletcher of Saltoun and his Family 1717-16’, History Society, *Miscellany of History Society*, Vol. X (Scottish History Society 1965).

<sup>2</sup> Gordon Brown, ‘Constitutional Change and the Future of Britain’ (Charter88 Sovereignty Lecture, London, 9 March, 1992).

<sup>3</sup> Clause 1, Draft Scotland Clauses 2015 featured in Scotland Office, *Scotland in the United Kingdom: An Enduring Settlement* (Cm 8990, 2015) 92.

<sup>4</sup> See Martin Loughlin and Petra Dobner (eds), *The Twilight of Constitutionalism?* (OUP 2010) and Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (OUP 2010).

<sup>5</sup> Anthony Bradley and Keith Ewing, *Constitutional and Administrative Law* (15<sup>th</sup> ed Longman 2010) 40.

<sup>6</sup> Adam Tomkins, ‘The Constitutional Law in *MacCormick v Lord Advocate*’ (2004) JR 213-224.

<sup>7</sup> Neil MacCormick, ‘Is There a Constitutional Path to Independence?’ 2000 *Parliamentary Affairs* 721, 727. Although this is a relatively modern view and not one that necessarily sits well with the whole of the UK, see Colin Kidd, *Union and Unionisms* (CUP 2008) 115.

With this in mind, it can be suggested that the United Kingdom is a union state, with alternative interpretations of the constitution available in different parts of the state.<sup>8</sup> In this “pluri-constitutive state”<sup>9</sup> a distinct tradition of popular sovereignty in Scotland is possible.<sup>10</sup>

Some have suggested that the advent of the Scottish Parliament is inherently and legally permanent.<sup>11</sup> This work will focus on the Scottish Parliament’s institutional challenge, along with the effect of referendums, to parliamentary sovereignty. The first section will consist of a broad discussion of sovereignty, focusing on the classical debates regarding Westminster’s sovereignty and the question of whether Scotland possessed a distinct tradition of popular sovereignty prior to entering the Union. The second chapter will examine the events of the 1980s and 1990s and argue that it represented a constitutional step change in Scotland. The third chapter will examine the approaches adopted by the Scottish and British supreme courts in relation to devolution. The fourth section will explore the constitutional and political meaning of referendums. The fifth chapter will discuss the theories of constitutional unsettlement and constitutional moments, before concluding that the Scottish Parliament is politically entrenched by the 1997 Referendum and the constitutional compact contained in the events of the “constitutional moment” of the 1980s and 1990s. This entrenchment profoundly challenges traditional conceptions of parliamentary sovereignty, but the doctrine cannot formally accommodate legal entrenchment. It will conclude by arguing that this reflects and exacerbates the constitutional unsettlement in which the United Kingdom currently operates, but that this is not necessarily a negative development.

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<sup>8</sup> Rodney Brazier, ‘The Constitution of the United Kingdom’ (1999) 58 C.L.J 56, Neil Walker ‘Beyond the Unitary Conception of the United Kingdom?’ P.L. 2000, Aut, 384-40,4 and David Feldman, ‘One, None or Several? Perspectives on the UK’s Constitution(s)’ C.L.J. 2005 64(2), 329-351.

<sup>9</sup> Neil Walker, ‘Out of Place and Out of Time: Law’s Shifting Co-ordinates’ Edin. L.R. 2010, 14(1),13-46.

<sup>10</sup> Peter Speirs, ‘The People in the Modern Scottish Constitution’, Edinbrough Student Law Review Vol. II Iss. II, 1-16.

<sup>11</sup> Noreen Burrows, *Devolution* (Sweet and Maxwell 2000) 56-65.

## Chapter 2: Parliamentary Sovereignty: Theory and Reality in Scotland

Parliamentary sovereignty, or legislative supremacy, the idea that an Act of Parliament is the highest source of law in the United Kingdom, is central to the British constitution. A thorough understanding of the doctrine and its history is necessary to appreciate its contemporary application in Scotland. Whether the Scottish devolution arrangements have attained the degree of permanence necessary to have created a new limitation on Westminster's legislative supremacy is a matter of political fact and will be assessed later in this work. The questions for this chapter are what the doctrine means, what its status has traditionally been in Scotland and whether it is possible for a limitation to be expressed in legal fact, as suggested by the former Prime Minister, Gordon Brown,<sup>12</sup> rather than as a mere political limitation.

### 2.1 Theory

The doctrine of legislative supremacy can be stated in a variety of ways. It has been variously defined as “the absence of any legal restraint upon the legislative power of the United Kingdom Parliament”<sup>13</sup>, “legislative power that is legally unlimited”<sup>14</sup>, and as constituting “what Parliament doth no authority upon earth can undo... Parliament can do anything that is not physically impossible.”<sup>15</sup> No matter how it is worded, it is irrefutably a very broad authority. It can be contrasted with the powers of legislatures in most other jurisdictions, whose legislation is subject to judicial review and possible reduction by a supreme court.<sup>16</sup>

The modern form of legislative supremacy is justified on democratic grounds.<sup>17</sup> Its normative power stems from the fact that ‘the supremacy of power conferred on

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<sup>12</sup> Gordon Brown, *My Scotland, Our Britain: A Future worth Sharing* (Simon and Schuster 2014) 242-3.

<sup>13</sup> JDB Mitchell, *Constitutional Law* (2<sup>nd</sup> edn W Green and Son 1964) 64.

<sup>14</sup> Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (CUP 2010) 57.

<sup>15</sup> William Blackstone, *Commentaries on the Laws of England I* (first published 1765, Routledge 2001) 160-161.

<sup>16</sup> Richard Bauman and Tsvi Kahana (eds), *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (CUP 2006).

<sup>17</sup> Anthony Bradley, ‘The Sovereignty of Parliament – Form or Substance?’ in Jeffrey Jowell and Dawn Oliver (eds) *The Changing Constitution* (6th edn OUP 2007) 41-42. For a contrary view, see Dawn Oliver, ‘Parliament and the Courts: A Pragmatic (or Principled) Defence of the Sovereignty of Parliament’ in Alexander Horne, Gavin Dewry and Dawn Oliver (eds), *Parliament and the Law* (Hart 2013).

Parliament by the unwritten constitution of the United Kingdom [is] subject to quinquennial democratic control and to the daily force of public opinion.”<sup>18</sup>

### 2.1.1 Dicey

The formalisation of the doctrine owes much to AV Dicey.<sup>19</sup> He is parliamentary sovereignty’s “chief ideologist.”<sup>20</sup> Even though Dicey’s depiction of legislative supremacy has largely fallen out of favour with public lawyers, “they argue within an intellectual framework that he largely created.”<sup>21</sup> His treatment of the subject remains the starting point for any discussion of legislative supremacy throughout the United Kingdom.<sup>22</sup> As an empiricist, Dicey was concerned not with theorising about constitutional doctrine, but attempted to “state what are the laws which form part of the constitution, to arrange them in their order, to explain their meaning, and to exhibit where possible their logical connection.”<sup>23</sup> This analytical process led him to his much-quoted axioms, that legislative supremacy is the “very keystone of the law of the constitution”<sup>24</sup> and the “dominant characteristic of our political institutions”.<sup>25</sup> The term Parliamentary sovereignty was Dicey’s, but it is effectively interchangeable with legislative supremacy.

Dicey found the English constitution to be centred on three interconnected principles: legislative supremacy, the “universal” rule of law and constitutional conventions.<sup>26</sup>

Legislative supremacy means:

*no more nor less than... that Parliament... has, under the English constitution, the right to make or unmake any law whatever; and, further that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.*<sup>27</sup>

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<sup>18</sup> *Nottinghamshire County Council v Secretary of State for the Environment* [1986] 1 AC 240, 265 per Lord Templeman.

<sup>19</sup> AV Dicey, *An Introduction to the Study of the Law of the Constitution* (First published 1889, 8<sup>th</sup> edn Macmillan 1918)

<sup>20</sup> Richard Bellamy, ‘Political Constitutionalism and the Human Rights Act’ 109 CON (2011), Vol. 9 No. 1, 86–111, 87

<sup>21</sup> Iain Maclean, *What’s Wrong with the British Constitution?* (OUP 2010) 21.

<sup>22</sup> Martin Loughlin, *Public Law and Political Theory* (OUP 1992) 140-168.

<sup>23</sup> AV Dicey, *The Law of the Constitution* *supra* 31.

<sup>24</sup> *Ibid* 70.

<sup>25</sup> *Ibid* 39.

<sup>26</sup> *Ibid* 35.

<sup>27</sup> *Ibid* 39-40. Goldsworthy believes the positive aspect to be redundant and the distinction between the two to be tautologous: Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (OUP 1999) 10.

Here, the positive and negative aspects of sovereignty are denoted: Parliament may make any law it so wishes and no other authority may “override or derogate from an Act of Parliament.”<sup>28</sup>

Only a specific form of legislation is supreme: it must be an Act supported by a majority vote in the Houses of Commons and Lords which then receives the Assent of the monarch. In other words, it is not Parliament that is supreme, but the “Queen in Parliament”.<sup>29</sup> This is not mere pedantry: Parliament produces a multitude of other publications and secondary instruments that are not deemed to be constitutionally supreme.<sup>30</sup>

### **2.1.2 Limitations on the Principle**

In spite of some of the caricatures of his work, Dicey saw beyond strict legal absolutism and recognized limitations on parliamentary sovereignty:

*Lawyers are apt to speak as though the legislature were omnipotent... but it is limited, so to speak, both from within and from without; from within, because the legislature is the product of a certain social condition, and determines by whatever determines the society; and from without, because the power of imposing laws is dependent upon the instinct of subordination.*<sup>31</sup>

These are generally termed the internal and external limitations on parliamentary sovereignty. The external limitation is related to obedience to law. Even “under the most despotic monarchies”<sup>32</sup> laws must receive general obedience amongst the populace. Citing David Hume’s belief that “the governors have nothing to support them but [public] opinion”<sup>33</sup>, Dicey asserted that Parliament must consider whether a law is likely to be broadly accepted by the people. Jennings reduced this to “Parliament passes many laws

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<sup>28</sup> Dicey, *The Study of the Law of the Constitution* n.19, 40.

<sup>29</sup> Ivor Jennings, *The Law and the Constitution* (5th edn University of London Press 1964) 160.

<sup>30</sup> Delegated and secondary legislation is amenable to judicial review. See *R (Bancoult No 2) v Foreign Secretary* [2007] EWCA Civ 498. See Pavlos Eleftheriadis, ‘Parliamentary Sovereignty and the Constitution’ *Canadian Journal of Law and Jurisprudence* Vol. XXII, No.2 (July 2009).

<sup>31</sup> Dicey, *The Law of the Constitution* n.19, 76

<sup>32</sup> *Ibid* 77.

<sup>33</sup> David Hume, *Essays, Moral, Political and Literary* (Longman 1875) vol. I, 109-110 quoted by Dicey, *The Law of the Constitution* n.19, 77.

which many people do not want. But it never passes any laws which any substantial section of the population violently dislikes.”<sup>34</sup>

The internal limit is a consequence of the social limitations of those involved in the legislative process. Societal norms and established practices limit what legislators consider acceptable topics and content of legislation. Dicey described it as ‘the moral feeling of the times and the society.’<sup>35</sup>

These limitations are intimately related to Dicey’s theoretical division of political from legal sovereignty. Political sovereignty lies with the people and is closely related to the doctrine of the mandate.<sup>36</sup> Dicey’s conception of legislative supremacy was concerned with legal sovereignty, that is, the power to make laws.

It can be inferred from this that whilst, as a matter of legal form, Parliament possesses the competence to legislate as it wishes, there exist immanent and external practical limitations on its actual ability to legislate. Identifying what these are is not always easy, but the democratic relationship between the House of Commons and the people and what Members of Parliament and the government believe the public will deem acceptable legislation creates a limitation on Parliament’s practical power to legislate. Dicey’s distinction between the legal sovereignty of Parliament and the political sovereignty of the people neatly expresses the relationship between the people as an ultimate check on any extreme behaviour from Parliament.

According to Dicey, where Parliament operates properly by channeling the will of the people, however, these limitations effectively disappear:

*The difference between the will of the sovereign and the will of the nation was terminated by the foundation of a system of real representative government. Where a Parliament really represents the people, the divergence between the external and the internal limit to the exercise of sovereign power can hardly arise, or if it arises must soon disappear.*<sup>37</sup>

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<sup>34</sup> Jennings, *The Law* n.29 143.

<sup>35</sup> *The Law of the Constitution*, n.19, 74.

<sup>36</sup> Ian Loveland, *The Constitution of the United Kingdom: A contextual Analysis* (2<sup>nd</sup> edn Hart 2012) 45.

<sup>37</sup> *The Law of the Constitution* n.19, 77.

Craig claims that “Dicey’s theories were themselves explicitly premised upon certain assumptions concerning representative democracy and the way in which it operated...”<sup>38</sup> In another work he noted that

*The Diceyan conception of sovereignty is therefore firmly embedded within a conception of self-correcting majoritarian democracy. Representative government would necessarily produce a coincidence between the external and internal limits of sovereign power in much the same way that the invisible hand of the market ensured a correspondence of supply and demand.*<sup>39</sup>

Legislative supremacy is, therefore, an integral part and function of British constitutional arrangements.

### **2.1.3 Hart**

For Professor Hart, the Queen in Parliament’s legislative supremacy formed the British constitution’s rule of recognition. This “specif[ies] some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts.”<sup>40</sup> Hart believed that “a great proportion of ordinary citizens – perhaps a majority – have no general conception of the legal structure or its criteria of validity.”<sup>41</sup> Therefore, the rule by which valid laws may be discerned is a function of what is accepted by those who do possess intimate knowledge of constitutional praxis, the predominate representatives of the three branches of state. What forms the rule of recognition “depends upon a morally neutral description of whichever standard of official behaviour officials accept at any given point in time.”<sup>42</sup> Hart is clear, therefore, that “what the Queen in Parliament enacts is law” constitutes the relevant rule of recognition of the British constitution.<sup>43</sup>

Hart distinguished between two approaches to the meaning of Parliament’s sovereignty. The first, “continuing” sovereignty, was described by “older constitutional theorists...

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<sup>38</sup> Paul Craig ‘Unitary, Self-Correcting Democracy and Public Law’ (1990) 106 LQR 105, 109

<sup>39</sup> Paul Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (OUP 1991) 15.

<sup>40</sup> HLA Hart, *The Concept of Law* (3<sup>rd</sup> edn OUP 2012) 79.

<sup>41</sup> *Ibid.*

<sup>42</sup> Stuart Lakin, ‘Debunking the Idea of Parliamentary Sovereignty: The Controlling Factor of Legality in the British Constitution’ (2008) OJLS 709, 717.

<sup>43</sup> Hart, *supra* 107.

[u]nder the influence of the Austinian doctrine that law is essentially the product of a legally untrammelled will” as

*if it was a logical necessity that there should be a legislature which was sovereign, in the sense that it is free, at every moment of its existence as a continuing body, not only from legal limitations imposed ab extra, but also from its own prior legislation...*<sup>44</sup>

The alternative, which he called “self-limiting” sovereignty, is

*the principle that Parliament should not be incapable of limiting irrevocably the legislative competence of its successors but, on the contrary, should have this wider self-limiting power. Parliament would at least once in its history be capable of exercising an even larger sphere of legislative competence than the accepted established doctrine allows to it.*<sup>45</sup>

Continuing sovereignty is the classical exposition of legislative supremacy. Although it is often presented as a matter of pure logic,<sup>46</sup> Hart viewed this conception as “only one interpretation of the ambiguous idea of legal omnipotence” and believed its veracity an “empirical question.”<sup>47</sup> Hart found continuing sovereignty to be the applicable rule of recognition of the United Kingdom. Hart does not view rules of recognition as entirely static or fixed. Constitutional dynamism, by which the rule of recognition is changed or supplanted, is provided for by the empirical nature of establishing what constitutes the rule of recognition.<sup>48</sup> If the majority of officials from Parliament, the executive and the courts agree that the rule of recognition has changed, then it has changed. This, by definition, cannot be completed unilaterally.

For Wade “if no statute can establish the rule that the courts obey Acts of Parliament, similarly no statute can alter or abolish that rule. The rule is above and beyond the reach of statute... because it itself is the source of the authority of statute.”<sup>49</sup> This statement of the traditional, continuing view of sovereignty, is in line with Dicey’s belief that Parliament’s

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<sup>44</sup> *Ibid* 149.

<sup>45</sup> *Ibid*.

<sup>46</sup> Dicey, *The Law of the Constitution* n.19, 69.

<sup>47</sup> *The Concept of Law* n.40. 149-50.

<sup>48</sup> *Ibid* 92

<sup>49</sup> William Wade, ‘The Basis of Legal Sovereignty’ [1955] CLJ 172, 188.

inability to pass “immutable laws” lies “deep in the history of the English people and in the peculiar development of the English Constitution.”<sup>50</sup>

## ***2.2 Implied Repeal: Continuing and self-embracing Sovereignty***

Dicey did not dwell on these limitations or philosophical justifications for parliamentary sovereignty, as they were “tangential to his main concerns and to the central thrust of his argument.”<sup>51</sup> He did, however, believe that the only legal limitation on Parliament’s powers was that it could not bind its successors. This was thought to be axiomatic by Dicey and many others. In the seventeenth century case of *Godden v Hales*, the court held that “... [I]f an act of parliament had a clause in it that it should never be repealed yet without question, the same power that made it, may repeal it...”<sup>52</sup>

Under this view, for a Parliament to possess true sovereignty it must be able to legislate for any end it wishes and cannot be encumbered by pre-ordained limitations on its ability to legislate. It also cannot be limited by the legislation of past Parliaments. Stair was unequivocal that “Parliament can never exclude the full liberty of themselves, or their successors... for, whatever a Parliament can do at one time, in making laws, or determining of causes, may be at their pleasure abrogate or derogate.”<sup>53</sup> . The doctrine of implied repeal is a judicial expression of this view.<sup>54</sup>

Wade recognised the ability of judicial loyalty to change from one interpretation of legislative supremacy to another. He acknowledged the potential for legal “revolutions” and “breaks of continuity”, such as in America in the eighteenth century. He also recognised the potential for more gradual change:

*Even without such discontinuity there might be a shift of judicial loyalty if we take into account the dimension of time... Suppose... that Parliament scrupulously observed [a] rule for 50 or 100 years, so that no conflicting legislation came before the courts. Meanwhile new generations of judges might come to accept that there had been a new constitutional settlement based on common consent and long*

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<sup>50</sup> Dicey, *The Law of the Constitution* n.19, 69.

<sup>51</sup> Anthony King, *The British Constitution* (OUP 2007) 35.

<sup>52</sup> (1686) 11 St Tr 1165 (KB) per Herbert CJ.

<sup>53</sup> Inst. IV, 1, 61. Erskine agreed on this matter, see Inst. I, 1, 19.

<sup>54</sup> Iain Loveland, *Constitutional Law, Administrative Law and Human Rights: A Critical Introduction* (5<sup>th</sup> Ed OUP 2012) 37.

*usage, and that the old doctrine of sovereignty was ancient history... The judges would then be adjusting their doctrine to the facts of constitutional life, as they have done throughout history.*<sup>55</sup>

Turpin and Tomkins note that it may take “a much shorter time than fifty or a hundred years” for such a change to take place.<sup>56</sup>

### **2.2.1 The New View**

It is accepted that it is possible, therefore, for the position to change. Advocates of the so-called ‘new-view’ or self-embracing theory, like Ivor Jennings, have argued that Parliament can limit the content and procedure by which legislation may be passed.<sup>57</sup> For Jennings, because legislative supremacy is, in his view, a product of the common law and courts have accepted that statute is superior to the common law, Parliament can instruct the courts that certain legislation may only be repealed in a certain way.<sup>58</sup>

Much of the evidence for this position comes from Parliaments other than Westminster. Cases such as *Trethowan*,<sup>59</sup> *Harris v Minister for the Interior*<sup>60</sup> and *Bribery Commissioner v Ranasinghe*<sup>61</sup> are proffered as evidence for this position. These cases relate to Dominion legislatures, and the cases in which this question arose in relation to Westminster, those of *Ellen Street Estates v Minister for Health*<sup>62</sup> and *Vauxhall Estates Ltd v Liverpool Corporation*,<sup>63</sup> the courts rejected the claim that Parliament can bind itself. In *Ellis Street* Maugham LJ summed up the traditional view when he said that

*the Legislature cannot, according to our constitution, bind itself as to the form of subsequent legislation, and it is impossible for Parliament to enact that in a*

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<sup>55</sup> William Wade, *Constitutional Fundamentals* (Stevens 1980) 37.

<sup>56</sup> Colin Turpin and Adam Tomkins, *British Government and the Constitution* (7<sup>th</sup> Ed CUP 2011) 74.

<sup>57</sup> See RFV Heuston, *Essays in Constitutional Law* 2nd ed (Universal Law Publishing 1999), Jennings, *The Law and the Constitution* n.29, George Winterton, ‘The British Grundnorm: Parliamentary Sovereignty re-examined’ [1976] 92 LQ Rev 591, and Paul Craig ‘Sovereignty of the United Kingdom Parliament after Factortame’ [1991] 11 Yearbook of European Law 221.

<sup>58</sup> Jennings, *The Law* n.29, 156-163.

<sup>59</sup> *Attorney-General for New South Wales v Trethowan* [1932] AC 526

<sup>60</sup> 1952(2) SA 428(AD).

<sup>61</sup> [1965] AC 172.

<sup>62</sup> [1934] 1 KB 590.

<sup>63</sup> [1932] 1 KB 733 and discussed in Han-Ru Zhou, ‘Revisiting the ‘Manner and Form’ Theory of Parliamentary Sovereignty’ 129 LQR 610-638.

*subsequent statute dealing with the same subject matter there can be no implied repeal.*<sup>64</sup>

These cases, however, were decided relatively narrowly and did not seek to expound absolute and immutable constitutional doctrine; they were statements of the law as it stood at the time of the decision and are not immutable.

### **2.2.2 Jackson**

The issue was discussed more recently by several judges in *obiter* remarks in *Jackson*.<sup>65</sup> Lord Hope rejected the idea absolutely in saying:

*it is a fundamental aspect of the rule of sovereignty that no Parliament can bind its successors. There are no means by whereby, even with the assistance of the most skilful draftsman, it can entrench an Act of Parliament. It is impossible for Parliament to enact something which a subsequent statute dealing with the same subject matter cannot repeal.*<sup>66</sup>

On the other hand, Lord Steyn argued that “Parliament acting as ordinarily constituted may functionally redistribute legislative power in different way”, and approvingly quoted an academic who said that

*...the very power of constitutional alteration cannot be exercised except in the form and manner which the law for the time being prescribes. Unless the Legislature observes that manner and form, its attempt to alter its constitution is void. It may amend or abrogate for the future the law which prescribes that form or that manner. But, in doing so, it must comply with its very requirements.*<sup>67</sup>

Although these matters were discussed in *obiter* remarks and Baroness Hale and Lord Steyn’s views were in the minority, the very fact that senior members of the British judiciary disagree on a topic as fundamental as this is significant and demonstrates the disputed nature of the legislative supremacy in the contemporary constitutional order.

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<sup>64</sup> *Ellis*, n.62, 597.

<sup>65</sup> *R (Jackson) v Attorney General* [2005] UKHL 56; [2006] 1 AC 262.

<sup>66</sup> *Ibid* para 113.

<sup>67</sup> Owen Dixon, ‘The Law and the Constitution’ 51 LQR 590, 601 quoted in *Jackson supra* para 81.

Maughum's dictum in *Ellis Streets* goes beyond the what was strictly under question in that case – whether Parliament can bind its successors as to the *content* of future legislation – and claims that it cannot bind its successors as to the *form* of future legislation, that is the procedure by which legislation may be passed. This manner and form argument is central to the new view. Goldsworthy takes the position that as the process outlined in something like the Parliament Acts is less restrictive than the ordinary procedure it is merely an example of Parliament “expandi[ng] its powers”, thus demonstrating its sovereignty.<sup>68</sup> This is substantively different to an instance in which Parliament limits its own powers. The preponderance of judicial and political opinion currently appears to be that Parliament is not able to bind its successors on either the content or the manner and form of future legislation.<sup>69</sup> As Loveland put it, ‘Parliament’s unconfined legislative power is created anew every time it meets, irrespective of what previous Parliaments have enacted.’<sup>70</sup>

### ***2.3 Constitutional Statutes and the Challenge of the Common Law***

In *Thoburn v Sunderland City Council*<sup>71</sup> Laws LJ introduced a new classification of statutes. In this so-called Metric Martyrs case, he held that some statutes are constitutional in nature and should only be subject to express repeal by Parliament:

*We should recognise a hierarchy of Acts of Parliament: as it were "ordinary" statutes and "constitutional" statutes. The two categories must be distinguished on a principled basis. In my opinion a constitutional statute is one which (a) conditions the legal relationship between citizen and State in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights.*<sup>72</sup>

The Scotland Act 1998<sup>73</sup> meets these criteria and is explicitly listed as an example of such an Act. Laws LJ continues:

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<sup>68</sup> Goldsworthy, *Contemporary Debates* n.14 179.

<sup>69</sup> Danny Nicol, *The Constitutional Protection of Capitalism* (Hart 2010) 28.

<sup>70</sup> Iain Loveland, n.54, 37.

<sup>71</sup> [2002] EWHC 195 Admin.

<sup>72</sup> *Ibid* para 62.

<sup>73</sup> *The 1998 Act*.

*Ordinary statutes may be impliedly repealed. Constitutional statutes may not. For the repeal of a constitutional Act... the court would apply this test: is it shown that the legislature's actual – not imputed, constructive or presumed – intention was to effect the repeal or abrogation? I think the test could only be met by express words in the later statute, or by words so specific that the inference of an actual determination to effect the result contended for was irresistible. The ordinary rule of implied repeal does not satisfy this test. Accordingly, it has no application to constitutional statutes.*<sup>74</sup>

This highly controversial claim has received a mixed reception from academics and in subsequent judgments, although Lord Laws regards it as a “benign development.”<sup>75</sup> Even TRS Allan, the committed common law constitutionalist, has expressed serious doubts over the concept:

*...Sir John Laws's talk of 'constitutional statutes' imposes rather too much rigidity on [the common law's] interpretative process capable of responding to all the relevant circumstances. It may be hard to know, in the abstract, whether or not a particular statute qualifies for such special status; and the question is likely to distract us from more nuanced matters of construction, tailored to the facts of the case in view.*<sup>76</sup>

It contradicts Dicey's claim that “fundamental or so-called constitutional laws are under our constitution changed by the same body and in the same manner as other laws”.<sup>77</sup> Barendt agrees with Dicey that “fundamental laws ... can be as easily repealed as, say, the Animals Act 1971 or the Estate Agents Act 1979.”<sup>78</sup> Laws LJ's is not, however, an entirely novel concept. In *Earl of Antrim's Petition (House of Lords)*<sup>79</sup> Lord Wilberforce said he felt “some reluctance to holding that a Act of such constitutional significance as the Union with Ireland Act is subject to the doctrine of implied repeal.”<sup>80</sup> Craig has argued that post-

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<sup>74</sup> *Ibid* para 63.

<sup>75</sup> *Ibid* para 64. See also *Robinson v Secretary of State for Northern Ireland*, [2002] UKHL 32, *Axa General Insurance v The Lord Advocate* [2011] UKSC 46, *Imperial Tobacco, Limited* [2012] UKSC 61 and David Feldman ‘The Nature and Significance of “Constitutional” Legislation’ L.Q.R. 2013, 129(Jul), 343-358.

<sup>76</sup> TRS Allan, *The Sovereignty of Law: Freedom, Constitution and Common Law* (OUP 2013) 149-50.

<sup>77</sup> *The Study of the Law of the Constitution* n.19, 75.

<sup>78</sup> Eric Barendt, *An Introduction to Constitutional Law* (OUP 1998) 27.

<sup>79</sup> [1967] 1 AC 691.

<sup>80</sup> *Ibid* 724.

*Factortame*, judges increasingly perceive the idea of nullifying legislation unrelated to the European Union as “less novel or revolutionary.”<sup>81</sup>

More recently in *obiter remarks* in *H*,<sup>82</sup> Lord Hope effectively endorsed the *Thoburn* approach without mentioning it explicitly. He held that only an express provision could alter the 1998 Act due to

*... the fundamental constitutional nature of the settlement that was achieved by the Scotland Act. This in itself must be held to render it incapable of being altered otherwise than by an express enactment. Its provisions cannot be regarded as vulnerable to alteration by implication from some other enactment in which an intention to alter the Scotland Act is not set forth expressly on the face of the statute.*<sup>83</sup>

In fact, Lord Hope goes somewhat further than Laws LJ. Lord Hope’s ruled that the 1998 Act cannot be impliedly repealed is absolute and unqualified, whereas Laws provided for some situations in which such a repeal may take place.

Again in *The HS2 Case*<sup>84</sup> Lords Neuberger and Mance said that

*The United Kingdom has no written constitution, but we have a number of constitutional instruments. They include Magna Carta, the Petition of Right 1628, the Bill of Rights and (in Scotland) the Claim of Rights Act 1689, the Act of Settlement 1701 and the Act of Union 1707. The European Communities Act 1972, the Human Rights Act 1998 and the Constitutional Reform Act 2005 may now be added to this list. The common law itself also recognises certain principles as fundamental to the rule of law. It is, putting the point at its lowest, certainly arguable (and it is for United Kingdom law and courts to determine) that there may be fundamental principles, whether contained in other constitutional instruments or recognised at common law, of which Parliament when it enacted the European Communities Act 1972 did not either contemplate or authorise the abrogation.*<sup>85</sup>

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<sup>81</sup> Paul Craig, ‘Report on the United Kingdom’ 215 quoted in Goldsworthy, *Contemporary Debates* n.14, 314.

<sup>82</sup> *H* [2012] UKSC 24; [2013] 1 AC 413.

<sup>83</sup> *Ibid* para 30. Emphasis added.

<sup>84</sup> *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3.

<sup>85</sup> *Ibid* para 207.

This expands on the *Thoburn* approach in that it creates a hierarchy of constitutional provisions. It implies that there exist constitutional provisions more fundamental than others. Yet this still applies only to implied repeal and there is no indication that it would apply to express repeal.

*Thoburn* and Laws LJ's extra-judicial arguments are interpreted by Elliot as an attempt to affect change in the rule of recognition.<sup>86</sup> It is the beginning of a dialogue between Hart's "officials" as to the true status of the rule of recognition. Courts are "attempting a peaceful revolution by incremental steps aimed at dismantling the doctrine of parliamentary sovereignty and replacing it with a new constitutional framework in which parliament shares ultimate authority with the courts."<sup>87</sup> Laws LJ is effectively staking out a position and seeking to build a consensus around it. There is no evidence that Parliament or the government have accepted the concept of constitutional statutes. Neither has it, for example, suggested or passed legislation with reference to it as constitutional in nature. The judiciary are increasingly willing to accept the rhetorical construct contained in *Thoburn* without applying it. This can be explained by an amended version of Allison Young's dialogic model, in which the judiciary, the legislature and the executive engage in public dialogue with each other regarding constitutional fundamentals and individual rights protections.<sup>88</sup> It would appear that this attempt at renegotiating the rule of recognition continues but with limited success.<sup>89</sup> Goldsworthy warns that "[b]y unsettling what has for centuries been regarded as settled, the courts would risk conflict with the other branches of government that might dangerously destabilize the legal system."<sup>90</sup>

The position is clearly fluid. *H* and *HS2* show that the approach has been subsumed into the judicial lexicon, but that the constitutional statute scheme is insufficiently comprehensive to be a complete answer all the questions relating to contemporary sovereignty.

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<sup>86</sup> Mark Elliot, 'Parliamentary Sovereignty and the New Constitutional Order: Legislative Freedom, Political Reality and Convention' (2002) LS 340, 362-374.

<sup>87</sup> Goldsworthy, *Contemporary Debates* n.14, 2.

<sup>88</sup> This model was developed in relation to the Human Rights Act 1998. See Allison Young, 'Deference, Dialogue and the Search for Legitimacy' OJLS (2010) 30(4): 815-831 and *Parliamentary Sovereignty and the Human Rights Act* (Hart 2009).

<sup>89</sup> Keith Syrett, *The Foundations of Public Law: Principles and Problems of Power in the British Constitution* (Palgrave 2011) 121.

<sup>90</sup> *Ibid* 246.

### 2.3.1 *The Source of Legislative Supremacy and Common Law Constitutionalism*

These questions, ostensibly technical ones of statutory interpretation, must be set in the context of what Turpin and Tomkins describe as the challenge of “common law radicalism.”<sup>91</sup> Several judges and academics have sought to ground the basis of legislative supremacy in the common law.<sup>92</sup> Lord Steyn believes legislative supremacy to be a “common law construct” flowing from the rule of law and that legislative supremacy is “out of place in the modern United Kingdom”;<sup>93</sup> Sedley LJ claimed that the UK has “a bipolar sovereignty of the Crown in Parliament and the Crown in its courts, to each of which the Crown’s ministers are answerable – politically to Parliament, legally to the courts”;<sup>94</sup> and Laws LJ thinks that “[i]n its present state of evolution, the British system may be said to stand at an intermediate stage between parliamentary supremacy and constitutional supremacy...”<sup>95</sup> Jowell is skeptical of the treatment that Dicey generally receives from academics, stating that

*[w]ith few exceptions, his [Dicey’s] conferment of prior status to parliamentary sovereignty over the rule of law has been parroted over the years as if were an eternal truth, and has always been honoured in practice.*<sup>96</sup>

Even as Attorney General, Lord Goldsmith stated the government’s belief that “the source of the legislative powers [of Westminster] is the common law.”<sup>97</sup>

By positioning legislative supremacy as a product of the courts this theory necessarily allow courts to amend or overturn the doctrine unilaterally. For Lord Irvine, such “extra-judicial romanticism” is unwelcome and naïve.<sup>98</sup> In any event, TRS Allan posits legislative

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<sup>91</sup> *British Government and the Constitution* n.56, 86.

<sup>92</sup> For critiques of the concept see Adam Tomkins, *Our Republican Constitution* (Hart 2005) Ch 1; JAG Griffiths ‘The Brave New World of Sir John Laws’ (2000) 63 MLR 159 and ‘The Common Law and the Political Constitution’ (2001) 117 LQR 42; Thomas Poole ‘Dogmatic Liberalism?’ T.R.S. Allan and the Common Law Constitution’ (2002) 65 MLR 463 and ‘Back to the Future? Unearthing the Theory of Common Law Constitutionalism’ [2003] OJLS Vol. 23, 3, 435-454.

<sup>93</sup> *Jackson, supra.*

<sup>94</sup> Stephen Sedley, ‘Human Rights: A Twenty-First Century Agenda’ [1995] P.L. 386, 389.

<sup>95</sup> *International Transport Roght GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158; [2002] 3 WLR 344 para 71.

<sup>96</sup> Jeffrey Jowell, ‘Parliamentary Sovereignty under the New Constitutional Hypothesis’, 2006 P.L. 562, 564. Support for the position can also be found in Ian Ward, *The English Constitution: Myths and Realities* (Hart 2004) 24-40.

<sup>97</sup> HL Deb 31 March 20014, vol. 2 col. WA 160.

<sup>98</sup> Lord Irvine, ‘Judges and Decision-Makers: The Theory and Practice of Wednesbury Review’ (1996) P.L. 59, 75-78.

supremacy to be a product of “deeper principles”, primarily of democracy and the rule of law. Much of the purported evidence for this position can be found in a handful of anomalous seventeenth century decisions largely decided by Sir Edward Coke.<sup>99</sup> Allan is unambiguous in his claim that the source of legislative supremacy must be found externally from Parliament as the institution could not have conferred power on itself. Instead, in his view, “Parliament is sovereign because the judges acknowledge its legal and political supremacy.”<sup>100</sup>

Advocates of this position have been emboldened by the decisions in the *Factortame* cases,<sup>101</sup> although Tomkins has demonstrated that, in deciding cases under the auspices of the European Communities Act 1972 the courts are acting at the request of Parliament in these cases and, therefore, there are no implications for the doctrine of legislative supremacy outside the boundaries of Community law.<sup>102</sup>

In his landmark books on legislative supremacy, Jeffrey Goldsworthy refutes the claims of the common law constitutionalists and demonstrates that Dicey’s historical survey was fundamentally correct. As to the source of Westminster’s legislative supremacy, Goldsworthy demonstrates that its theoretical roots lie in the writings of a series of English political and legal writers from the thirteenth century onwards. He identifies the obvious flaw in Allan’s position, namely that “[t]he only alternative consistent with the argument is to think judges conferred authority on themselves.”<sup>103</sup>

He goes on to show that the doctrine gained institutional acceptance is in the political settlement of the aftermath of the Glorious Revolution of 1688. Similarly, Tomkins describes the judicial recognition of the “political reality” of Parliament’s victory in the English civil war.<sup>104</sup> This historical approach is in line with the advice of JAG Griffith, who described many constitutional approaches as being the result of conflicts<sup>105</sup>, and JDB Mitchell, who said that

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<sup>99</sup> E.g. *Dr Bonham’s Case* (1609) 8 Co Rep 118.

<sup>100</sup> TRS Allan, *Law, Liberty and Justice* (Clarendon, 1994) 10.

<sup>101</sup> *R v Secretary of State for Transport, ex parte Factortame* [1990] 2 AC 85 and *R v Secretary of State for Transport, ex parte Factortame (No. 2)* [1991] 1 AC 603.

<sup>102</sup> Adam Tomkins, *Public Law* (Clarendon 2003) 108-120.

<sup>103</sup> Goldsworthy, *History and Philosophy* n.27, 240.

<sup>104</sup> Tomkins, *Public Law supra* 10; cf. Allan, *Law, Liberty and Justice supra* 4.

<sup>105</sup> ‘The Political Constitution’ [1979] MLR 1.

*Constitutions and constitutional doctrines are the result of history ... [N]o theory about the sovereignty of Parliament can be proved, in the way that other legal concepts can be, by a chain of elucidatory decisions.*<sup>106</sup>

It can be seen, therefore, that the rule of recognition that the Queen in Parliament is supreme is conferred by consensus. When the doctrine of legislative supremacy is viewed as a product of a political consensus it is clear that is contingent upon that consensus remaining intact, as discussed above. The contemporary position is summed up by Goldsworthy when he says that:

*for many centuries there has been a sufficient consensus among all three branches of government in Britain to make the sovereignty of Parliament a rule of recognition in H. L. A. Hart's sense, which the judges by themselves did not create and cannot unilaterally change.*<sup>107</sup>

## **2.4 Historical Sovereignty**

It will not have gone unnoticed that Dicey referred to the English rather than the British constitution. Whilst the two were widely conflated at the time, he was also implying that the historical position of legislative supremacy is different in Scotland and England.<sup>108</sup> That the Scottish constitutional order prior to the Union had no recognition of the concept of legislative supremacy is a common position and will now be evaluated.

Scotland's pre-union constitution was neither firmly settled nor clear. The relationship between Crown, Parliament and the people was subject to change depending on the personalities of the relevant constitutional actors and the broader political, social, military and economic context of the time. Essential themes on the issue are explored here.

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<sup>106</sup> Mitchell, *Constitutional Law* n.13, 63.

<sup>107</sup> *History and Philosophy*, n.27 234.

<sup>108</sup> Bradley and Ewing, *Constitutional and Administrative Law* n.5, 34-35 and 53.

### 2.4.1 *The Pre-Union Scots Parliament*

The Scots Parliament<sup>109</sup> was a complex and dynamic institution. It was formed as an extension of the King's Council in the thirteenth century. Although a unicameral legislature, it was divided into three estates along the broader "Estates of the Realm" principles of middle ages Europe.<sup>110</sup> Central to understanding the Parliament was the operation of the Lords of the Articles. This acted as a pre-legislative committee, generally dominated by the King, but officially elected by the Estates. It is the strength of this institution as well as the Conventions of Estates upon which Dicey and Raitt maintained that the Scots Parliament was not sovereign.<sup>111</sup> However, the Parliament dissolved the Lords of Articles in 1690 and did not summon a Convention of Estates after this. The Scots Parliament then passed the Act of Union 1706, extinguishing itself and Scottish sovereignty. This was done with no recourse to the people, who were thought to be opposed to the creation of a union with England and the abolition of the Scots Parliament.

If "the principle of Parliamentary sovereignty means no more nor less than... the right to make or unmake any law whatever and, further that no person or body is recognised by the law... as having a right to override or set aside the legislation of Parliament"<sup>112</sup> then the pre-union-post-revolution Scots Parliament can be regarded in retrospect as an increasingly sovereign Parliament by the time of Union. The Scots Parliament dissolved itself and sacrificed Scotland's sovereignty after unilaterally negotiating the limits of the Crown succession. No practical limitation had been recorded on the legislative power of the post-Revolution Scots Parliament.<sup>113</sup> In addition to this the principle of desuetude, the disapplication of laws of the Scots Parliament based on "a very considerable period, not merely of neglect, but of contrary usage of such a character as practically to infer such completely established habit of the community as to set up a counter-law or establish a quasi-repeal"<sup>114</sup>, has been pointed to as evidence of popular sovereignty acting as a check

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<sup>109</sup> The term 'Scots Parliament' will be used here to avoid confusion with the modern Scottish Parliament, which is necessarily a separate body in spite of the rhetorical flourish used when Winnie Ewing MSP, the first Presiding Officer of the current Scottish Parliament, at the institution's opening declared: "The Scottish Parliament, adjourned on the 25 March 1707, is hereby reconvened": SP OR 12 May 1999.

<sup>110</sup> These were: the Prelates of Bishops and Abbots (which was abolished in 1638), the Nobility and the Burgh Commissioners.

<sup>111</sup> AV Dicey and RS Raitt, *Thoughts on the Union between England and Scotland* (Greenwood 1920), 32-44.

<sup>112</sup> Dicey, *The Law of the Constitution* n.19, 39-40.

<sup>113</sup> Goldsworthy, *History and Philosophy* n.27, 165.

<sup>114</sup> *Brown v Edinburgh Magistrates* 1931 SLT 456 at 458, OH. See also *The Laws of Scotland: Stair Memorial Encyclopedia* (The Law Society of Scotland and Butterworths 2002) paras 102- 124. and JR Philip 'Some Reflections on Desuetude' (1931) 43 JR 260.

on the Scottish Parliament's sovereignty. This has been held up as an example of a limitation on the Scots Parliament's powers.<sup>115</sup> It is better regarded as an example of occasions in which the Scots Parliament failed to appreciate the political limits on its power and part of the negotiation of its authority. It is the very definition of an external limitation on parliamentary sovereignty as described by Dicey. In any event, it is universally acknowledged to have ceased to apply to post-Union legislation.<sup>116</sup>

Moreover, the Scots Parliament acted as the highest court of appeal<sup>117</sup>, and other courts, which were therefore inferior to the Parliament, could not invalidate its acts.<sup>118</sup> Laws made by the Estates were "said to oblige all the lieges of the realm."<sup>119</sup> A Scottish Commissioner in the negotiations surrounding the union said "the sovereign and representatives are the only judges of everything which does contribute to the happiness of the body politic, and from whom no appeal can legally be made... Our law is positive, that this Supreme Court is subject to no human authority."<sup>120</sup>

The doctrine of Parliamentary sovereignty had not been articulated fully by 1707.<sup>121</sup> The Scots Parliament did not get the opportunity to develop into an explicitly sovereign legislature, or in another direction, as it extinguished itself in the process of Union. However, there is sufficient evidence that it was heading in the direction of legislative supremacy.

#### **2.4.2 The Claim of Right 1689 and George Buchanan**

The Scots Parliament's precise constitutional status was never formally settled. This is largely because the Scottish constitutional order was in a constant state of flux in the seventeenth century and the theoretical framework had not yet been established.<sup>122</sup> In 1689 the Parliament adopted the Claim of Right, the terms upon which William and Mary

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<sup>115</sup> William Bain and Jean McFadden, 'Strategies for the Future: A Lasting Parliament for Scotland?' in St J Bates, (ed.), *Devolution to Scotland: the Legal Aspects* (T&T Clark 1997) 12.

<sup>116</sup> JDB Mitchell, *Constitutional Law* n.13, 80 and TB Smith, *A Short Commentary on the Law of Scotland* (Green 1963) 30.

<sup>117</sup> David Walker, *A Legal History of Scotland Vol.III* (T&T Clark 1997), 224-6.

<sup>118</sup> *Stuart v Wedderburn* (1627) Durie 201. TB Smith, *supra* concluded that 113-4 "The existing privileges of the courts in Scotland in 1707 were confirmed [by the Treaty of Union] – but these certainly did not include scrutiny of the legislation of the Scottish Estates" 31.

<sup>119</sup> Goldsworthy, *History and Philosophy* n.27, 166.

<sup>120</sup> Speech in Scots Parliament by Mr Seton Junior of Pitmedden quoted in Goldsworthy, *History and Philosophy* n.27, 168.

<sup>121</sup> Michael Keating, *Plurinational Democracy in a Post-Sovereignty Era* (OUP 2003) 38.

<sup>122</sup> Walker, *A Legal History of Scotland supra* Ch.2.

were to accept the Scottish Crown.<sup>123</sup> The Claim is based on George Buchanan's sixteenth century exposition of a social contractarian relationship between the monarchy and the people.<sup>124</sup>

Neil MacCormick has proposed an interpretation of the Scottish constitution which places popular sovereignty at its fulcrum, based on his reading of Buchanan.<sup>125</sup> Buchanan evinced an interpretation of Scottish political thought that vested in the Scottish people the authority to overthrow despotic rulers. His argument was that, as Scotland had never been conquered by a foreign invader, its people had never been dominated by force. The authority of the Crown was, therefore, contingent on the people's consent. As MacCormick himself interpreted it:

*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. From this, and from such other iconic texts as the Declaration of Arbroath and his interpretation of the ancient constitution, has derived the thesis that in Scottish constitutional tradition, sovereignty belonged to the people, to the community of the realm, rather than to Parliament, or, strictly King or Queen in Parliament.*<sup>126</sup>

MacCormick's romanticised interpretation of Buchanan is problematic.<sup>127</sup> Buchanan's writing is not a purely descriptive account of the contemporary Scottish constitution. Instead, it is his selective interpretation of Scottish history combined with his political theory.<sup>128</sup> He is asserting political oughts rather than legal realities.<sup>129</sup> Buchanan "constructed an ancient constitutional history of Scotland, relying on a theory of popular sovereignty in which the 'people' meant an assembly of the nobles and clan chiefs..."<sup>130</sup> His "the people" was radically different to modern conceptions. Buchanan viewed the

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<sup>123</sup> Claim of Right Act 1689.

<sup>124</sup> George Buchanan, *De Iure Regni Apud Scotos*, (Saltire Society 2006).

<sup>125</sup> Neil MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (OUP 1999).

<sup>126</sup> *Ibid* 55.

<sup>127</sup> Dan Sharp, 'Parliamentary Sovereignty: A Scottish Perspective' C.S.L.R. 2010 6(1), 135-154

<sup>128</sup> Colin Kidd, *Subverting Scotland's Past: Scottish Whig Historians and the Creation of an Anglo-Scottish Identity: 1689-1830* (CUP 2003) 19-20

<sup>129</sup> Paul McGinnis and Arthur Williamson (eds), *The British Union: A Critical Edition and Translation of David Hume of Godscroft's De Unione Insulae Britannicae* (Ashgate 2002) 7.

<sup>130</sup> *Ibid* 20.

supposed election of monarchs after the deposition or assassination of tyrannical rulers by “leading men – *primores* – of the nation”.<sup>131</sup> Such behaviour in modernity would be regarded as a coup d’état rather than the expression of popular sovereignty. This is understandable, as Buchanan was writing at a point in history before democracy as we would recognise it had crystalized, but it serves to demonstrate the next problem.<sup>132</sup>

The primary problem with MacCormick’s interpretation of Buchanan and the pre-union Scottish constitution is that it attempts to impose modern, or at least more recent, concepts on the past.<sup>133</sup> Buchanan relied upon the Declaration of Arbroath of 1320 and his interpretation of the supposed ancient Scottish constitution as a basis for a proto-popular sovereignty movement within the Scottish constitution. The Declaration is best known for its anti-English conquest peroration,<sup>134</sup> but its primary purpose was to request that the Pope at Avignon recognise Robert the Bruce as king of Scotland and the rights of the Scottish people to select their own form of government. It seeks to safeguard the Scottish people’s independence from England and implies that, in Scotland, the monarch’s power is derived from the people. This is used by Buchanan to demonstrate a somewhat limited Scottish monarchy whose power derives from the consent of the people.

The Declaration is far from unique as a medieval document seeking to limit the monarch’s powers. Magna Carta, signed a century prior to the Declaration, has very similar rhetoric to the Declaration. It contains near universal protections for Englishmen, and sought to limit the power of the King. It is difficult to maintain that the Declaration represents a uniquely Scottish approach to the relationship between the Crown and the people.

Moreover, this position views the constitutional position of the Scottish monarchs as static. The subsequent behaviour of the Scottish monarchs did not always indicate that they felt particularly limited by popular sovereignty, with the revival of the Divine Right theory under the Stuarts the most notable example of this.<sup>135</sup>

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<sup>131</sup> *Ibid.*

<sup>132</sup> Colin Kidd, ‘Sovereignty and the Scottish Constitution Before 1707’ [2004] J.R. 225, 229 and Elizabeth Wicks, *The Evolution of a Constitution* (Hart 2006) 21.

<sup>133</sup> Kidd, *Ibid.*

<sup>134</sup> “[F]or, as long as but a hundred of us remain alive, never will we on any conditions be brought under English rule. It is in truth not for glory, nor riches, nor honours that we are fighting, but for freedom – for that alone, which no honest man gives up but with life itself.”

<sup>135</sup> Sharp, *Parliamentary Sovereignty* n.127, 139.

Arguments surrounding sovereignty developed to a point recognisable to modern lawyers through the eighteenth century.<sup>136</sup> Prior to that discussions surrounding sovereignty were highly theoretical or descriptive of struggles between different branches of the state, generally the Crown, Courts, Parliament and the Kirk. This relationship ebbed and flowed in the pre-union Scottish constitution, but a general trend towards increasing power towards parliament and away from the crown, culminating in the 1689 revolution, is discernable. From this point until the union itself the Scottish Parliament rapidly gained power and prominence in Scotland, and exhibited a sort of “proto-sovereignty”.<sup>137</sup>

The “very rapid growth” of the Scots Parliament’s significance in the constitutional order from the 1688 to 1707 “is often overlooked.”<sup>138</sup> Although many of the factors in the removal of King James were religious and unrelated to the constitutional status of Parliament, Parliament ousted the monarch in 1689, not the people. In doing so the Scots Parliament started in a direction very similar to its English counterpart, that of a formally supreme legislature.<sup>139</sup>

It can be observed, therefore, that the growth of the Scots Parliament’s sovereignty, whilst uneven, was evident. The people did not figure in these events. Scottish constitutional practice at the time was focused on tensions between the courts, landowners and Parliament, and popular sovereignty was of little relevance.

It may be the case that a tradition of popular sovereignty as we would recognise it would have developed in an independent Scotland alongside the French and American conceptions in the seventeenth century. This is unknowable, as Scotland, heavily influenced by English political and constitutional thought and practice, increasingly adhered – and contributed – to the doctrine of parliamentary sovereignty as it developed in the eighteenth and nineteenth centuries. What is clear is that the vast majority of the Scottish people were not regarded as forming ‘the people’ in seventeenth century Scotland. Legitimate use of “popular” sovereignty was the exclusive jurisdiction of the nobility and land owning elites.

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<sup>136</sup> Colin Kidd, 'Sovereignty and the Scottish Constitution before 1707' n.132.

<sup>137</sup> *Ibid.*

<sup>138</sup> Mitchell, *Constitutional Law* n.13, 70.

<sup>139</sup> Dicey and Rait acknowledged that “its [The Scots Parliament’s] members were determined to assert their right to an authority at least equal to... [that] of the English Parliament” when it abolished the Lords of Articles: *Thoughts on the Union Between Scotland and England* n.111, 57. Bingham also points out that “It is hard to see how the pre-1707 Scottish Parliament could have done anything more fundamental than abolish itself”: Tom Bingham, *The Rule of Law* (Penguin, 2011) 166.

Seventeenth century Scotland was a “half-baked medieval mixed constitution which, consisting only of aristocratic and monarchic elements, was, unlike England’s, incapable of generating or protecting the liberty and property of the commons.”<sup>140</sup> When Scotland entered into the union the precise nature of its constitution had not been fully declared; its part in the “Parliamentary revolution” is clear.<sup>141</sup>

### **2.4.3 Post-Union Scotland**

Post-union Scottish constitutional development is generally similar to that of the English constitution, or at least running parallel with it. There were issues of distinction but the general trend is of convergence.<sup>142</sup> This is a function of the increasingly unitary, centralist nature of the British political and constitutional order at the time. As Parliament sought to consolidate its power gained in the aftermath of the removal of King James and the subsequent Acts and Treaty of Union, it developed an absolutist position in the British constitutional order. Jacobite uprisings, which may have been budding movements based on popular sovereignty, in the decades following the union were quelled.<sup>143</sup> The people are almost entirely absent from this period, with the doctrine of Parliamentary sovereignty developing through the work of Blackstone and then Dicey, consolidating legislative and Crown power in the legislature and executive. Scottish public law, partially as a consequence of the Judicial Committee of the House of Lords acting as its Supreme Court on civil matters, developed in step with that of England. A number of questions have been raised on the relevance of legislative supremacy to Scotland in the period leading up to the 1998 Act. They will be discussed here.

### **2.4.4 The Acts and Treaty of Union**

The Acts and Treaty of Union are the products of the interests of the English and Scottish establishments. The protection of the Scottish legal, education and religious systems emphasises their privileged status within pre-Union Scotland. The Acts and Treaty make no reference, however, to sovereignty or supremacy. They provide no mechanism for their

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<sup>140</sup> Kidd, *Subverting Scotland’s Past* n.128, 209.

<sup>141</sup> Mitchell, *Constitutional Law* n.13, 64.

<sup>142</sup> The anomalous position of the Church of Scotland was a challenge to the orthodoxy of the day. See the Church of Scotland Act 1921, *Minister for Prestonkirk v Earl of Wemyss* 3<sup>d</sup> Feb 1808, Dict, App. h. t. 6. and *Percy v Church of Scotland Board of National Mission* 2001 SC 757, 2006 SC (HL) 1.

<sup>143</sup> Tom Devine, *The Scottish Nation: A Modern History* (Penguin, 2012) Ch. 8.

judicial enforcement. For this reason, the assertion at the end of the Treaty that it applies “for all time coming” is an attempt at political, rather than legal entrenchment and, in any event, was a common term of statutory construction in Acts of the Scots Parliament.<sup>144</sup> It is not, contrary to the claims of some<sup>145</sup>, a quasi-constitution for the United Kingdom. The union predates the late eighteenth century establishment of written constitutions,<sup>146</sup> and “even those who regarded these provisions as legally unalterable did not believe that they were judicially enforceable...”<sup>147</sup> Indeed, no case has successfully secured the invalidation of an Act of Parliament based on a breach of the terms of the Act of Union.<sup>148</sup>

In any event several provisions of the Act of Union have been breached and the argument that it is in any way an encumbrance on the doctrine of legislative supremacy is now largely esoteric. Similarly abstruse is the debate regarding the position of the Church of Scotland. Although “most members and ministers”<sup>149</sup> of the Church of Scotland believe Section one of the Church of Scotland Act 1921 entrenches the Church’s independence from judicial and Parliamentary interference, Parliament retains the legal authority to legislate on such matters. As Dicey and Raitt claim

*A sovereign Parliament, in short, though it cannot be logically bound to abstain from changing any given law, may, by the fact that an Act when it was passed had been declared to be unchangeable, receive a warning that it cannot be changed without grave danger to the Constitution of the country.*<sup>150</sup>

In this sense, the 1921 Act is, in effect, morally and politically entrenched.<sup>151</sup> The revision of its essential provisions is unlikely due to the constitutional and political ramifications of such a course of action. It is an example of the external limitations on legislative supremacy. It is also an example of the tremendous degree of political accommodation that Scottish institutions have experienced as part of the Union, even in terms of legislative supremacy, rather than a substantive limitation on the doctrine.

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<sup>144</sup> Mitchell, *Constitutional Law* n.13, 70.

<sup>145</sup> The debate has been extensively held and seems to have largely resulted in the acceptance of the conclusion suggested above. See TB Smith, ‘The Union of 1707 as Fundamental Law’ [1957] P.L. 99, CR Munro, *Studies in Constitutional Law* (2<sup>nd</sup> edn OUP 1999) 137-142, and Bradley and Ewing, *Constitutional and Administrative Law* n.5, 71-74.

<sup>146</sup> Colin Kidd, ‘Sovereignty and the Scottish Constitution before 1707’ n.132.

<sup>147</sup> Goldsworthy, *History and Philosophy* n.27, 232.

<sup>148</sup> Munro, *Studies in Constitutional Law*, *supra*, 137-142.

<sup>149</sup> Bain and McFadden, ‘Strategies for the Future’ n.115.

<sup>150</sup> *Thoughts on the Union Between Scotland and England* n.111, 247 and 252-4.

<sup>151</sup> Martin Loughlin, *Sword and Scales: An Examination of the Relationship Between Law and Politics* (Hart 2000) 153.

#### 2.4.5 *MacCormick and the (not-so) Distinctly English Principle*

Few cases from the Court of Session can be as quoted as *MacCormick v Lord Advocate*<sup>152</sup>. A somewhat vexatious claim regarding Queen Elizabeth's right to style herself "the Second" under the Royal Title Act 1953 in Scotland led Lord President Cooper to make his seminal remarks as to the relevancy of the doctrine of parliamentary sovereignty to Scotland. For Cooper, "the principle of the unlimited sovereignty of Parliament is a distinctly English principle which has no counterpart in Scottish constitutional law."<sup>153</sup> He developed this point further:

*...considering that the union legislation extinguished the Parliaments of Scotland and of England and replaced them with a new parliament, I have difficulty in 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. That is not what was done.*

*...the Treaty and associated legislation ... contain some clauses which expressly reserve powers of subsequent modification; and other clauses which either contain no such power, or emphatically exclude subsequent alteration by declaration that the provision shall be fundamental and unalterable in all times coming ... I have never been able to understand how it is possible to reconcile with elementary canons of [statutory] construction, the adoption by the English constitutional theorists of the same attitude to these markedly different types of provision.<sup>154</sup>*

There is an ostensible irony of a political unionist who stood for Parliament for the Unionist Party stating this, but Scottish legal nationalism has no necessary connection with political nationalism.<sup>155</sup>

Although *obiter* and in a case that failed on both the pursuer's lack of title and interest and the court's lack of competence on the matter, Lord President Cooper's intervention has

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<sup>152</sup> [1953] SC 396.

<sup>153</sup> *Ibid* 397.

<sup>154</sup> *Ibid* 411.

<sup>155</sup> Adam Tomkins, 'Scotland's Choice, Britain's Future' L.Q.R. 2014, 130(Apr) 215-234, 217 and Colin Kidd, *Unions and Unionisms* n.7, 201-2.

been the source of a great deal of comment over the years.<sup>156</sup> A surprising amount of it has missed the point that Cooper's *obiter* remarks are part of a far broader project initiated by him and TB Smith.<sup>157</sup> The "Cooper-Smith"<sup>158</sup> ideology insisted that the Scottish civil legal tradition had been subjected to the unwelcome and "rarely if ever... for the good"<sup>159</sup> influence of various English institutions, most importantly Parliament and the Judicial Committee of the House of Lords. The unchecked influence of this "alien source" was "unwholesome" for Scots law.<sup>160</sup>

Lord President Cooper's remarks, therefore, are not a dispassionate and impartial assessment of objective fact; they are a political and partial reading of a history expressing a legal nationalist position. This does not necessarily render them inaccurate. Nonetheless, or perhaps because of this, they have been the source of great tension.

In *Gibson v Lord Advocate*<sup>161</sup> Lord Keith left open the appropriate judicial response to Westminster abolishing the Court of Session or Church of Scotland. In *Stewart v Henry*<sup>162</sup> a Sheriff relied on Lords Cooper and Keith to assert that there is no constitutional bar to judicial investigation of whether legislation complied with certain articles of the Act of Union. In *Pringle Petitioner*<sup>163</sup> Lords Hope and Weir explicitly reserved their judgment as to whether the Court of Session could use the Act of Union to challenge a Westminster Act.

The primary problem with Lord President Cooper's assertion and the confused cases mentioned above, is that they fail to recognise the significance of the existing consensus amongst officials in Scotland and at UK level that Westminster is in fact legally supreme. Furthermore, Lord President Cooper selectively reads Scottish history. As we have seen, the post-reformation Scots Parliament never had the opportunity to establish its sovereignty, to fall back under the domination of the Crown or acquiesce to the purported

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<sup>156</sup> Tomkins, 'The Constitutional Law in *MacCormick v Lord Advocate*' n.6.

<sup>157</sup> Lindsay Farmer, 'Under the Shadow of Parliament House: The Strange Case of Legal Nationalism' in Lindsay Farmer and Scott Veitch (eds), *The State of Scots Law and Government after the Devolution Settlement* (Tottel 2001) 151.

<sup>158</sup> Ian Willock, 'The Scottish Legal History Revisited' in JP Grant (ed), *The Challenge to Westminster: Sovereignty, Devolution and Independence* (Tuckwell 2000) 1-14.

<sup>159</sup> Hector MacQueen, 'The Two Toms and an Ideology for Scots Law: TB Smith and Lord Cooper of Culross' in Elspeth Reid and David Miller (eds), *A Mixed Legal System in Transition: TB Smith and the Progress of Scots Law* (EUP 2005) 47.

<sup>160</sup> Lord President Cooper, 'The Importance of Comparative Law in Scotland' as quoted in MacQueen, *ibid* 48.

<sup>161</sup> [1975] SC 136.

<sup>162</sup> 1989 SLT (Sh Ct) 34.

<sup>163</sup> [1991] S.L.T. 330.

“sovereignty of the people”. The Scots Parliament’s status was still developing at the time of the Union, as discussed above.

The post-Union developments show little evidence of Scottish disquiet at the growing consensus of legislative supremacy. This consensus grew in line with the accommodating approach towards Scotland adopted by Westminster. Its current status is at the heart of this work, but the depiction of legislative supremacy as a foreign import in Scotland is inaccurate. It has been a stable part of the Scottish constitution for several centuries.

## **2.5 Conclusions**

The applicability of the doctrine of legislative supremacy to Scotland is a longstanding issue. The claims are largely unfounded, but they persist. Legislative supremacy has been the operating rule of recognition in Scotland and the UK for three centuries.

The attempts by several judges and academics to undermine legislative supremacy is a profound and fundamental challenge to the doctrine. It is tenuous and muddled, but appears increasingly assertive. We can “now set aside common law constitutionalism. In truth, most constitutional scholars and judges accept that the foundation of legal authority, including Parliament's sovereignty, is not a common law rule but rather what Sir William Wade called a “political fact” “ultimate rule of recognition.”<sup>164</sup>

Whether Parliament possesses the capacity to legally bind its successors is a vexed question. If, as Griffith notoriously remarked, the constitution is ‘what happens’,<sup>165</sup> then, there is potential for a new position to be adopted.

In an early work, TRS Allan rejects the absolutist interpretation of this issue, like the one proposed in *Ellis*, as it will “...overlook the elasticity inherent in the simple idea that what the Queen in Parliament enacts will be recognised by the courts as law.”<sup>166</sup> He continues:

*The point at which the courts have stepped sufficiently beyond the traditional limits of statutory construction, imposing more ambitious restraints on legislation, as to justify use of the term 'revolution' is surely a matter of taste. It certainly defines no*

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<sup>164</sup> Farrah Ahmed and Adam Perry, 'The Quasi-Entrenchment of Constitutional Statutes' C.L.J. 2014, 73(3), 514-535, 530.

<sup>165</sup> JAG Griffiths, "The Political Constitution" [1979] MLR 1979 1, 19.

<sup>166</sup> TRS Allan, 'Parliamentary Sovereignty: Lord Denning's Dexterous Revolution' (1993) 3 OJLS 22, 30.

*point of special legal significance—the legal order has, perhaps, been modified one more degree, but it is the same legal order. To insist that, at some magic moment, the old legal order passes away and a new one comes into being is to insist on an arbitrary division and to hinder the natural process.*<sup>167</sup>

Allan argues that different perspectives on sovereignty are possible depending on the consensus that has developed on the particular issue being decided. For example, a manner and form requirement could be enacted in relation to legislation regarding Community law but nothing else depending on the consensus.

In this vein, the constitutional status of the 1998 Act could be different from other enactments often considered to be “constitutional” in nature, such as the European Communities Act 1972 or the Human Rights Act 1998. The Scottish political settlement, centred as it is on the democratically elected Scottish Parliament, granted strong support in a referendum and its perpetuation representing the consensus view of officials in Scotland and the rest of the UK, may be more difficult to disrupt than the more contentious incorporation of human rights into domestic law, for example. The manner and form of legislation relating to the Scottish constitutional settlement could be treated distinctly by Parliament and the courts without necessarily spilling over into other areas of law. But it is clear that there is little appetite for the adoption of such a position. The utilisation of a technical form of formal entrenchment is not proposed by any political party.

Parliamentary sovereignty remains “...under the British Constitution, the sun around which the planets revolve.”<sup>168</sup> It is the central rule of recognition in the Scottish and British constitutional orders.

Hart, Wade and Goldsworthy correctly identify the empirical nature of the process of establishing the precise status of legislative supremacy at any given point. They all accept the potential for alterations to the rule of recognition short of revolution. The context for such a potential change in Scotland will be explored in the following chapter.

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<sup>167</sup> *Ibid.*, 32.

<sup>168</sup> Vernon Bogdanor, ‘Devolution and the British Constitution’ in Dawn Butler, Vernon Bogdanor and Robert Summers (eds) *The Law, Politics and the Constitution* (OUP 1999) 55.

### Chapter 3: From Home Rule to the Scottish Parliament

Home Rule, and the related concept of devolution, has been a key part of mainstream Scottish political discourse for over a century.<sup>169</sup> Home Rule was a central issue in the United Kingdom prior to the outbreak of the First World War, and was frequently raised in the interwar period by reformers. No government was willing to abrogate its own power in this way. Further, during the Second World War talk of Home Rule was regarded as at best a distraction from the war effort.<sup>170</sup>

As Mullen has noted, since its formation, however, there has continuously been “a distinctly Scottish political space and a distinctly Scottish system of governance within the Union.”<sup>171</sup> The position of Secretary of State for Scotland, abolished in 1747, was re-established in 1885 as a de facto cabinet attending position, with full cabinet status awarded in 1892.<sup>172</sup> The Scottish Office originally controlled law and order and education along with assorted other matters, but the department gradually took a larger role in governing Scotland<sup>173</sup>, with the department having to be divided into several sub-departments and moved to Edinburgh in 1939.<sup>174</sup> This administrative devolution was the institutionalised acknowledgement of the distinctive nature of Scottish politics and society.<sup>175</sup>

The post-war consensus centred on strong central planning, with Whitehall acting on instruction of Parliament widely perceived as the best method of securing both socialist and conservative goals for the two major parties respectively.<sup>176</sup> With Labour and the

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<sup>169</sup> The Scottish Home Rule Association was formed in 1886; the antecedent to the modern Labour Party placed Home Rule on its electoral platform in the 1888 Mid-Lanark by-election; and the modern Labour Party supported Home Rule for Scotland and Wales at its formation. In 1912 Prime Minister Asquith noted that: “We start from a congested centre... from a Union... which has this peculiarity: that while for common purpose all its constituent members can deliberate and act together, none of them is at liberty to deal with those matters which are specially appropriate and necessary for itself without the common consent of all.” HC Deb 11 April 1912 vol 36 col 1406.

<sup>170</sup> David Torrance, *Britain Rebooted: Scotland in a Federal Union* (Luath 2014) 26.

<sup>171</sup> Tom Mullen, ‘The Scottish Independence Referendum’ *Journal of Law and Society* 41(4), 627-640, 628..

<sup>172</sup> Munro n.145, 38.

<sup>173</sup> David Milne, *The Scottish Office and other Scottish Government Departments* (George Allan and Ulwin 1957).

<sup>174</sup> David Torrance, *The Battle for Britain: Scotland and the Independence Referendum* (Biteback 2013) 55.

<sup>175</sup> Hector Macqueen, ‘Invincible or Just a Flesh Wound? The Holy Grail of Scots Law’, L.I.M. 2014, 14(1), 1-14, 4. According to Colley, “London practiced a sort of indirect rule... [Scotland possessed a] ‘quasi-autonomy’” - Linda Colley, *Acts of Union and Disunion: What has held the UK together - and what is dividing it?* (Profile, 2014) 40.

<sup>176</sup> David Marquand, *Britain Since 1918: The Strange Career of British Democracy* (Orion 2008) 378; and Gordon Brown, ‘Introduction’ in Gordon Brown (ed.) *The Red Paper on Scotland* (EUSPB 1975) 1.

Conservatives dominating elections from the 1940s until the late 1970s<sup>177</sup> devolution remained a subject of mainly esoteric concern even in Scotland with sporadic and fleeting outbursts of intense interest. The Scottish Covenanting Association, for example, could only sustain itself for two years, from 1949 to 1951, despite attracting two million signatures for its declaration.<sup>178</sup>

The Scottish National Party, founded in 1934, saw several MPs elected since the 1945 General Election, but it is widely regarded as making its major breakthrough in the 1967 Hamilton by election.<sup>179</sup> This followed Plaid Cymru's victory in the Carmarthen by-election a year earlier and, alongside general disquiet with the degeneration of the post-war consensus, placed devolution at the forefront of the political agenda.

In response to this, Conservative leader Ted Heath committed his party to devolution in his so-called "Declaration of Perth" in 1968.<sup>180</sup> Prime Minister Harold Wilson commissioned a report into devolution, and a Royal Commission on the Constitution, instituted in 1969 and chaired by Lord Kilbrandon<sup>181</sup> reported in 1973.<sup>182</sup> The Kilbrandon Report recommended that a Scottish Assembly be formed, with relatively broad powers, although its constitutional status would be explicitly inferior to Westminster.

The SNP's emergence as a significant political force in the late 1960s was intensified by the discovery of large deposits of oil in the North Sea.<sup>183</sup> This added a new credibility to Scottish independence, which encouraged unionist parties to take the discussion of devolution more seriously.

Thus the Labour party introduced legislation providing for a Scottish Assembly based broadly on the Kilbrandon recommendations, which required a post-legislative referendum to approve the Assembly.<sup>184</sup> During its difficult passage through Parliament an MP for an English constituency (but originally from Scotland) introduced a requirement for 40% of

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<sup>177</sup> Generally receiving in excess of 80% of the vote.

<sup>178</sup> BBC News, 'Devolution's Swings and Roundabouts' (London, 7 April 1999) <[http://news.bbc.co.uk/1/hi/events/scotland\\_99/the\\_scottish\\_parliament/306850.stm](http://news.bbc.co.uk/1/hi/events/scotland_99/the_scottish_parliament/306850.stm)>.

<sup>179</sup> Devine, *The Scottish Nation* n.143, 576-7.

<sup>180</sup> Gordon Pentland, 'Edward Heath, the Declaration of Perth and the Conservative and Unionist Party, 1966-70' *Twentieth Century Brit. Hist.* (2015) 1-25.

<sup>181</sup> After the death of the original Chair, Lord Crowther.

<sup>182</sup> The Cabinet Office, *The Royal Commission on the Constitution 1969 – 1973*, Volume I, Report (Cmnd 5460, 1973).

<sup>183</sup> Michael Lynch, *Scotland: A New History* (Pimlico 1992) 440.

<sup>184</sup> The Scotland Act 1978.

the Scottish population to vote in favour of devolution for the referendum to succeed.<sup>185</sup> In the 1979 referendum, the Scottish people narrowly voted in favour of the Assembly, but failed to muster enough votes to meet the 40% requirement set by the so-called wrecking amendment.<sup>186</sup> The 1978 Act was consequently repealed and the Assembly was not formed.

Margaret Thatcher was bound to publicly support the principle of devolution prior to the referendum by Heath's 1968 speech, although her party opposed the precise form of home rule proposed in 1979. She immediately abandoned the commitment to devolution upon becoming Prime Minister.<sup>187</sup>

### ***3.1 The Campaign for a Scottish Assembly***

By the end of 1979 "it seemed that devolution... was well and truly off the table."<sup>188</sup> The Campaign for a Scottish Assembly (CSA), however, was formed by pro-devolution academics and political activists in 1980 to "keep the torch [of devolution] alight."<sup>189</sup>

The campaign engaged with political parties and civic groups, although they maintained an "arm's length approach" to the organisation.<sup>190</sup> The CSA commissioned opinion polls, printed leaflets, held conventions and protests and sought public support for a Scottish Assembly. Its work garnered increasing support amongst MPs and local councillors, but it had little effect until the 1987 election, where the Conservative party received less than 1 in 4 votes in Scotland but still comfortably controlled the government – the so-called doomsday scenario.<sup>191</sup> In response to this the CSA formed a steering committee to draw up plans for a Scottish Constitutional Convention (SCC), tasked with increasing and mobilising support for the CSA's project.

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<sup>185</sup> *Ibid.* s.85.

<sup>186</sup> 51.6% voted in favour of an Assembly, a majority of just under 80,000 over those who voted against. However, this meant that 32.9% of the electorate had voted yes, 7.1% short of the requisite 40%.

<sup>187</sup> Richard Vinen, *Thatcher's Britain* (Simon and Schuster 2009) 209.

<sup>188</sup> Devine, *The Scottish Nation* n.143, 600.

<sup>189</sup> *Ibid* 607.

<sup>190</sup> Brian Mclean, *Getting it Together* (Luath 2005) 50.

<sup>191</sup> The Conservatives received 42% of the overall UK vote, but in Scotland they won only 24% of the vote. Their 101 seat majority exceeded the 72 Scottish MPs, rendering the concerns of Scottish MPs potentially immaterial in House of Commons votes.

The CSA's aim was to unite the opponents of the constitutional status quo around a consensus vision of Scotland's constitutional future. In this vein the steering committee prepared a Claim of Right for Scotland.

### 3.1.1 A Claim of Right

A Claim of Right asserted that the people of Scotland were responding to "misgovernment", deliberately echoing the writers of the previous Claims of Right for Scotland in 1689 and 1842.<sup>192</sup> This "misgovernment" was immanent to British constitutional arrangements, not merely the decisions of a particular government: "Symptoms are mistaken for causes, which lie in the way Scotland is governed."<sup>193</sup> It was the Westminster system itself and its tendency toward centralisation that was the cause, and the Thatcher government's policies an extreme symptom.

The Claim explained that 76% of Scottish voters voted for parties in favour of home rule in 1987, but there was "no possibility" of it being enacted.<sup>194</sup> This was fundamentally undemocratic, unjust, and compounded by the fact that the Scottish people had voted in favour of devolution in the 1979 referendum, according to the Claim.<sup>195</sup>

The Claim derided the "English constitutional tradition" as "fraudulent[t]", "fragil[e]" and alien to Scotland.<sup>196</sup> The Claim asserted that, in distinction, the Scottish constitutional tradition is founded upon the sovereignty of the people, not of parliament.<sup>197</sup> The British majoritarian tradition founded on parliamentary sovereignty no longer accommodated distinctive approaches in Scotland because Scotland can vote for parties radically opposed to the governing party's policies and the British constitutional status quo but, because of that constitution, to no avail. The Claim stated that:

*Scotland faces a crisis of identity and survival. It is now being governed without consent and subject to the declared intention of having imposed upon it a radical change of outlook and behaviour pattern which it shows no sign of wanting... The crucial questions are power and consent; making power accountable and setting*

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<sup>192</sup> Devine, *The Scottish Nation* n.143, 608.

<sup>193</sup> Owen Dudley Edwards (Ed.), *A Claim of Right for Scotland* (Polygon 1989) 3.

<sup>194</sup> *Ibid* p.19

<sup>195</sup> Dudley Edwards *supra* 19.

<sup>196</sup> Devine, *The Scottish Nation* n.143, 610.

<sup>197</sup> Dudley Edwards *supra* 3.

*limits to what can be done without general consent... [which] will not be adequately answered in the United Kingdom until the concentration of power masquerading as the Crown-in-Parliament' has been broken up... Scotland, if it is to remain Scotland, can no longer live with such a constitution and has nothing to hope from it.*<sup>198</sup>

The British constitution could not accommodate Scottish claims for self-government on its own because it privileged Westminster's sovereignty over the Scottish people's, and therefore the Scottish people "must create their own machinery [of constitutional change]."<sup>199</sup> A Scottish Parliament was needed to ensure that Scotland's distinct legal, political and social systems could be governed democratically and fairly. To achieve consensus on this, a Constitutional Convention was required:

*Repeatedly down the years a great volume of Scottish opinion has been expressed in favour of an elected assembly... An assembly still has not been achieved, and this is the clearest evidence that Scottish opinion cannot be effectively registered in the British Parliament... A political climate has to be created in which a Scottish Assembly becomes inevitable whichever party is in power. We see a Constitutional Convention as means of so registering Scottish opinion as to make an assembly inevitable and to ensure that the assembly created is an effective one...*<sup>200</sup>

### **3.1.2 The Scottish Constitutional Convention**

Constitutional conventions are bodies 'chosen for the purpose of considering and either adopting or proposing a new constitution or changes in an existing constitution.'<sup>201</sup> They "fill a democratic gap when the government of an existing state has partly or wholly failed."<sup>202</sup> The source of its legitimacy is usually disputed by those it challenges as it is not an emanation of the state and cannot, therefore, derive its legitimacy from the democratic mandate afforded to governments.<sup>203</sup>

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<sup>198</sup> *Ibid.* 51.

<sup>199</sup> *Ibid.* 28.

<sup>200</sup> *Ibid.* 44. Emphasis added.

<sup>201</sup> James Mitchell, *Strategies for Self-government* (Polygon 1996) 113.

<sup>202</sup> Dudley Edwards n.193, 33.

<sup>203</sup> Mitchell, *Strategies supra* 115.

There have been several failed constitutional conventions in Scotland in the past century, but the SCC of the late 1980s and early 1990s is uniquely significant.<sup>204</sup>

The purpose of the SCC was to act as a bridge between the CSA and Scotland's political parties and civic institutions, and prepare a blueprint for devolution. To this end a report by a "representative group of people who are not enslaved to the political parties but who carry political weight" was needed.<sup>205</sup> The Convention was to also mobilise Scottish opinion and eventually work with a future government to secure a Scottish Parliament.

The SCC emphasised a consensus-based approach to its work, both as a measure to ensure that all parties involved bought in to the arrangements and as a point of distinction from the Westminster majoritarian style of government epitomised by the Thatcher government.<sup>206</sup> In this sense, it saw itself as more consistent with the typical understanding of the Scottish constitutional tradition. The SCC saw as central the need to convince the Scottish people that the *specific* policy problems they may have with the government were symptoms of a *general* constitutional problem.

The Convention held plenary sessions, took evidence and prepared several reports. Its first meeting was attended by 55 Labour and Liberal Democrat MPs for Scottish constituencies, 7 MEPs, representatives of each regional authority, all island councils and most district councils, the STUC, churches, business and industry organisations, Gaelic and ethnic minority representatives, and representatives of the Universities. Absent were SNP and Conservative MPs.

Its first act was to create a declaration, confusingly also called A Claim of Right for Scotland. This Claim acknowledged "the sovereign right of the Scottish people to determine the form of Government best suited to their needs."<sup>207</sup> This pledge was signed by all who took part in the Convention and was aimed at "root[ing] the Convention solidly in the historical and historic Scottish constitutional principle that power is limited, should

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<sup>204</sup> *Ibid* 115-127.

<sup>205</sup> Lawson quoted in Andrew Marr, *The Battle for Scotland* (Penguin 1992) 197.

<sup>206</sup> King, n.51, 209.

<sup>207</sup> Scottish Constitutional Convention, *Towards Scotland's Parliament* (The Scottish Constitutional Convention 1990) 10.

be dispersed, and is derived from the people.”<sup>208</sup> This claim was heavily influenced by Lord Cooper’s infamous *obiter* statement in *MacCormick*.<sup>209</sup>

That Labour MPs and unionist politicians signed such a nationalistic declaration was “crossing the Rubicon.”<sup>210</sup> It was a declaration founded on “two pillars – the historic claim [of the sovereignty of the people]... and the contemporary sense of outrage at the way Scotland was being treated.”<sup>211</sup>

The SCC established several working groups on practical matters relating to devolution. It had no legal identity, no agendas and no votes. On St Andrew’s Day 1990, it published *Towards Scotland’s Parliament*, which reasserted much of what the original claim had argued for. It represented “civil Scotland contriving to oppose her [Thatcher] government’s very right to govern north of the border.”<sup>212</sup> It stated that “the people of Scotland want and deserve democracy”, which was denied by “present constitutional circumstances.”<sup>213</sup> It then outlined in broad terms the provisions suggested for a Scottish Parliament, elected by proportional representation, with wide-ranging powers on virtually all matters bar macroeconomic policy, defence and foreign affairs and with an emphasis on limited power exercised through consensus.

The report was rushed out in expectation of a Labour victory in the 1992 election.<sup>214</sup> When this did not materialise, the SCC committed itself to forcing the devolution issue with both further reports<sup>215</sup> and through increased campaign activity.<sup>216</sup>

In 1995 the SCC published *Scotland’s Parliament, Scotland’s Right* which produced a far more detailed “blueprint”<sup>217</sup> for the Parliament, including provisions for its voting system and committee structure.

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<sup>208</sup> *Ibid.*

<sup>209</sup> N.152.

<sup>210</sup> Kenyon Wright, *The People Say Yes!* (Argyll Press 1997) 53.

<sup>211</sup> *Ibid* 54-55.

<sup>212</sup> David Torrance, *Thatcherism in a Cold Climate* (Birlinn Ltd 2009) 188.

<sup>213</sup> N.193, 6.

<sup>214</sup> Jean McFadden, ‘The Scottish Constitutional Convention’ P.L. 1995, Sum, 215-223 (1995) 5.

<sup>215</sup> Such as *Scotland’s Parliament, Scotland’s Right* (The Scottish Constitutional Convention 1995) and *Further Steps: Towards a Scheme for Scotland’s Parliament: A Report to the Scottish Constitutional Convention* (The Scottish Constitutional Commission 1994).

<sup>216</sup> McFadden, *supra*, 6.

<sup>217</sup> Isobel White and Jessica Yonwin, *Devolution in Scotland*, House of Commons Standard Note, 5 April 2004 3.

### 3.1.3 Referendums

After the death of Labour leader John Smith, who due to successive elections in which the vast majority of the Scottish people had voted for parties in favour of home rule, had accepted devolution as the “settled will of the Scottish people”<sup>218</sup> which did not require a referendum to enact it, Tony Blair changed Labour policy and set a pre-legislative plebiscite on the question of whether there should be a Scottish Parliament and whether it should have limited tax-varying powers.<sup>219</sup> This was a political move, aimed at minimising the accusation that Labour would be a “tax and spend” government<sup>220</sup>, and a tactical one, using a referendum result as a method of silencing the complaints of English MPs in the North of England who resented increased powers for Scotland.<sup>221</sup>

The referendum resulted in an overwhelming vote in favour of the creation of a Scottish Parliament and a strong vote in favour of it possessing tax varying powers.<sup>222</sup> In response to the result Blair said “Well done. This is a good day for Scotland, and a good day for Britain and the United Kingdom...the era of big centralised government is over!”<sup>223</sup>

### 3.2 Legitimacy

Legitimacy is at the heart of the devolution argument, tending to manifest itself both in a negative sense (contesting the legitimacy of the Westminster system of government itself in Scotland) and a positive one (asserting the legitimacy of the SCC).

The concept of legitimacy is “far from straightforward, and is much contested in political science.”<sup>224</sup> Legitimacy may mean that “that a regime or institution has moral authority according to agreed rules” or it may be “equate[d] with public and elite support.”<sup>225</sup>

David Beetham has argued that power should be “acquired and exercised according to justifiable rules”, and that legitimacy is intimately connected to this.<sup>226</sup> He contends that

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<sup>218</sup> BBC News ‘Scotland Gets Smith’s Settled Will’ May 12 1999

<[http://news.bbc.co.uk/1/hi/uk\\_politics/341284.stm](http://news.bbc.co.uk/1/hi/uk_politics/341284.stm)>.

<sup>219</sup> Scottish Labour press notice 12.6.96 quoted in Oona Gay and David Foster, *Thresholds in Referendums* House of Commons Library Standard Note SN/PC/2809 25 November 2009 3.

<sup>220</sup> Devine, *The Scottish Nation* n.143, 616.

<sup>221</sup> Vernon Bogdanor, *The New British Constitution* (Hart 2010) 184.

<sup>222</sup> With a turnout of 60.4%, 74.3% voted in favour of a Scottish Parliament and 60.2% supported granting it tax varying powers.

<sup>223</sup> Mark Evans, ‘Devolution to Scotland and Wales: Is “Power Devolved Power Retained”?’ in Stuart Lancaster (ed.) *Developments in Politics* Vol. 10, 1999, 68.

<sup>224</sup> Meg Russell, *The Contemporary House of Lords: Westminster Bicameralism Revisited* (OUP 2013) 253.

<sup>225</sup> *Ibid.*

legitimacy is defined by various groups in different ways, e.g. lawyers think in strictly legalistic terms, social scientists regard public support as the defining characteristic of legitimacy.

This rationalist approach can be contrasted with the empirical methodology derived from Weber.<sup>227</sup> This requires measurable legitimation to come from above, below and horizontally, with superior bodies, the subjects of the body's power (generally the public) and equivalent institutions recognizing a body's legitimacy. Beetham describes this as "the belief in legitimacy" that occurs where "those involved in them, subordinate as well as dominant, believe them to be [legitimate]."<sup>228</sup>

Habermas further divides this into perceived and moral legitimacy.<sup>229</sup> Perceived legitimacy occurs when an organization is viewed as legitimate, but his description of legitimacy requires us to go "beyond perception alone".<sup>230</sup> He states that if:

*...every effective belief in legitimacy is assumed to have an immanent relation to truth, the grounds on which it is explicitly based contain a rational validity claim that can be tested and criticized independently of the psychological effects of these claims.*<sup>231</sup>

Whilst moral legitimacy is partially a function of perceptions of legitimacy, "it is something qualitatively different from the latter, since it hinges on more than just contingent, subjective reasons..."<sup>232</sup>

Utilizing a slightly different process of classification, Russell refers to what various political scientists have described as 'input', 'output' and 'throughput', or 'source', 'substantive' and 'procedural' legitimacy.<sup>233</sup>

Input, or source, legitimacy refers to the methods by which members of an institution are selected. The simplest method by which input legitimacy may be derived is by electing the members of the body, the idea being a rudimentary democratic one, that the people, having

<sup>226</sup> David Beetham, *The Legitimation of Power* (Palgrave 1991) 3.

<sup>227</sup> Max Weber, *The Theory of Social and Economic Organization* (Free Press 1957).

<sup>228</sup> Beetham, *Legitimation*, *supra* 6.

<sup>229</sup> Jürgen Habermas, *Legitimation Crisis* (Beacon 1975) 95-105.

<sup>230</sup> Michael Saward, *Co-Optive Politics and State Legitimacy* (Dartmouth 1992) 36.

<sup>231</sup> *Ibid.* 97.

<sup>232</sup> Saward, *supra* 37.

<sup>233</sup> *Ibid.*

selected the membership of that body, transfer their will to it until the next opportunity they have to elect members, where the process and legitimacy are renewed.

However, in some circumstances, when a body is not democratically elected it may derive legitimacy from alternative sources. Russell identifies “policy expertise and independence from the party political process” as other potential sources of input legitimacy.<sup>234</sup> The use of such groups is prevalent in any democracy. Majone identifies an “important issue for democratic theory” as “specify[ing] which tasks may be legitimately delegated to institutions insulated from the democratic process...”<sup>235</sup>

Output legitimacy is derived from the positions taken by the body. In effect, if the public assess that they support the output of an institution they deem it legitimate; if they consistently do not support its policy positions, eventually they will find it to be illegitimate. The public may disagree with individual decisions of institutions, but retain overall support for their authority to make decisions in what can be described as “diffuse support”.<sup>236</sup> This is the sort of backing provided to courts in democratic states. According to Russell, output legitimacy “may to some extent compensate for a lack of democratic input legitimacy.”<sup>237</sup> Russell quotes Steffek as saying that there may “be other reasons than democratic participation and control for people feeling that they should accept rules and decisions of governance...”<sup>238</sup>

Finally, throughput legitimacy relates to the body’s decision making process and adherence to procedural propriety. This form of legitimacy, again, traditionally applies to courts and is closely related to output legitimacy.<sup>239</sup> The supposedly neutral status of accepted procedures imbues the body in question with a sense of fairness.

### **3.2.1 Legitimacy and the 1980s devolution debate**

This relatively abstract discussion of legitimacy lay at the heart of the devolution debate. The general perception of successive Conservative governments’ lack of legitimacy in

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<sup>234</sup> Russell n.224, 257.

<sup>235</sup> Giandomenico Majone, ‘Europe’s “Democratic Deficit”: The Question of Standards’ *European Law Journal*, 4(1), 5–28.

<sup>236</sup> David Easton, *A Systems Analysis of Political Life* (Wiley 1965) 339-40.

<sup>237</sup> Russell n.224, 237.

<sup>238</sup> Achim Hurrelmann, Steffen Schneider & Jens Steffek (eds.), *Legitimacy in an Age of Global Politics* (Palgrave 2007) quoted in Russell, *ibid* 237.

<sup>239</sup> Easton, *A Systems Analysis supra* 340.

Scotland was the aggravating factor for the devolution debate in the 1980s and what made it different to the preceding century of calls for home rule.

### ***3.2.2 Legitimacy and the Poll Tax<sup>240</sup>***

In 1983 the scheduled revaluation of Scottish local government rates was postponed in order to allow debate on their future. The Conservatives had opposed the way these rates were calculated since 1974.<sup>241</sup> When the revaluation was eventually scheduled to be carried out it was described by the press as promising increases of four or five times the prior figure.<sup>242</sup> This led a small group of businesses and wealthy people to stridently lobby the government to abandon the increases, adopting a “quasi-nationalist” approach that emphasised that English businesses were not being re-evaluated for several years.<sup>243</sup>

This became a major issue for conservative supporting businesses and party members. In response, the government proposed a flat-rate tax as a solution to the problem.<sup>244</sup> The legislation to introduce the Community Charge or Poll Tax was rushed through parliament, minimising and largely ignoring concerns expressed by Scottish MPs, local government and Scottish civic opinion.<sup>245</sup> The legislation only passed with English MPs’ votes.<sup>246</sup> The poll tax was introduced a year earlier in Scotland than in England.

It was a disastrous policy. 2.5 million summary warrants were issued for non-payment of the tax over three years and tens of thousands of people fell off the electoral register to avoid the tax.<sup>247</sup> It was challenged by judicial review<sup>248</sup>, marches, petitions and protests were organised throughout Scotland, but the Scottish approach of civil non-payment and protest proved fruitless whilst riots and civil disobedience in England led to the tax’s demise.<sup>249</sup> It was eventually repealed UK wide and replaced by the Council Tax.<sup>250</sup>

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<sup>240</sup> Officially the Community Charge, but a title broadly ignored.

<sup>241</sup> Marr, *The Battle for Scotland* n.205, 176.

<sup>242</sup> *Ibid.*

<sup>243</sup> *Ibid.*

<sup>244</sup> The Abolition of Domestic Rates *etc.* (Scotland) Act 1987 and Local Government Finance Act 1988 Part X.

<sup>245</sup> Devine, *The Scottish Nation* n.143, 603.

<sup>246</sup> Marr, *The Battle for Scotland* n.205, 177.

<sup>247</sup> *Ibid.* 179.

<sup>248</sup> E.g. *Pringle, Petitioner op. cit.* and *Murray v Rogers* 1992 SLT 221. See Christopher Himsworth and Neil Walker ‘The Poll Tax and Fundamental Law’ (1991) J.R. 45.

<sup>249</sup> Iain MacWhirter, *The Road to the Referendum* (Cargo 2013) 192.

<sup>250</sup> Local Government Finance Act 1992.

The poll tax was seminal in the devolution debate. It typified the myriad frustrations and doubts held by many Scottish people about the way that Scotland was treated within the British political system. It was “a bad tax brought in by a minority party with minimal support beyond its own ranks” in Scotland.<sup>251</sup> It was derided as “undemocratic, unjust, socially divisive and destructive of community and family life” by representatives of Scotland’s three largest churches.<sup>252</sup> It has acquired totemic status in Scottish political debate.

The tax’s introduction a year earlier than in England invited the accusation that Scotland was being used as a guinea pig for British legislation and exacerbated the sense of grievance.

Of the poll tax, a Claim of Right noted that:

*Probably no legislation at once so fundamental and so lacking in public support would have been initiated other than in a territory within which the Government was unrepresentative of and out of touch with the electorate.*<sup>253</sup>

The lack of popular support for the Conservatives in Scotland was the essence of the problem: “Scotland was... being governed by a Conservative government in London, elected not only by a minority of the United Kingdom vote, but unrepresentative of the will of the Scottish electors.”<sup>254</sup> The Labour Party adhered to largely parliamentary methods of challenging the legislation, but this proved futile. This reiterated the central thesis of the devolutionists, that the Westminster system not only *was* not delivering for Scotland, that it *could* not do so.

The Poll Tax represents the ultimate point of atrophy for the conservative government’s democratic legitimacy in Scotland. It radicalised many politically minded people in Scotland in a constitutional sense<sup>255</sup>, and provided a constitutional context for political problems: “The law did not become invalid as a result of its ineffectiveness; rather, the ineffectiveness created a political reason as to why the law should be repealed.”<sup>256</sup>

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<sup>251</sup> Marr, *The Battle for Scotland* n.205, 180.

<sup>252</sup> Quoted in K Wright, *The People Say Yes* n.210, 55.

<sup>253</sup> Dudley Edwards n.193, 32.

<sup>254</sup> David Millar, 'Scottish Home Rule: Entering the Second Century' Edin. L.R. 1997, 1(2), 260-269, 262.

<sup>255</sup> Lindsay Paterson, *A Diverse Assembly: The Debate on a Scottish Parliament* (EUP 1998) 143.

<sup>256</sup> Hilaire Barnett, *Constitutional and Administrative Law* (10<sup>th</sup> ed Routledge 2013) 288.

Opposition to the poll tax became aligned with the case for a [Scottish] parliament. The perception grew in Scotland that the Conservative government, with limited support north of the border, was imposing policies on Scotland - which the poll tax symbolized.

Widespread non-payment of the poll tax can be seen as a rejection of the government's legitimacy. The tax even helped radicalise hitherto relatively conservative constitutional campaigners like Donald Dewar.<sup>257</sup> The tax became regarded as symbolic of the Thatcher government's "...abuse of parliamentary sovereignty and therefore a violation of the unwritten norms of the constitution."<sup>258</sup> The illegitimacy flowing from the poll tax, therefore, created a vacuum in which the SCC could seek legitimacy.<sup>259</sup>

### **3.2.3 The SCC and the Government**

The Conservatives were profoundly hostile to the SCC and its aims.<sup>260</sup> Thatcher referred to the SCC as "not a cross section" of Scottish society, consisting of "self-selected people who already hold a particular view."<sup>261</sup> A prominent Conservative MP called the potential Scottish Parliament a "secure Socialist power base from which to challenge Westminster",<sup>262</sup> with another calling the SCC "the Labour Party at prayer"<sup>263</sup>. A government spokesman at the time dismissed the Claim of Right as "mumbo jumbo"<sup>264</sup>, and the British government refused to recognize the SCC as a representative body of the Scottish people. More generally, a motion supporting the principle of devolution was voted down 300-11 at the 1988 Scottish Conservative Conference,<sup>265</sup> whilst a report advocating

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<sup>257</sup> "The status quo is, I believe, untenable. No matter what the Tories say, the great problem for the Scottish political system is why someone like Ian Lang is Secretary of State, calling the shots... when almost no one votes for him", The Scottish Labour election rally, 1992 quoted in Marr, *The Battle for Scotland* n.205, 223  
<sup>258</sup> Trevor Salmon and Michael Keating (eds.) *The Dynamics of Decentralization: Canadian Federalism and British Devolution* (Queen's University Press 2001).

<sup>259</sup> Marco Goldini and Chris McCorkindale, 'Why We (Still) Need a Revolution' 14 *German Law Journal* (2013) 22.

<sup>260</sup> Although some, like Malcolm Rifkind, held more nuanced and sympathetic view on the broader question of devolution and respect for Scottish civil society, see Kidd, *Union and Unionisms* n.7, 31-35.

<sup>261</sup> Scotland on Sunday Interview quoted in Torrance, *Thatcherism in a Cold Climate* n.212, 234.

<sup>262</sup> Allan Stewart 'The Devolution Maze' in Paterson, *A Diverse Assembly* n.255, 155.

<sup>263</sup> Marr, *The Battle for Scotland* n.205, 207.

<sup>264</sup> Iain MacWhirter, 'After Doomsday: The Convention and Scotland's Constitutional Crisis' in Alice Brown and Richard Parry (eds.) *The Scottish Government Yearbook 1990* (Unit for the Study of Government – University of Edinburgh 1990) 25.

<sup>265</sup> The Young Tories organised a "Rock Against Devolution" disco and wore "Thatcherism: YES, Devolution: NO" t shirts and "Expel the 11" stickers sold out at the conference: Torrance, *Thatcherism in a Cold Climate* n.212, 184.

“take it or leave it unionism” which proposed the “full assimilation of Scotland... within the overall framework of Conservative politics...” was welcomed by the government.<sup>266</sup> The doctrinaire position adopted by the Thatcher government was that the British constitution furnished only them with legitimacy to speak for the Scottish people.<sup>267</sup> It failed to recognise the potential for constitutional accommodation for Scotland short of an ultimate right to secede from the Union. Thatcher herself said:

*As a nation, they [the Scottish people] have the undoubted right to national self-determination... Thus far they have exercised that right by joining and remaining in the Union... What the Scots (nor indeed the English) cannot do, however, is insist upon their own terms for remaining in the Union, regardless of the views of others. If the rest of the UK does not favour devolved government, then the Scottish nation may seek to persuade the rest of us of its virtues... but it cannot claim devolution as a right of nationhood inside the Union.*<sup>268</sup>

The SCC extended the logic inherent to the idea of Scottish self-determination regarding remaining with the Union to devolution. It posited that the Union was a compact between its constituent nations and that this permitted distinct constitutional traditions to remain from the pre-Union era and continue to develop.

Scottish popular sovereignty, supposedly a foundational principle of the Scottish constitutional order, was being denied by the structure of the British state in breach of this compact, and that revision of the British constitution was necessary to adapt to it, unilaterally if necessary.<sup>269</sup> A Claim of Right asserted that “the Scots are a minority which cannot ever feel secure under a constitution which, in effect, renders the treaty of union a contradiction in terms.”<sup>270</sup>

The two sides did not engage in arguments on the same terms. The Conservative government saw their actions as inherently legitimate as they possessed a UK-wide parliamentary majority; they perceived the UK as a single demos, a unitary state.<sup>271</sup>

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<sup>266</sup> *Ibid* 185.

<sup>267</sup> Tom Devine (ed.), *Scotland and the Union: 1707-2007* (EUP 2007) 171.

<sup>268</sup> Margaret Thatcher, *The Downing Street Years* (Harper 1993) 181.

<sup>269</sup> Dudley Edwards n.193, 27-28 and Keating *Plurinational States* n.121, 26-27.

<sup>270</sup> *Ibid* 19.

<sup>271</sup> The Scotland Office, *Scotland in the Union: A Partnership for Good* (CM225, 1993).

Advocates of devolution regarded Scotland as a distinct demos within a Union state, with legitimacy in Scotland requiring widespread political support in Scotland.

Their differences were even more profound than this. The SCC's critique of majoritarian British political culture and philosophy was an implicit – and often explicit – criticism of parliamentary sovereignty.<sup>272</sup> The SCC's competing conceptualisation of legitimacy was of the sovereignty of the people. This was summed up by the SCC's chair, Canon Kenyon Wright, in his celebrated question and answer that: “What happens when that other voice we know so well [Mrs Thatcher] says, ‘We say No, and We are the State.’ Well, We say Yes and We are the People!”<sup>273</sup>

This “...conjunction of the two arguments – union state and popular sovereignty...”<sup>274</sup> lay at the heart of the campaign for devolution. It is the constitutional tradition in Scotland being “refurbished and pressed into new use.”<sup>275</sup>

### 3.2.4 *The SCC's Legitimacy*

With only 17% of the population aware of the SCC at a relatively advanced stage in its deliberations a question may be asked of how truly representative an organisation it could seriously claim to be.<sup>276</sup> It could be argued that the low level of public awareness and engagement with the SCC and CSA<sup>277</sup> lent some credence to the Thatcher interpretation of it as little more than a pressure group. Some saw it as an “anti-establishment establishment”<sup>278</sup>, frustrated that it could not wield power.<sup>279</sup>

The contrary argument is that the SCC gained indirect legitimacy from the broad participation of a wide range of elected MPs, MEPs and councillors, and became a “truly representative” convention imbued with an inherent legitimacy.<sup>280</sup> They were elected on devolutionary platforms, and most then elected again after joining the SCC. Further, the

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<sup>272</sup> *Towards Scotland's Parliament* described parliamentary sovereignty as “a constitutional fiction which cloaks the effective exercise of sovereign power by the governing political party”, n.207, 16.

<sup>273</sup> Quoted in Christopher Harvie and Peter Jones, *The Road to Home Rule: Images of Scottish Nationalism* (Polygon 2001) 154.

<sup>274</sup> Stephen Tierney, *Constitutional Law and National Pluralism* (OUP 2004) 116.

<sup>275</sup> Keating, *The Dynamics of Decentralisation* n.258, 23.

<sup>276</sup> Robert Houston and William Knox (eds.), *The New Penguin History of Scotland* (Penguin 2002) 518.

<sup>277</sup> The CSA and related bodies' membership amounted to only a few thousand: Marr, *The Battle for Scotland* n.205, 198.

<sup>278</sup> *Ibid* 198.

<sup>279</sup> *Ibid* 174.

<sup>280</sup> Mitchell, *Strategies* n.201, 153; and Millar, 'Scottish Home Rule' n.254, 268.

technical expertise and status in society of many of the participants as well as its consensual, ‘round table’ approach to policy formulation adds further legitimacy to the SCC.<sup>281</sup>

Moreover, opinion polls regularly reported support for the SCC’s cause and output, if not the SCC itself.<sup>282</sup> This is output legitimacy, and the SCC’s approach – consensus-focused and participatory – confirms its throughput legitimacy as well.<sup>283</sup> In sum, the SCC, in spite of the absence of direct elections for its members, was a legitimate organisation. The traditional methods of demanding change within the structures of the British constitution had been exhausted, with not only a succession of elections recording overwhelming support for devolutionary parties being ignored, but a referendum vote in favour of devolution frustrated by a technicality in 1979. An extra-parliamentary project was necessary. The large majority who voted in favour of the devolution plan set out in the government’s white paper<sup>284</sup>, which was “...firmly based on the agreement reached in the Scottish Constitutional Convention”<sup>285</sup>, acts as a post-hoc validation of the SCC’s legitimacy.

The SCC was not the only method by which the Scottish people were actively rejecting the legitimacy of the Thatcher government in Scotland, and this demonstrates the broader movement for change that the SCC was part of. The poll tax non-payment movement constituted a serious rejection of legitimacy. It was organized and broad-based. The American Revolution was sparked by a rebellion against the duties imposed on the American Colonies by the Tea Act 1773, with mass participation fermented by the slogan “No taxation without representation”. The American colonists had no Members of Parliament at all and is therefore not an identical comparator, but the act of imposing an unpopular tax where there was defective representation in the context of questionable legitimacy is similar. Non-payment is in some ways similar to the infamous “Boston Tea Party”: a political act of defiance against a power perceived to be illegitimate.

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<sup>281</sup> Christine Bell, ‘Constitutional Transitions: The Peculiarities of the British Constitution and the Politics of Comparison’ P.L. 2014, Jul, 446-471, 455-456.

<sup>282</sup> Marr, *The Battle for Scotland* n.205 198.

<sup>283</sup> Dawn Oliver, ‘The United Kingdom’ in Dawn Oliver and Carlo Fusaro (eds.), *How Constitutions Change: A Comparative Study* (Hart 2011) 339.

<sup>284</sup>The Scotland Office, *Scotland’s Parliament* (Cm 3658, 1998).

<sup>285</sup> Labour Party, *New Labour: Because Scotland Deserves Better* (The Labour Party, 1997).

The SCC was part of this broader movement denying the legitimacy of the Conservative government in Scotland. It sought to connect the grievance aimed at the specific policies of the Conservative government with the constitutional context that created the grievances.

### 3.3 *The Scotland Act 1998*

The 1998 Act received Royal Assent on 19 November 1998. Due to the overwhelming nature of the 1997 Referendum result and the Labour Party's large majority in the House of Commons, the Scotland Bill was comfortably passed. It is "on any view, a monumental piece of legislation."<sup>286</sup> The 1998 Act as amended provides *inter alia* for a Scottish Parliament<sup>287</sup>, a Scottish Government<sup>288</sup>, tax-varying powers for the Scottish Parliament<sup>289</sup> and its legislative competence<sup>290</sup>. The Parliament's legislative competence is broad, with any power not explicitly reserved in Schedule 5 presumed to be devolved.<sup>291</sup> This is the so-called 'retaining model' of devolution.<sup>292</sup> The powers devolved and the procedures of the Scottish Parliament are indistinguishable from those proposed by the SCC.

One major distinction with the SCC's proposals is the absence of formal entrenchment of the Scottish Parliament. On the contrary, during the 1998 Act's passage through Parliament, Donald Dewar said: "We accept that sovereignty within a devolved system lies with the United Kingdom Parliament."<sup>293</sup> Tony Blair asserted that sovereignty would remain with him "as an English MP at Westminster."<sup>294</sup> Section 28 (7) of the 1998 Act states that "This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland." This is an unusual clause. It is not usually necessary for Westminster to assert its sovereignty. It is, in many regards, a statement made from a position of weakness. The then Shadow Secretary of State for Scotland, Michael Ancram, described it as a "half-hearted reassertion" of parliamentary sovereignty.<sup>295</sup>

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<sup>286</sup> *Martin v Most* [2010] UKSC 10.

<sup>287</sup> S.1.

<sup>288</sup> Part II.

<sup>289</sup> Part IV.

<sup>290</sup> Ss.28 – 29 and Sched. 5.

<sup>291</sup> William Wade and Christopher Forsyth, *Administrative Law* (11th edn OUP 2009).

<sup>292</sup> Sujit Choudhry, *Constitutional Design for Divided Societies: Integration or Accommodation?* (OUP 2008) 447; Jean McFadden and Mark Lazarowicz, *The Scottish Parliament: An Introduction* (Tottel 2003) 5-7.

<sup>293</sup> HC Deb 31 July 1997 vol. 299 col. 457.

<sup>294</sup> Quoted by Michael Ancram MP, HC Deb 12 January 1998: vol. 304 col.41.

<sup>295</sup> *Ibid.*

The Government of Wales Act 1998 does not have a comparable provision.<sup>296</sup> More recently, Section 18 of the European Communities Act 2011 also asserted Parliament's sovereignty, on this occasion over law emanating from the European Union.

One corollary of Section 28 (7) is the so-called Sewel Convention. This constitutional convention precludes Westminster from legislating on devolved issues without the consent of the Scottish Parliament, expressed in legislative consent motions.<sup>297</sup> As Lord Sewel explained in the House of Lords during the Scotland Act's passage through Parliament:

*Clause 27 makes it clear that the devolution of legislative competence to the Scottish parliament does not affect the ability of Westminster to legislate for Scotland even in relation to devolved matters. Indeed, as paragraph 4.4 of the White Paper explained, we envisage that there could be instances where it would be more convenient for legislation on devolved matters to be passed by the United Kingdom Parliament. However ... 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.*<sup>298</sup>

This sensitive and consensual approach to legislating has largely been adhered to. It is the constitutional expression of the political fact that whilst “the UK Parliament, as a sovereign body, retains full legal power to legislate on devolved matters... the spirit of devolution implies that political power rests with the Scottish Parliament.”<sup>299</sup>

The 1998 Act has been significantly amended by the Scotland Act 2012 and will be again by the legislation following the Smith Commission Report.<sup>300</sup>

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<sup>296</sup> Section 18 of the European Union Act 2011 states that: “Directly applicable or directly effective EU law (that is, the rights, powers, liabilities, obligations, restrictions, remedies and procedures referred to in section 2(1) of the European Communities Act 1972) falls to be recognised and available in law in the United Kingdom only by virtue of that Act or where it is required to be recognised and available in law by virtue of any other Act.”

<sup>297</sup> See Paul Bowers ‘Sewel Conventions’ House of Commons Library 2005, Scottish Parliament Procedure Committee, ‘The Sewel Convention’ Scottish Parliament 2005, and Barry Winnetrobe, ‘A Partnership of the Parliaments? Scottish Law Making Under the Sewel Convention at Westminster and Holyrood’ in Robert Hazell and Richard Rawlings (eds.), *Devolution, Law Making and the Constitution* (Imprint Academic 2007).

<sup>298</sup> HL Deb 21 Jul 1998 vol. 592 col. 791.

<sup>299</sup> Bowers, *Sewel supra* 5.

<sup>300</sup> As discussed below.

### 3.4 Conclusions

Using the theoretical terms outlined above, the SCC questioned the Thatcher government's input legitimacy, as it received only a relatively small minority of the vote and number of MPs in Scotland<sup>301</sup>; its output legitimacy, in that its policies – epitomized by the poll tax – were “...impose[d]”<sup>302</sup> on Scotland and out of sync with Scottish traditions, public opinion and values<sup>303</sup>; and its throughput legitimacy, querying the relevance and distinctive nature of the Scottish Office, the Scottish Grand Committee, the majoritarian system employed at Westminster, and, ultimately, parliamentary sovereignty.<sup>304</sup> In response, the Thatcher government denied the SCC's input legitimacy due to its unelected status, but the SCC gained legitimacy from the elected status of many of its members, the technical expertise of others as well, broad public support for its output and the vacuum of legitimacy left by the government of the day's lack of democratic mandate.

The policies of the Conservative government of the time represented the final straw for Scotland's long attenuating constitutional relationship with the rest of the UK. Generations of displeasure at what *A Claim of Right* called “misgovernment”<sup>305</sup>, epitomized by the poll tax, accumulated to develop the fertile ground for a constituent power to form in Scotland. The SCC's calls for change were truly representative of what the Scottish people sought, as confirmed by the overwhelming support given to plans set out by the Blair government for devolution which were consciously very similar to the SCC's proposals. The Convention acted as “the final, self-constituted expression of a voice which had no other agent to carry it”.<sup>306</sup>

The Convention represented a:

*paradoxical linkage [between] a commitment to constitutional form... [and] a claim that the sub-state national society is constitutionally entitled to revive the*

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<sup>301</sup> Dudley Edwards n.193, 19.

<sup>302</sup> *Ibid* 15.

<sup>303</sup> *Ibid* 26 and 32.

<sup>304</sup> *Ibid* 16-17.

<sup>305</sup> *Ibid* 3.

<sup>306</sup> Goldini and McCorkindale n.259, 24.

*pluralized version of constituent power with which it and other national societies entered the union.*<sup>307</sup>

The SCC was a bold critique of the British constitutional status quo. It was a vehicle for latent calls for change but also an agent of it. The SCC constituted an autochthonous and vanguard response to the democratic deficit inherent within the existing British constitutional arrangements. The response of the major political parties to their proposals – near complete acceptance of their plan from Labour, the Liberal Democrats, and, eventually, the SNP and Conservatives – demonstrates how the SCC acted as a structure through which the Scottish people altered the British constitutional settlement.<sup>308</sup>

The 1998 Act transposed the political work of the SCC in to legal reality and largely adhered to the SCC's model. How the courts reacted to this change will now be considered.

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<sup>307</sup> Stephen Tierney "'We the Peoples": Constituent Power and Constitutionalism in Plurinational States' in Martin Loughlin and Neil Walker (eds.), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (OUP 2007) 229.

<sup>308</sup> Bogdanor, *The New British Constitution*, n.221, 117.

## Chapter 4: *The Courts' Approach to Devolution: From Whaley to Imperial Tobacco*

The political shift outlined in the previous chapter has been brought before the Scottish and British courts. This chapter will examine the judicial accommodation to this political shift in the devolution jurisprudence of the Court of Session and the Supreme Court.

The British courts have gradually adapted the level of accommodation they are willing to afford to the Scottish devolution scheme. On devolution it is clear that they have taken a journey in the fifteen years since the Scottish Parliament's formation. Over this period the Court of Session, the Judicial Committee of the House of Lords and, latterly, the Supreme Court have all demonstrated an increased willingness to recognise the significance of the democratic legitimacy of the Scottish Parliament.

### 4.1 *Early Cases*

In the first case concerning the Scottish Parliament's legislative powers to come before the Court of Session, *Whaley v Watson*<sup>309</sup>, Lord President Rodger adopted a profoundly conservative approach to the Scottish Parliament's constitutional status. The Lord President declared that

*the fundamental nature of the [Scottish] parliament as a body which – however important its role – has been created from statute and derives its power from statute... [The Scottish] Parliament, like any other body set up by law, is subject to the law and to the courts which exist to uphold that law.*<sup>310</sup>

In doing so it “join[ed] that wider family of parliaments [that] owe their existence and powers to statute and are in various ways subject to the law and to the courts which act to uphold the law.”<sup>311</sup> In this decision the impact of the 1997 referendum and the Parliamentary status of the new institution was completely ignored. In a later case<sup>312</sup> the Judicial Committee of the House of Lords refused to comment on whether Scottish Parliamentary legislation was primary or secondary in nature, again not acknowledging the

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<sup>309</sup> 2000 S.C. 340.

<sup>310</sup> *Ibid* 348.

<sup>311</sup> *Ibid* 349.

<sup>312</sup> *Anderson, Reid and Doherty v. Scottish Ministers* (2002) UKHRR 1.

implications of the popular support expressed for the Parliament in the 1997 Referendum or of its capacity to produce primary legislation.

In *Adams v Scottish Ministers*<sup>313</sup> a few years later, the Inner House of the Court of Session adopted a very different approach. The Lord Justice Clerk's judgment acknowledged the Scottish Parliament's wide discretion and was deferential to it as a "sui generis" institution.<sup>314</sup> In the same case in the Outer House<sup>315</sup> Lord Nimmo Smith made more precise comments regarding the nature of the Scottish Parliament's legislation. Lord Nimmo Smith described its Acts as having "far more in common with public general statutes of the United Kingdom Parliament than with subordinate legislation as it is more commonly understood."<sup>316</sup> This, he said, is because the Parliament is democratically elected, may amend Westminster legislation regarding Scottish devolved matters, and its Acts require Royal Assent. In the Inner House the Lord Justice Clerk approved of this thinking.<sup>317</sup> Lord Nimmo Smith qualified the decision, however, by acknowledging that while the legislative process "distinguish[es] legislation so enacted from acts or instruments subject to judicial review on traditional grounds..." its "establishment did not involve the ceding to it of "sovereignty" (whatever precisely that may mean) even within its restricted statutory field of competence."<sup>318</sup>

These early decisions lack a coherent approach to the devolution settlement. The judiciary appear to be coming to terms with the Scottish Parliament in an ad hoc fashion. An element of judicial conservatism is apparent, with Scottish courts keen on at least keeping open the possibility of applying the broad supervisory jurisdiction of the Court of Session to the Scottish Parliament's legislation.

#### **4.1.1 Advances**

More recently, in *Sinclair Collis Limited, Petitioners*<sup>319</sup> the Lord Ordinary noted that:

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<sup>313</sup> 2004 S.C. 665.

<sup>314</sup> *Ibid* para 62.

<sup>315</sup> *Adams v Advocate General for Scotland* 2002 SCLR 881.

<sup>316</sup> *Supra* para 62.

<sup>317</sup> *Ibid* para 142.

<sup>318</sup> *Ibid* para 87.

<sup>319</sup> [2011] CSOH 80.

*On the spectrum of decision-makers the Scottish Parliament occupies a place close to that of the national legislature. In my opinion an enactment of the Scottish Parliament should be accorded a margin of discretion similar to, and approaching, that which would have been accorded to the measure had it been enacted by Parliament at Westminster.*<sup>320</sup>

This more nuanced thinking was extended by the *Axa* decisions.<sup>321</sup> In this case, concerning the Scottish Parliament's decision to legislate to make asymptomatic asbestos-related illnesses actionable harms for the purposes of the law of delict, several insurers raised an action claiming that the legislation was outwith the legislative competence of the Scottish Parliament, as infringing certain Convention Rights and on common law grounds.<sup>322</sup>

In both the Inner and Outer Houses of the Court of Session, it was held that the supervisory jurisdiction of the Scottish Parliament's legislation on the established grounds of irrationality or illegality could be used only in extreme cases in which bad faith, improper motive or manifest absurdity is demonstrable.<sup>323</sup>

This position was rejected in the Supreme Court, with Lord Hope relying on "the guiding principle... [of the] rule of law enforced by the courts" as "the ultimate controlling factor on which our constitution is based."<sup>324</sup> In applying this he held that Acts of the Scottish Parliament are subject to the Court of Session's supervisory jurisdiction.

However, Lords Hope and Reid qualified this principle with the support of the five English Justices who also sat on this case. Lord Hope acknowledged that, as the Scottish Parliament is rooted "in the traditions of universal democracy", the courts should "intervene, if at all, only in the most exceptional circumstances."<sup>325</sup> This case took the Court in to "uncharted territory."<sup>326</sup> Lord Hope made clear that the Scotland Act is of "real constitutional importance", implying that it is not a standard Act of Parliament.<sup>327</sup> In spite of this democratic imperative, he emphasised that "[t]he rule of law requires that the judges must retain the power to insist that legislation of that extreme kind is not law

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<sup>320</sup> *Ibid* para 38.

<sup>321</sup> [2011] CSIH 31 affd. 2012 S.C.(U.K.S.C.) 122.

<sup>322</sup> Damages (Asbestos-Related Conditions) (Scotland) Act 2009. See *Rothwell* [2007] UKHL 39.

<sup>323</sup> *Supra* para 87.

<sup>324</sup> *Ibid* para 51.

<sup>325</sup> *Ibid* para 49.

<sup>326</sup> *Ibid* para 48.

<sup>327</sup> *Ibid* para 87.

which the courts will recognise.”<sup>328</sup> He stressed, however, that the democratic mandate afforded to the Scottish Parliament renders instances in which this would occur exceptional:

*The Scottish Parliament takes its place under our constitutional arrangements as a self-standing democratically elected legislature. Its democratic mandate to make laws for the people of Scotland is beyond question. Acts that the Scottish Parliament enacts which are within its legislative competence enjoy, in that respect, the highest legal authority.*<sup>329</sup>

Similarly for Lord Reed, even though Parliament “legislated for a liberal democracy founded on particular constitutional principles and traditions” it cannot have “intended to establish a body which was free to abrogate fundamental rights or to violate the rule of law.”<sup>330</sup> Lord Reed believes that the Scottish Parliament’s plenary law making powers mean that the “grounds of review developed in relation to administrative bodies which have been given limited powers for identifiable purposes ... generally have no purchase” to Holyrood.<sup>331</sup>

For both Lords Hope and Reed the type of legislation required to be struck down under these conditions is unlikely to occur. Importantly, Lord Hope’s general remarks concerning the Scottish Parliament apply equally to Westminster, ignoring the standard status granted to the United Kingdom Parliament as a sovereign legislature. The two Parliaments, Lord Hope asserts, share a democratic mandate and the value gained from the “width of experiences” of its members.<sup>332</sup> They also share similar problems:

*We now have in Scotland a government which enjoys a large majority in the Scottish Parliament. Its party dominates the only chamber in that Parliament and the committees by which bills that are in progress are scrutinised. It is not entirely unthinkable that a government which has that power may seek to use it to abolish judicial review or to diminish the role of the courts in protecting the interests of the individual.*<sup>333</sup>

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<sup>328</sup> *Ibid* para 51.

<sup>329</sup> *Ibid* para 46.

<sup>330</sup> *Ibid* para 153.

<sup>331</sup> *Ibid* para 147.

<sup>332</sup> *Ibid* para 49.

<sup>333</sup> *Ibid* para 51.

Such issues raise conflicts between the rule of law and democratic imperatives. Lord Hope accepted that in this case there was no need to resolve that question or any tension between the rule of law and legislative supremacy, but he assumes that such a tension exists.<sup>334</sup>

In *Imperial Tobacco*<sup>335</sup> the Supreme Court sought to create a sense of comity and structure to the Scottish Parliament's status in relation to Westminster. Here Lord Reed recognised that the Scottish Parliament must be able to "legislate effectively" within the "generous settlement of legislative authority" devolved to it "while ensuring that there were adequate safeguards for those matters that were intended to be reserved."<sup>336</sup> In the Inner House of the Court of Session, the Scotland Act, according to Lord Reed<sup>337</sup> and quoted approvingly by Lord Brodie<sup>338</sup>, was described "not a constitution", distancing themselves from Lord Hoffman's judgment in *Robinson*, in which Lord Hoffman called the Northern Ireland Act 1998 a "constitution for Northern Ireland".<sup>339</sup>

The case underlines that the Scottish Parliament's Acts should be interpreted using the same principles as any Act of the UK Parliament.<sup>340</sup> Lord Hope also noted that Parliament devolved power to the Scottish Parliament "while itself continuing as a sovereign legislature."<sup>341</sup>

Some cases regarding the Welsh Assembly have been less accommodating in their approach to devolution.<sup>342</sup> Although, in spite of what Lord Hope noted in *The Welsh Byelaws case*<sup>343</sup> "the essential nature of the legislatures that the devolution statutes have created in each case is the same", the Scottish Parliament and Welsh Assembly will not be treated in identical ways by the courts; the Scottish Parliament may be afforded greater judicial deference than the Welsh Assembly due to the increased political sensitivities relating to the more nationalistic Scotland. These cases can be seen as "clarifications" of

<sup>334</sup> *Ibid*,

<sup>335</sup> N.75.

<sup>336</sup> *Ibid* para 15.

<sup>337</sup> *Imperial Tobacco v The Lord Advocate* [2012] CSIH 9 para 71.

<sup>338</sup> *Ibid* para 181.

<sup>339</sup> N.75 para 25. See also Tarun Khaitan, "'Constitution" as a Statutory Term' L.Q.R. 2013, 129(Oct), 589-609.

<sup>340</sup> Lord President Hamilton in *Imperial Tobacco v The Lord Advocate supra* para 14 and Lord Hope in *Imperial Tobacco supra* para 14.

<sup>341</sup> *Ibid* para 13.

<sup>342</sup> See e.g. *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill: Reference by the Counsel General for Wales* [2015] UKSC 3, discussed below.

<sup>343</sup> *Local Government Byelaws (Wales) Bill 2012 – Reference by the Attorney General of England and Wales* [2012] UKSC 53 para 81.

*Robinson*, a unique case in which a specific provision of an Act, in peculiar circumstances, contradicted the Act's purpose.<sup>344</sup>

#### **4.1.2 Lord Hope's Further Remarks**

Since deciding these cases Lord Hope has elaborated on these positions. He summarised his judgment in *Axa* in the following terms:

*The common law challenge [to the 2009 Act] was rejected on the ground that the mandate given to the Scottish Parliament by the electorate suggested that, while its legislation was not immune from judicial review, the judges should intervene, if at all, only in the most extreme circumstances. The opportunity was however taken to emphasize that the rule of law was the ultimate controlling factor, and that the Scottish Parliament was not free to abrogate fundamental rights.*<sup>345</sup>

Here, Lord Hope relies heavily on the referendum process as a tacit principle of respect for democracy as being fundamental in the Supreme Court's approach to devolution.

As to the conflict between the rule of law and legislative sovereignty, Lord Hope explicitly states that

*It is an uncomfortable fact that parliamentary sovereignty and the rule of law are not entirely in harmony with each other. So long as Parliament respects the rule of law there is no problem. But to assert that Parliament can enact whatever laws it pleases runs the risk that the rule of law will be subordinated to the will of the government... My point in Jackson... is that the ultimate safeguard against such abuses of the legislative power of Parliament lies in the power of the judges... The absence of a general power to strike down legislation which it has enacted does not mean that the courts could never fashion a remedy for use in an exceptional case....*<sup>346</sup>

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<sup>344</sup> Stephen Dimelow, 'The Interpretation of "Constitutional" Statutes' L.Q.R. 2013, 129(Oct), 498-503, 502.

<sup>345</sup> Lord Hope of Craighead, "Is the Rule of Law now the Sovereign Principle?" in Richard Rawlings, Peter Leyland and Allison Young (Eds.), *Sovereignty and the Law* (OUP 2013) 93. Emphasis added.

<sup>346</sup> *Ibid* 96-7.

In sum, the rule of law limits extreme behaviour by democratically elected legislatures, which must be enforced by unelected judges.<sup>347</sup>

#### **4.2 Human Rights Cases**

Even on the occasions where, under the Human Rights provisions expressly stipulated by the Scotland Act 1998, the Courts have struck down parts of the Scottish Parliament's legislation they have done so in a measured and limited way. In *Cameron v Cottam*<sup>348</sup> and *Salvesen v Riddell*<sup>349</sup> the Court of Session held that provisions of Scottish Parliamentary Acts are not law under the Scotland Act<sup>350</sup> as they were in breach of the Human Rights Act 1998. The Supreme Court rejected the former decision and upheld the latter. The decisions related to relatively minor matters, not central planks of the Scottish government's legislative programme. The remedy provided by the court was to remit the matter to parliament to cure the defects. "Decisions as to how the incompatibility is to be corrected... must be left to the Parliament guided by the Scottish Ministers."<sup>351</sup>

Moreover, it is a part of the Scotland Act 1998, and, thus, the constitutional settlement agreed to by the Scottish people, that Acts of the Scottish Parliament be subject to judicial review on grounds of incompatibility with the European Convention on Human Rights. In these decisions the courts are applying the provisions of a Westminster statute with a sensitivity to the Scottish Parliament's democratic nature.

#### **4.3 The accommodation of Devolution**

The distance from Lord President Rodger's view, written in 2000, to these more recent cases is vast. The journey, however, has taken, in constitutional terms, a short time; in little over a decade the courts have gone from regarding the Scottish Parliament as another devolved body whose decisions require little to no deference and which possesses no special significance owing to its democratic legitimacy, to Holyrood occupying a unique position in the constitutional order. In the *Axa* and *Imperial Tobacco* decisions (although not in the majority decision in *The Welsh Asbestos Case*) the Scottish Parliament has gone

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<sup>347</sup> Such a view is a controversial statement of the liberal-legalist/legal-constitutionalist model. See Goldsworthy, *Contemporary Debates* n.14 and TRS Allan, *Law, Liberty, and Justice* n.100.

<sup>348</sup> 2012 SLT 173.

<sup>349</sup> *Salveson v Riddell and Another, The Lord Advocate Intervening* [2013] UKSC 22

<sup>350</sup> S.29 (2) (d).

<sup>351</sup> *Salveson v Riddell and Another, The Lord Advocate Intervening* [2013] UKSC 22 para 57. See also *Somerville v Scottish Ministers* [2007] UKHL 44.

from legally indistinguishable from a local authority or quango to similar to the sovereign Westminster Parliament. A coherent jurisprudence is absent in the early stages of these cases. It is clear that there is no lengthy line of decisions - made in a similar vein to the Canadian Supreme Court in relation to unwritten principles - from the Supreme Court of the United Kingdom in relation to devolution.

In recent years, the position has become even more complex and contradictory. The status of the Scottish Parliament in these cases must be seen in the context of the issues discussed in *Jackson*. Devolution is widely accepted to be one of the primary challenges to traditional notions of sovereignty, alongside the Human Rights Act 1998, European integration and globalization. In *Jackson* the Law Lords “assert[ed] the significance of their function within the UK constitution and refusing to admit that (in future cases) they are powerless to correct fundamental injustices.”<sup>352</sup>

Significantly, the most recent Scottish judgments above rest on arguments regarding democratic legitimacy. In *Axa* Lord Hope repeatedly emphasised the strong democratic foundation of the Parliament. In *Imperial Tobacco* the court adopted a careful approach to the Scottish Parliament’s powers, again acknowledging its constitutionally unique status. The cases have not, however, explicitly acknowledged the role of the people in the Scottish constitution, with relatively conservative constitutional language being relied upon. Lord Hope has gone somewhat further in some of his post-judicial writing. As discussed earlier, in the seminal case of *Jackson*.<sup>353</sup> Although the case did not directly address or relate to devolution, it did include some general and pointed remarks on the nature of parliamentary supremacy from the Law Lords. *Axa* affirms these principles and may be another step towards a more assertive judiciary in the face of Parliamentary and executive action.

A complicating factor is the recent case of the *Welsh Asbestos Case*.<sup>354</sup> In this case, the Supreme Court – in a majority decision and *contra* Lord Hope in *Axa* – found that “[p]erhaps in light of article 9 [of the Bill of Rights] there is a relevant distinction between cases concerning primary legislation by the United Kingdom Parliament and other

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<sup>352</sup> Brice Dickson, ‘Judicial Activism in the House of Lords 1995-2007’ in Brice Dickson (ed.), *Judicial Activism in Common Law Supreme Courts* (OUP, 2003) 372. Dickson also, somewhat exaggeratedly, compares this to the case to *Marbury v Madison* (1803) 1 Cranch (5 Us) 307: ‘The Role of Judges in the Development of Constitutions’ (2006) NILQ 332.

<sup>353</sup> N.65.

<sup>354</sup> N.342.

legislative and executive decisions.”<sup>355</sup> This binary distinction places the Welsh Assembly alongside the Scottish Parliament, Northern Ireland Assembly, Local Authorities, and Ministers in distinction with the UK Parliament; the former is subjected to substantially less deference (if any) than the latter. The minority judgment written by Lord Thomas used language much more similar to *Axa*, granting “great weight to informed legislative choices” of all legislatures “particularly so where the judgment is made,, on matters of social and economic policy.”<sup>356</sup> Lord Thomas approvingly refers to the *Axa* approach.<sup>357</sup> He goes on to say that

*Under the devolution settlements, in areas where legislative competence has been devolved, the Assemblies and the Scottish Parliament, as the democratically elected bodies with primary legislative competence, have to exercise the same legislative choices as the United Kingdom Parliament would have to exercise in areas of legislative competence which it has not devolved.*<sup>358</sup>

Lord Thomas states that there is “no reason” why lesser weight should be granted to the devolved legislatures on devolved matters than the UK Parliament has on the same issues in England.<sup>359</sup>

The two opinions are clearly at odds with each other in a fundamental sense; this is not a disagreement on a minor technical point or interpretation of facts. The decision was decided three to two, and, as it is clearly in conflict with *Axa* and *Imperial Tobacco*, it cannot be inferred from this single decision that the approach adopted there has been abandoned entirely by the Supreme Court. The case law is now, however, clearly in a state of flux.

*The Welsh Asbestos* case notwithstanding, the central issue is that in *Axa* and *Imperial Tobacco* both the Court of Session and the Supreme Court rejected the idea that the defining characteristic of the Scottish Parliament is its devolved status. Instead, they focused on the democratic mandate afforded to the Parliament by the Scottish people. This is renewed in every election to the Scottish Parliament, but its founding act was in the overwhelming support afforded to it by the 1997 referendum. Thus, the significance of

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<sup>355</sup> Ibid. para 56.

<sup>356</sup> *Supra* para.118.

<sup>357</sup> Ibid.

<sup>358</sup> Ibid. para 120.

<sup>359</sup> Ibid. para 122.

popular sovereignty is implicitly recognized as a complicating factor in the modern view of legislative supremacy.

However, the above-mentioned cases have not related to issues of grand constitutional significance or constitutional crises proper-so-called, being as they are actions raised by private companies or individuals. In the context of a dispute between the UK and Scottish governments, on the other hand, the court may have to resort to more constitutionally creative decision making in order to reflect the political reality of the Scottish constitutional order whilst maintaining the broad comity it has arrived at with Parliament.

However, in *Axa* Lord Hope relies on the democratic mandate granted to the Scottish Parliament by the people for much of his decision. Could, therefore, the unilateral abolition of the Scottish Parliament act as a similar extraordinary catalyst for change to the Supreme Court's sovereignty jurisprudence?

#### **4.4 Conclusions**

With the principles established by the 1997 and 2014 Referendums and the emphasis placed upon the Scottish Parliament's democratic mandate and origins, popular sovereignty *could* be formally assimilated into the Scottish constitution. This would be recognition of the existing Scottish political constitution. Any such action would clearly be "charting new constitutional waters" in the United Kingdom's constitutional order.<sup>360</sup> This could be achieved by acknowledging that principles of popular participation, devolution and mutual respect between the institutions at a Scottish and British level are "fundamental and organizing" principles of the Scottish constitution, much like in the *Quebec Secession Reference*.<sup>361</sup>

Such a decision would have to be sensitively decided. It would perhaps be an error to go as far as *Robinson v Secretary of State*.<sup>362</sup> A more subtle approach was adopted by the High Court of Northern Ireland in *Parson* when it partially relied upon the support expressed in a referendum on the Belfast Agreement in endorsing the legality of a new scheme for police recruitment as the Referendum constituted a demonstration of the Northern Irish

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<sup>360</sup> Tom Mullen and Stephen Tierney, 'Scotland's Constitutional Future: The Legal Issues' University of Edinburgh, School of Law, Working Papers, 2013, 10.

<sup>361</sup> *Reference re Secession of Quebec* [1998] 2 SCR 217 para 51.

<sup>362</sup> N.75.

people's settled view.<sup>363</sup> boldness of *Robinson* has been disapproved of in *Imperial Tobacco*<sup>364</sup>, but the nuanced approach to the constitutional implications of referendums utilized in *Parson* may be useful to the Scottish context; as . It is important to remember that devolution in the United Kingdom is asymmetrical and, as a consequence, the Northern Ireland Act could be a Constitution for Northern Ireland without the Scotland Act necessarily acting in a similar way in Scotland.

The flaw in this approach, however, is that it is not for the courts to make such decisions. What constitutes fundamental and organizing principles of a constitution is a matter for the people utilizing their constituent power or expressed through their elected representatives.

Whilst the courts have not gone this far, the fact that judges are entering into the even the early stages of this debate is part of a “quiet but profound revolution” of the Supreme Court's role as necessitated by the boundary disputes inherent in the system of devolution adopted in the United Kingdom.<sup>365</sup>

It should also be remembered that these decisions are simultaneously radical and conservative.<sup>366</sup> They boldly seek to limit the excesses of legislative supremacy whilst also seeking to impose only “modest restrictions on legislative competence.”<sup>367</sup> These cases, therefore, can only point to a certain direction of travel. Although the new Scotland Draft Clauses, which inserts into the Scotland Act an assertion that the Scottish Parliament is now a “permanent part of the United Kingdom's constitutional arrangements”,<sup>368</sup> likely to be law, there is no evidence that this legally entrenches the Scottish Parliament's position in the British constitutional order. That is to say, there is little evidence that a British court will yet go as far as to strike down legislation expressly contradicting a constitutional statute.<sup>369</sup> The Draft Clauses seek to amend the Scotland Act. If an Act of Parliament repealed the Scotland Act, then this assertion of permanence would be repealed at the same time. Legal entrenchment, therefore, cannot be achieved with legislative supremacy.

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<sup>363</sup> *In the Matter of an Application by Mark Parson for Judicial Review* [2001] NIQB 46 para 34; discussed in Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (OUP 2012) 148.

<sup>364</sup> N.75.

<sup>365</sup> Vernon Bogdanor, ‘Parliament and the Judiciary: The Problem of Accountability’, lecture to UK Public Administration Consortium, February 9, 2006 2.

<sup>366</sup> Mark Elliot, ‘Holyrood, Westminster and Judicial Review of Legislation’ C.L.J. 2012, 71(1), 9-11, 11

<sup>367</sup> *Ibid.*

<sup>368</sup> N.3, Clause 1.

<sup>369</sup> The Bingham Centre for the Rule of Law, *A Constitutional Crossroads: Ways Forward for the United Kingdom*, May 2015, 14.

The related question of the consequences and theoretical context of referendums has been a theme throughout this work. The next chapter will examine this issue.

## Chapter 5: Referendums, Constitutional Moments and Constitutional Unsettlement

The previous chapter discussed a potential avenue for resolving the issue in the courts. It was seen that this is undesirable on democratic and pragmatic grounds. This chapter will look at a political approach to resolving the issue. This chapter will firstly discuss referendums from a theoretical perspective before considering the 2014 Independence Referendum. It will then seek to frame the 1997 and 2014 Referendums within the concept of constitutional moments before discussing whether this has led to a new Scottish constitutional settlement.

### 5.1 Constitutional Referendums

It is important to distinguish between different types of referendums. It is constitutional referendums with which this work is concerned.

Constitutional referendums are those ‘popular votes in which the question of partially or totally revising a State's Constitution...is asked.’<sup>370</sup> Tierney further distinguishes between two types of constitutional referendum, namely those that are ‘constitution-changing’ and those that are ‘constitution-framing’.<sup>371</sup> The former are internal to the existing constitutional order and run alongside the ordinary political process, whereas the latter are external and concerned with the creation of new states or new constitutions.

Recourse to referendums has become much more common in the last few decades across the Western world. The reasons for this are various, with disaffection and mistrust of political elites the most significant.<sup>372</sup> Although some local referendums were held in Scotland and parts of Wales concerning licensing laws<sup>373</sup>, the device of a referendum has not traditionally been widely used in the United Kingdom.<sup>374</sup> The increased use of direct democracy in the UK is part of an ‘anxious questioning and search, sometimes desperate, for innovations to revive a seemingly outworn system.’<sup>375</sup> It remains the case, however,

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<sup>370</sup> European Commission for Democracy Through Law (Venice Commission), Guidelines for Constitutional Referendums at National Level (11 July 2001) COE Doc CDL- INF(2001)10, I.

<sup>371</sup> Tierney, *Referendums* n.363, 11.

<sup>372</sup> See *ibid* Ch.3.

<sup>373</sup> See e.g. the Temperance (Scotland) Act 1913, the Sunday Entertainments Act 1932 and the Local Government Act 1933.

<sup>374</sup> The Constitution Committee of the House of Lords *Referendums in the United Kingdom* (HL 2009-10) 7.

<sup>375</sup> Bogdanor, *The New British Constitution*, n.221, 24.

that referendums are used infrequently in the vast majority of democracies, including the United Kingdom.<sup>376</sup>

There is little evidence that the increased use of referendums is part of a principled effort to insert the people into the British or Scottish constitutional orders. Instead, they appear to have been used in an ad hoc fashion, a pragmatic and sometimes cynical response to prevailing political conditions<sup>377</sup>: Harold Wilson was committed to a referendum on Britain's membership of the European Community as a product of infighting on the topic within the Labour Party;<sup>378</sup> the 1979 Referendums in Scotland and Wales resulted from Jim Callaghan's parliamentary coalition with Scottish and Welsh Nationalists and fears of Scottish nationalism;<sup>379</sup> the 1997 Referendums in Scotland were announced relatively late on in the devolution process, at least partially due to tactical considerations regarding Labour MPs from the North of England;<sup>380</sup> and the 2011 AV Referendum was a function of a coalition agreement. This does not mean, however, that this increased utilization of referendums has no affect on constitutional principles.

Sub-state referendums, with their claim to a 'people' beneath the level of the monistic national *demos*, challenge the one of the central claims of western constitutionalism, namely that constitutions 'res[t] upon the consent whether expressed or tacit, of *one* constitutional people.'<sup>381</sup> In the United Kingdom, it questions a singular understanding of a constitution, as, if you have more than one 'people', you can have more than one constitutional praxis. It is this sense that the UK is a union state, with potentially different views on constitutional fundamentals, such as parliamentary sovereignty.

It is this tension that Habermas attempted to resolve with his theory of 'equiprimordiality.'<sup>382</sup> This posits that democracy, which he uses as a shorthand for popular sovereignty, and the rule of law, which denotes constitutionalism, can co-exist as equals.<sup>383</sup> Constitutional limitations on popular sovereignty should be designed to permit the people to have a democratic influence on them and, if necessary, amend or supplant

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<sup>376</sup> Tierney, *Referendums* n.363, 174.

<sup>377</sup> King, *The British Constitution* n.51 295.

<sup>378</sup> Loveland, *Critical Introduction* n.54, 371.

<sup>379</sup> McLean, *What's Wrong with the British Constitution?* n.21, 167.

<sup>380</sup> Bogdanor, *The New British Constitution* n.221, 91-92.

<sup>381</sup> Tierney, *Referendums* n.363, 138.

<sup>382</sup> Jurgen Habermas, 'Constitutional Democracy: A Paradoxical Union of Contradictory Principles', *Political Theory* 29, no 6 (2001), 774.

<sup>383</sup> James Tully, 'On the Global Multiplicity of Public Spheres' in Christian Emden and David Midgley (eds.), *Beyond Habermas: Democracy, Knowledge and the Public Sphere* (Berhann Press 2012) 190.

them. The most obvious mechanism for achieving this goal is the referendum. Habermas contends that, although the foundations of a constitution are inevitably ‘groundless discursive self-constitution’, it is the ‘future-orientated character, or openness, of the democratic constitution’ that offers the ability for constitutions to accommodate competing and contradictory claims.<sup>384</sup> Habermas states that ‘whoever bases her judgment today on the normative expectation of complete inclusion and mutual recognition... must assume that she can find these standards by reasonably appropriating the constitution and its history of interpretation.’<sup>385</sup> Lindahl finds this analysis unsatisfactory as it fails to explain the source of constitutional legitimacy.<sup>386</sup>

In any event, subgroups, such as sub-state nationalists, may seek to renegotiate the terms of their inclusion in the polity, or create a co-sovereign in certain circumstances, namely of their ‘people.’

Tierney recognises that implicit in much of this is a false dichotomy between ‘assertions of political sovereignty [and] the positivist authority of the constitution.’<sup>387</sup> Similarly, Bogdanor notes that “the referendum serves not to replace the machinery of representative government, but only to supplement it.”<sup>388</sup> Mendelsohn and Parkin observed that referendums are ‘intricately intertwined with the institutions and agents of representative democracy.’<sup>389</sup> Walker explains that referendums “suppl[y] an ad hoc mechanism to authorize constitutional change where the normal pathways are deemed to lack the requisite constitutional gravitas or are of disputed legitimacy” and are, therefore, complementary to representative democracy.<sup>390</sup>

Sub-state nationalists often resort to referendums with at least putative constitutional authority. Tierney identifies a tendency for sub-state nationalists to operate both “inside

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<sup>384</sup> *Supra.*

<sup>385</sup> *Ibid.*

<sup>386</sup> Hans Lindahl, ‘Recognition as Domination: Constitutionalism, Reciprocity and the Problem of Singularity’ in Neil Walker, Jo Shaw, and Stephen Tierney (eds.), *Europe's Constitutional Mosaic* (Hart 2011) 205 and ‘On Law, Democracy and Imperialism’ in Emiliios Christodoulidis and Stephen Tierney (eds.), *Public Law and Politics: The Scope and Limits of Constitutionalism* (Ashgate 2008) 98-100.

<sup>387</sup> Tierney, *Referendums*, n.363, 139.

<sup>388</sup> Bogdanor, *The New British Constitution*, n.221, 174.

<sup>389</sup> Matthew Mendelsohn and Andrew Parkin, ‘Introduction: Referendum Democracy’ in Matthew Mendelsohn and Andrew Parkin (eds.), *Referendum Democracy: Citizens, Elites and Deliberation in Referendum Campaigns* (Palgrave 2011) 4.

<sup>390</sup> Neil Walker, ‘Our Constitutional Unsettling’ [2014] *Public Law* 529-548, 544.

and outside... the constitution in ways that are both strategic and, at the same time, intended to be mutually reinforcing.<sup>391</sup>

In Scotland the nationalist movement largely operates from within the constitutional order; for example, the referendums in 1997 and 2014 were both from ‘inside’ the constitution in that they were products of Westminster legislation<sup>392</sup> and, thus, received the imprimatur of parliamentary sovereignty. The Consultation Paper published by the Scottish Government, ‘*Your Scotland, Your Voice: A National Conversation*’, states that

*Scottish Parliament legislation must conform to the provisions of the Scotland Act 1998. ...It is...legitimate for a referendum held under an Act of the Scottish Parliament to ask the people questions related to an extension of its powers insofar as this is within the framework of the Scotland Act.*<sup>393</sup>

The White Paper on Scottish independence goes even further by claiming that the process of becoming independent would occur within the constitution:

*Existing constitutional arrangements in Scotland will provide the basis for the transition to independent statehood, with additional powers transferred as soon as possible after the referendum, giving the Scottish Parliament the ability to declare independent statehood for Scotland in the name of the sovereign people of Scotland.*<sup>394</sup>

These are expositions of constitutional orthodoxy and present the referendum, and even Scotland seceding from the union, as acts that rest within the constitution. This is unsurprising. As the Scottish Parliament’s existence and constitutional status flows from the 1997 Referendum, it would have been contradictory for the Scottish Government to, on one hand, assert the significance of popular sovereignty for a future referendum whilst, on the other, rejecting it in a past one.

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<sup>391</sup> *Ibid* 140.

<sup>392</sup> Although the Independence Referendum was initiated by the Scottish Parliament, as we have seen the enabling legislation was passed by Westminster.

<sup>393</sup> The Scottish Government, *Scotland’s Future: Draft Referendum (Scotland) Bill Consultation Paper* (2010) 16.

<sup>394</sup> The Scottish Government, *Scotland’s Future: Your Guide to an Independent Scotland* (2014) 337.

The essential question for this work is whether a referendum can entrench the Scottish Parliament. As we have seen, the classical orthodox claim would be that it can not. However, ‘once sub-state constituent power is mobilized through a referendum, traditional understandings of the limits of constitutional control can be challenged’;<sup>395</sup> the referendum’s relationship with popular sovereignty carries with it a normative force.

The theoretical position outlined by Habermas can see practical manifestation in Scotland’s constitutional order. Referendums are ‘an instantiation of ‘today’s people’ speaking in a self-conscious way as constitutional author’ which can be ‘presented as a new constitutional moment that legitimizes the supersession of earlier self-conscious – or imagined – expressions of the popular will.’<sup>396</sup>

Direct democracy is not necessary in conflict with representative democracy. There is no need for the legitimacy that flows from referendums to exist out with an existing constitutional order. Instead, it may exist within it, providing added legitimacy to significant foundational change and granting permission to constitutional actors to enact further change. Whilst the referendum may expose the limits of and disturb the ordinary constitution, its power is ‘relational’ to it.<sup>397</sup>

### **5.1.1 Popular Sovereignty**

Popular sovereignty is a simple concept to state, it is the idea that the people are the ultimate source of sovereignty in a state, but elusive to fully appreciate. It is normative and often forms the basis of legitimacy in a constitutional order.

As Ivor Jennings put it, “[t]he people cannot decide until someone decides who are the people”<sup>398</sup>, so we must first turn to what constitutes a people. In terms of geographical limitations, Tierney notes that “standard modern formulations” of the people are “assumed to map neatly onto the boundaries of the state.”<sup>399</sup> Because a demos produces a state through a constitutional act, a state must possess that single demos by definition. However, in union states<sup>400</sup> there are a number of pre-existing demoi that are unified in one state.<sup>401</sup>

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<sup>395</sup> Tierney, *Referendums* n.363, 149.

<sup>396</sup> *Ibid* 150.

<sup>397</sup> *Ibid* n.361, 152.

<sup>398</sup> Ivor Jennings, *The Approach to Self-Government* (first published 1956, CUP 2011) 56.

<sup>399</sup> Tierney, *We the Peoples* n.306, 231.

<sup>400</sup> Discussed above at 7 and 49.

There are multiple political identities in the UK. These interact in a variety of complex ways,<sup>402</sup> but for the purposes of this work it is sufficient to note that overlapping Scottish and British peoples can exist simultaneously and be invoked and utilized at different points and for different purposes within the UK.

Within a geographical class who are the people? In a less democratic age the people was limited to elites.<sup>403</sup> As notions of democracy grew more inclusive, as did the classes of person included in conceptions of the people. The notorious provision of the American Constitution<sup>404</sup> classifying slaves as equivalent to three-fifths of a non-slave was repealed, and now ethnicity, social class and gender are irrelevant to our conception of a people.

What, then, is the meaning of sovereignty in this context? It is not the purpose of this to fully explore the theoretical, historical, philosophical and sociological aspects of the concept of sovereignty.<sup>405</sup> It is sufficient for us to recognise the need for an ultimate authority by which the general behavior of the state is legitimized and the possibility that, in particular circumstances and instances, a method by which some decisions are specifically legitimized. Loughlin describes this as ‘an expression of a political relationship between the people and the state’.<sup>406</sup> It is traditionally regarded as indivisible, but a relatively recent challenge to this monistic conception emanates from so-called “plurinational states”<sup>407</sup>, such as the United Kingdom. This allows for divisible or perhaps shared sovereignty, expressed through multiple peoples within a single state who may possess overlapping and membership of these peoples.

With this in mind, we must examine what meaning popular sovereignty has. Hobbes regarded the people as a product of the formulation of the state, which “ceases to perform any active political role” upon the birth of its creation<sup>408</sup> Locke described the people as “one Body Politick”, formed by consent and subject to “...the determination of the

<sup>401</sup> Tierney, *Referendums* n.363, 231-232.

<sup>402</sup> Keating, *Plurinational States* n.121, 102-133

<sup>403</sup> E.g. George Buchanan regarded the people as constituted by noblemen, see Kidd, *Subverting Scotland's Past* n.128, 20.

<sup>404</sup> Section 2 of Article I of the American Constitution which provided *inter alia* that slaves are equivalent to three-fifths of a non-slave was repealed, and now ethnicity, social class and gender are irrelevant to our conception of a people.

<sup>405</sup> Many of these are discussed in Martin Loughlin, *The Idea of Public Law* (OUP 2003) 72-98, and Tomkins, *Public Law* n.102, 102-125.

<sup>406</sup> Loughlin, *ibid* 95.

<sup>407</sup> Tierney, *Constitutional Law and National Pluralism* n.274, 4.

<sup>408</sup> Loughlin, *Idea supra* 55-57 and 102.

majority.”<sup>409</sup> The people here are thought of as active agents of formation and change in a constitutional order. The idea of the people as an agent of change can be explored through the models of the constituent and constituted powers.

### 5.1.2 *Constituent and Constituted Power*

The constituent power is that force “prior to everything... the source of everything... Its will is always legal; indeed, it is the law itself.”<sup>410</sup> It “presupposes the existence of an entity which is the bearer of political unity and which, through an act of will, constitutes the office of government.”<sup>411</sup> It creates government as a method of managing tensions between different parts of society. Generally, it creates a form of representative rather than direct democracy due to the former’s ability to mediate these tensions through organized politics, which becomes increasingly important in large, more complex societies.<sup>412</sup> For Maistre, the people “are a sovereign which cannot exercise sovereignty.”<sup>413</sup> Their sovereignty must, therefore, be “divided, constrained, and exercised through distinctive institutional forms.”<sup>414</sup> The constituent power creates the constituted power, which is the formal power of a series of institutions within a legal hierarchy.<sup>415</sup> The constituent power is, therefore, an active force of change of the constituted power. The constituted power may be the mechanism by which change formally occurs in order to save or supplement its own legitimacy and existence, or it may be supplanted by a new range of institutions and underlying philosophy.<sup>416</sup> This relationship must be continually mediated or it may descend in to populism, which can be a threat to constitutional democracy.<sup>417</sup> In either event, the impetus for change emanates from the constituent power.

The people are an example of a constituent power. Their acceptance of a constituted power, generally implicit and inferred from their democratic interactions with the government, is universally accepted as the basis of constitutionalism and legitimacy. In most countries the moment that the constituent power formed the constituted power is obvious: the writing of a constitution, for example. In Scotland there is no such moment.

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<sup>409</sup> John Locke, *Two Treatises of Government* ii. 97 (first published 1689, The Lawbook Exchange 2010).

<sup>410</sup> Emmanuel-Joseph Sieyes, *What is the Third Estate?* (Pall Mall 1963) 126.

<sup>411</sup> Martin Loughlin, *The Foundations of Public Law* (OUP 2010) 221.

<sup>412</sup> Westminster is “at once a legislative and constituent assembly”: Alexis de Tocqueville, *Democracy in America and Two Essays on America* (Penguin, 2003) 74.

<sup>413</sup> Joseph de Maistre, *Study on Sovereignty* accessible at <http://maistre.ath.cx:8000/sovereignty.html>.

<sup>414</sup> Loughlin, *Paradox* n.307, 1.

<sup>415</sup> Sieyes, *What is the Third Estate?* *supra* 125-6.

<sup>416</sup> E.g. the Bolshevik Revolution of 1917.

<sup>417</sup> Cesare Pinelli, ‘The Populist Challenge to Constitutional Democracy’, E.C.L. Review 2011, 7(1), 5-16.

The Acts and Treaty of Union were drawn up and executed by Commissioners on behalf of the Scottish and English Parliaments. They are not perceived as being truly constitutional in nature.<sup>418</sup> There is no moment at which it can be said the Scotland was formed and its institutions constituted; the Scottish people never self-consciously constituted themselves. Instead, the nation itself emerged gradually over time and its institutions developed in a piecemeal fashion.

What can be said is that in Scotland the Parliaments at Westminster and Holyrood, local authorities, courts, the government and the monarch form the constituted power. Similarly, that the people form a constituent power, in that they can overthrow the constituted power and replace it with a new one of their choosing, is an uncontroversial proposition. The central thesis of this work is that the people must be asked to express their view on matters of constitutional significance using referendums in Scotland.<sup>419</sup> This work will now go on to explore whether popular sovereignty has been assimilated into the Scottish constituted power through the mechanism of referendums.

### **5.1.3 The 1997 Referendum**

The SCC saw no need for a referendum on devolution, regarding the people to have expressed their “settled will”<sup>420</sup> in successive general elections.<sup>421</sup> They also saw themselves as representative of the people. However, the fact that one was held is deeply significant in understanding the in the modern Scottish Constitution.

The referendums confirming the Scottish people’s support for a Scottish Parliament and its tax-varying power were won comfortably by the yes campaign.<sup>422</sup> Prior to 1997, Scotland had only ever taken part in two referendums, one on Britain’s membership of the European Community and the other on the proposals for a Scottish Assembly in 1979. The latter was successful in gaining a majority of the votes but failed due to a wrecking amendment which required 40% of the overall Scottish population to vote in favour of an Assembly.<sup>423</sup>

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<sup>418</sup> Cf. T B Smith, “The Union of 1707 as Fundamental Law” [1957] Public Law 99.

<sup>419</sup> This is distinct from the British “referendal model” proposed in R Joel Colón Rios, ‘Five Conceptions of Constituent Power’ L.Q.R. 2014, 130(Apr), 306-336, and Rivka Weill, “We the British People” P.L. 2004, Sum, at 380-406.

<sup>420</sup> A phrase attributed to then Labour Leader John Smith.

<sup>421</sup> Wright, *The People Say Yes!* n.210, 155.

<sup>422</sup> UCL Constitution Unit, ‘Devolution: An Overview of the Constitutional Changes’ L.I.M. 2001, 1(1), 27-34, 27.

<sup>423</sup> Tierney, *Referendums* n.363, 311.

The primary difference between the genesis of the referendums in 1979 and 1997 is that the former was the result of disagreement within the Labour Party,<sup>424</sup> and the latter the realization of a popular demand from the Scottish people. As we saw, the SCC represented a vanguard movement which sought to renegotiate the terms of the Scottish constitutional settlement in the name of the Scottish people. The Convention's demand was that a devolved parliament be introduced in order to satisfy the Scottish people's call for a distinct domestic policy agenda which could not be provided by the existing constitutional arrangements. It predicated this on the absence of a democratic mandate for the government in Scotland, treating it as a distinct polity.

The manner by which it sought to implement the radical changes to the Scottish constitution it desired was, paradoxically, conservative. The ordinary legislative process was utilized. This can be explained by the fact that the SCC did not view itself as a revolutionary force.<sup>425</sup> To the contrary, it called for what it viewed as a return to the traditional conception of the Scottish constitution.

By demanding that the constituted power of Westminster be used to meet the needs of the constituent power of the Scottish people the SCC demonstrated a fidelity to the established practices of the British constitution.

Although it was not the government's intention to do so, the 1997 referendum implicitly ratified the insinuation of the people in the constituted power of the Scottish constitution. It made clear that, contrary to the SCC's claims, on major constitutional issues the people's permission cannot be inferred from ordinary parliamentary elections, where other, more pressing issues tend to dominate. As Tierney has noted "...once sub-state constituent power is mobilised through a referendum, traditional understandings of the limits of constitutional control can be challenged."<sup>426</sup> Rios notes that "Constituent power is... a force that challenges juridical systems from the outside and that, even when institutionalised, might re-emerge at any moment to destabilise it."<sup>427</sup> This appears to have happened in Scotland.

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<sup>424</sup> Bradley and Ewing, *Constitutional* n.5, 76.

<sup>425</sup> See above.

<sup>426</sup> Tierney, *Referendums* n.363, 148.

<sup>427</sup> Rios, n.419.

### 5.1.4 *The People's Referendum*

After their landslide victory in the 2011 Scottish Parliamentary Election, the SNP sought to enact their manifesto commitment to hold a referendum on Scotland seceding from the United Kingdom.<sup>428</sup> Some academic debate arose regarding the Scottish Parliament's capacity to pass legislation on holding a referendum premised on a false distinction between advisory and binding referendums, but it was widely recognised that only Westminster could legislate for a referendum.

In a strictly legal sense the British government, applying Diceyan principles, could have maintained that, as the constitution is reserved and a clear majority of Scottish MPs represent unionist parties, the election of a majority nationalist Parliament at Holyrood was irrelevant to the reserved matter of Scotland's continued status as a member of the United Kingdom. They could have interpreted the election as an electoral mandate for the SNP's policies on devolved issues and not a referendum. The Spanish government is currently engaged in this form of constitutional formalism with Catalonia, as the Spanish Constitution precludes sub-national referendums.<sup>429</sup>

The British government chose to interpret the 2011 election as the expression of the people's demand for an independence referendum, with Prime Minister David Cameron stating that "I will do everything, obviously, as British prime minister, to... treat the Scottish people and the Scottish government with the respect they deserve."<sup>430</sup> He referred to the plebiscite as "the people's referendum."<sup>431</sup> Negotiations between the Scottish and British governments resulted in the so-called Edinburgh Agreement.<sup>432</sup>

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<sup>428</sup> Scottish National Party, *Taking Scotland Forward*, 2011, 3.

<sup>429</sup> The Constitution of Spain:

"Section 1:

...

2. National sovereignty belongs to the Spanish people, from whom all State powers emanate.

...

Section 2

The Constitution is based on the indissoluble unity of the Spanish Nation, the common and indivisible homeland of all Spaniards; it recognizes and guarantees the right to self-government of the nationalities and regions of which it is composed and the solidarity of them all..."

<sup>430</sup> Severin Carrell, 'Salmond Hails "Historic Victory" As SNP Secures Holyrood's First Ever Majority', *The Guardian* (May 6 2011).

<sup>431</sup> 'David Cameron signs historic deal granting Scottish referendum', accessible at <https://www.gov.uk/government/news/david-cameron-signs-historic-deal-granting-scottish-referendum> (last accessed 5 December 2014)

<sup>432</sup> *Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland.*

An Order in Council under Section 30 of the Scotland Act 1998 was approved by the Privy Council, temporarily amending Schedule 5 of the 1998 Act to permit the Scottish Parliament to legislate for a referendum.<sup>433</sup> Consequently, The Scottish Independence Referendum Act 2013 and Scottish Referendum (Franchise) Act 2013 were passed by the Scottish Parliament, providing for a referendum on September 18 2014 asking the question ‘Should Scotland be an independent country?’<sup>434</sup>

With an extremely high turnout of 84%, 55% of those who voted chose to remain in the United Kingdom.<sup>435</sup> In the aftermath of the referendum the British government set up the cross-party Smith Commission to propose new powers for the Scottish Parliament. Its conclusions rested on several pillars. One pillar was the bringing about of a “durable but responsive democratic constitutional settlement, which maintains Scotland’s place in the UK...”<sup>436</sup> Specifically, it provided that “UK legislation will state that the Scottish Parliament and Scottish Government are permanent institutions.”<sup>437</sup>

The 2014 Referendum represents the recognition of a shift in the status of the Scottish Parliament. As described above, the courts have increasingly recognized the importance of the democratic nature of the Scottish Parliament, its ‘sui generis’<sup>438</sup> nature and, tacitly, the significance of the referendum that introduced the Parliament. The 2014 Referendum can be seen as a form of ‘constitutional moment’, in which this shift is crystallized.

## **5.2 Constitutional Moments**

As the 2014 Referendum and the findings of the Smith Commission underline, the constitutional implications of referendums are vast. American constitutional lawyer Bruce Ackerman has developed a theory regarding ‘constitutional moments,’<sup>439</sup> which, although

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<sup>433</sup> The Scotland Act 1998 (Modification of Schedule 5) Order 2013.

<sup>434</sup> Scottish Independence Referendum Act 2013 s.1.

<sup>435</sup> <https://www.gov.uk/government/topical-events/scottish-independence-referendum/about>.

<sup>436</sup> *The Smith Commission Report detailing Heads of Agreement on further devolution of powers to the Scottish Parliament* 9.

<sup>437</sup> *Ibid* para. 21.

<sup>438</sup> *Axa* n.75 per Lord Hope para 74.

<sup>439</sup> Bruce Ackerman, *We the People Vol. I: Foundations* (Harvard University Press 1993), *We the People Vol. II: Transformations* (Harvard University Press 2000), *We the People Vol. III: The Civil Rights Revolution* (Harvard University Press 2014) and “Higher Law-Making” in Sanford Levinson (ed) *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton University Press 1995) 63.

primarily concerning the American Constitution, may provide a useful framework to be applied, in a broad sense, to the British constitutional order.<sup>440</sup>

Ackerman identifies several moments where the American Constitution was amended outside the ordinary Constitutional amendment procedure, which is specified by the Constitution itself and difficult to meet the requirements of.<sup>441</sup> This theory is known as dualism. In it, Ackerman distinguishes ordinary from constitutional politics and ordinary from constitutional law.<sup>442</sup> He posits that while the American Constitution has been formally altered dozens of times, there have only been three truly transformative ‘constitutional moments’ in American history. These are “... a special kind of politics that involves the entire American people acting in their capacity as sovereign.”<sup>443</sup> These three constitutional moments are the adoption of the Constitution and Bill of Rights, the post-civil war Reconstruction era and the period surrounding Franklin Roosevelt’s New Deal. Ackerman evidences his theory by analyzing the approaches adopted by the American Founding Fathers.<sup>444</sup>

Ackerman argues that there is a cyclical pattern in American history. Typically, the vast majority of people are broadly disengaged from higher-order politics and constitutional thinking. Those who seek to prioritise these fundamental questions are “regularly rebuffed in the polls in favour of politics-as-usual.”<sup>445</sup> For a variety of reasons, this sometimes does not happen and a particular fundamental is put at the centre of the political debate.

Ackerman argues that:

*Decisions by the People occur rarely, and under special constitutional conditions. Before gaining the authority to make supreme law in the name of the People, a movement’s political partisans must, first, convince an extraordinary number of their fellow citizens to take their proposed initiative with a seriousness that they do not normally accord to politics; second, they must allow their opponents a fair opportunity to organise their own forces; third, they must convince a majority of their fellow Americans to support their initiative as its merits are discussed, time*

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<sup>440</sup> Weill, ‘We the British People’ n.419.

<sup>441</sup> U.S. Const. Art. V. requires that two-thirds of the House of Representatives and the Senate and that three-quarters of the states’ legislatures or special ratifying conventions approve an amendment.

<sup>442</sup> Ackerman, *Foundations* n.439, 6-7.

<sup>443</sup> Stephen Griffin, *American Constitutionalism: From Theory to Politics* (Princeton University Press 1997) 47.

<sup>444</sup> Ackerman, *Foundations* n.439 Ch. 2-6.

<sup>445</sup> *Ibid* 31.

*and again, in the deliberative for a provided for “higher lawmaking”. It is only then that a political movement earns the enhanced legitimacy the dualist Constitution accords to decisions made by the People.<sup>446</sup>*

Ordinary governmental decisions obviously occur far more frequently, but are circumscribed by the prior limitations imposed by the People:

*Once a reform movement survives its period of trial, the Constitution tries to assure that its initiatives have an enduring future in political life. Elected politicians will not be readily allowed to undermine the People’s solemn commitments through everyday legislation. If they wish to revise preexisting principles, they must return to the People and gain the deep, broad, and decisive popular support that earlier movements won during their own periods of institutional testing.<sup>447</sup>*

Ackerman identifies several phases in a movement that transforms its central issue into a constitutional moment. There is the signaling phase, in which the movement gains sufficient traction amongst the People that it becomes the central question in politics; this is followed by the proposal phase, where a solution is proposed; the triggering phase takes place where a political event intervenes that provides tentative support for the broad premises of the proposals from the people and “generates additional momentum for change”<sup>448</sup>; then the mobilized popular deliberation stage takes place, where the proposals are heavily scrutinized by the public as well as political and legal actors<sup>449</sup>; finally, if a movement survives this stage, it is legally codified by the Supreme Court, “supplying the cogent doctrinal principles that will guide normal politics for many years to come”<sup>450</sup> and ratified by the other branches of government and constitutional order.<sup>451</sup>

Ackerman moves this descriptive analysis to a normative one, arguing that it suits countries that suffer from ebbs and flows of political engagement, encouraging the People to engage with the most fundamental constitutional questions of the day and limiting the

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<sup>446</sup> *Ibid* 6.

<sup>447</sup> Ackerman, *Transformations* n.439, 5.

<sup>448</sup> Daniel Taylor Young, ‘How Do You Measure a Constitutional Moment? Using Algorithmic Topic Modeling To Evaluate Bruce Ackerman’s Theory of Constitutional Change’, 122 *Yale Law Journal* 1990 (2013) 1999.

<sup>449</sup> It is at this point that most movements fail, according to Ackerman.

<sup>450</sup> Ackerman *Foundations* n.439, 267.

<sup>451</sup> *Ibid* 266-294.

ability of political and legal figures to circumvent the People's fundamental principles.<sup>452</sup> In an implicit nod toward a Hartian Rule of Recognition, once all three branches of government accept (explicitly or tacitly) the limitations imposed upon them by the People, it is indubitably in existence.<sup>453</sup>

The alterations to the Constitution may be in the shape of a formal Constitutional Amendment, or may be more nebulous limitations on constitutional and political behaviour imposed upon constitutional actors.

Clearly this argument is highly specific to the American Constitution and political structures. To be sure, Ackerman makes no claim for universality and explicitly limits his analysis to the American Constitution. In fact, Ackerman regularly contrasts their approach to his fairly simplistic description of the British constitution, to him the exemplar of a constitutional order that leaves politicians, once elected, to carry out constitutional change with little input from the People, a condition that he describes as “democratic monism.”<sup>454</sup> But Ackerman's analysis here is of the eighteenth and nineteenth century British constitution that Jefferson and the other Founding Fathers sought to deviate from. It is not a realistic analysis of the contemporary British constitutional order.

This idea of dualistic constitutional change, where extra-legal factors can cause substantive constitutional alterations, is more broadly applicable than the specific arguments that Ackerman puts forward regarding the American Constitution. Ackerman's contrast between ordinary and constitutional politics is illustrative of how most modern democracies appear to work and how most electorates engage with politics and constitutional change:

*... [W]e usually spend most of our time and effort in more private spheres of life. Normal politics is a sideline...*

*But at other times, politics can take center stage with compelling force. The events catalyzing a rise in political consciousness have been as various as the country's history... For whatever reason, political talk and action begin to take on an urgency and breadth lacking most of the time. Normally passive citizens become*

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<sup>452</sup> *Ibid.*

<sup>453</sup> Ackerman, *The Civil Rights Revolution* n.439, 4-5.

<sup>454</sup> *Ibid* 7-10.

*more active – arguing, mobilizing, and sacrificing their other interests to a degree that seems to them extraordinary.*<sup>455</sup>

This sounds much like both the Scottish Constitutional Convention and the recent referendum. The ordinary politics of the economy, inequality and public spending were sublimated into the national question of devolution and then Scottish independence. It is important to keep in mind that for Ackerman referendums do not *necessarily* constitute constitutional moments in and of themselves: ‘the referendum retains its democratic appeal under the special conditions of constitutional politics—when millions of citizens have indeed been mobilized and confront the political agenda with a rare seriousness.’<sup>456</sup>

In spite of this, we can apply a somewhat amended Ackerman’s principles of change outlined above to Scotland. The signaling and proposal phases of the Scottish question may have been a gradual and slow one. The Scottish National Party’s rise to prominence and the period of dissatisfaction and constitutional awareness of the 1980s and 1990s amount to the signaling phase. The demand for a Scottish Parliament constitutes the proposal. The trigger is the 1997 election of the pro-devolution Labour Party. The mobilized popular deliberation phase took place in the 1997 Referendum, and the courts and political institutions have been grappling with the final phase ever since.

Here, the interplay between formal and informal methods of amending the constitution can be mapped. The formal mechanism by which the Scottish Parliament was introduced was the Scotland Act 1998. As we have seen, the Act’s content was heavily influenced by the Scottish Constitutional Convention’s work and the democratic mandate granted to the proposals by the 1997 Referendum. The courts’ interpretations of the devolution scheme have also been heavily coloured by the genesis of the proposals and the imprimatur of popular sovereignty upon them as well as the democratic nature of the Scottish Parliament. The idea of the “settled will of the Scottish people”, although problematic, is significant to the interpretation and practice of the devolution arrangements. It is used to explain the putatively superior democratic legitimacy of the Scottish Parliament over Westminster and to limit tinkering with the fundamentals of the devolution arrangements. It is not only the 1997 Referendum itself that constitutes this limit, but the continued support, expressed formally at elections and informally through opinion polls and general popular

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<sup>455</sup> Ackerman, *Transformations* n.439, 6.

<sup>456</sup> *Ibid* 41.

engagement, for the Scottish Parliament. In Ackermanian terms, it possesses “enhanced legitimacy” and ought to be provided with superior respect to ensure that it has an “enduring future in political life.”<sup>457</sup>

The process was, however, reset by the trigger phase of the 2011 Scottish Parliamentary Election. When the SNP gained an unexpected majority in the Scottish Parliament, Scottish independence was placed at the centre of Scottish political life. It became the proposal to be assessed by the People. It was rejected, but, with the Smith Commission proposals and a more nebulous sense of political change, it is clear that, in spite of this, the final stage has still been met. The proposal – Scotland leaving the United Kingdom – has mutated into a demand for general constitutional change, embodied in a significantly more powerful and explicitly permanent Scottish Parliament.

### ***5.3 Walker’s Constitutional Unsettlement***

For Ackerman, a new constitutional approach is imbued with legitimacy by its capacity to channel contending political forces into itself:

*This is the point at which the higher lawmaking system confronts its greatest challenge: Can it channel the contending parties into an energetic exchange of public views, inviting them to address each other’s critiques as they seek to mobilize deeper and broader support from the general citizenry?... In a single line: will the system encourage the protagonists to talk to one another or past one another?*<sup>458</sup>

The SNP’s involvement in the Smith Commission may give the impression that the protagonists in Scotland’s constitutional order have been encouraged to talk to rather than past one another. It is clear, however, that the SNP remain dissatisfied with British constitutional arrangements even with the full adoption of the Smith proposals.

The SNP’s landslide victory in the May 2015 General Election in Scotland has led to continued calls for devolution beyond that envisioned by the Smith Commission.<sup>459</sup> At a

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<sup>457</sup> *Foundations* n.439, 5-6.

<sup>458</sup> *Ibid* 287.

<sup>459</sup> David Phillips, ‘Scotland would gain significant new powers under SNP plans for further devolution’, *Institute for Fiscal Studies: Observations* 22 April 2015.

minimum, the Smith Commission proposals are very likely to be passed. For some, this amounts to a new constitutional settlement for Scotland, which would settle the question of Scottish independence for a generation or more.

A very different view of the British constitutional order can be found in Neil Walker's depiction of a constitutional unsettlement.<sup>460</sup> Professor Walker posits that Britain has entered a period not simply of prolonged constitutional change, but of indefinite constitutional disorder and disagreement.

For a definition of the opposite a constitutional unsettlement, a settled constitution, Walker turns to Professor Bogdanor's depiction of the 'Old Constitution.'<sup>461</sup> This comprises parliamentary sovereignty, and an evolutionary and gradualist approach to constitutional change, as described by Bagehot.<sup>462</sup> These complementary principles have, together with the absence of any revolutionary act, militated against wholesale constitutional redesign. The British constitution was, therefore, for centuries a settled constitution.

That is not to say that there it was an unchanging and static constitution. The British constitution has gone through vast changes. It is the pace of change and its lack of infringement upon central constitutional principles that rendered it settled. As Walker notes:

*primary constitutional conflicts within the settled constitution rarely struck to constitutional fundamentals - Neither by intensity nor scope of ambition is there a challenge to the very foundations of the order.*<sup>463</sup>

### **5.3.1 An Unsettled Constitution**

This position – broadly – held until the 1970s, with Britain's accession to the European Union. The unsettlement was accelerated by the significant constitutional reforms enacted by the 1997 Labour government, including devolution, the Human Rights Act 1998, the inception of the Supreme Court, the fundamental restructuring of the House of Lords, Freedom of Information legislation and the abolition of many of the roles of the Lord

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<sup>460</sup> *Our Constitutional Unsettlement*, n.390.

<sup>461</sup> Bogdanor, *The New British Constitution*, n.221, Ch.2.

<sup>462</sup> Walter Bagehot, *The English Constitution* (Oxford University Press, 2009).

<sup>463</sup> N.390, 534.

Chancellor.<sup>464</sup> These vast changes have combined to erode both the traditional principle of parliamentary sovereignty and the evolutionary approach to constitutional change. It has also been haphazard, unsystematic, and self-perpetuating:

*Just as parliamentary sovereignty and the evolutionary constitution fed off each other, so too the erosion of parliamentary sovereignty and declining investment in the settled constitution and in a gradualist approach to its development are mutually suggestive and reinforcing trends.*<sup>465</sup>

The principle of parliamentary sovereignty has been the locus of the primary disputes of contemporary constitutionalism, for example the critique originating from common law constitutionalism.<sup>466</sup> In the settled constitutional order of the past such disputes would not have arisen. Indeed, Walker argues, the political, academic and legal elites who would have accepted parliamentary sovereignty and the evolutionary constitution as axiomatic in the past now question and, in some instances, reject it. Allied with the contemporary challenges of globalization and technological change, these forces conspire to create an unsettled constitution that queries its fundamental tenets. Even now, devolution is described by other writers as “deeply unstable.”<sup>467</sup>

Walker turns to what the unsettled constitution may lead to. There are various answers to this. Firstly, some believe it to be a relatively brief episode of unsettlement that will eventually return to its settled state. A second approach views the recent rapid change in the constitution as representative of ‘a new equilibrium committed to ongoing constitutional adjustment.’<sup>468</sup> A third regards the unsettled constitution as a necessary step towards a new era of constitutional settlement.

These are unsatisfactory. The first two are contradicted by the ongoing unsettlement of the constitution embodied in the European Union Act 2011, the Fixed Term Parliament Act 2010 and the ongoing lack of consensus on Britain’s constitutional fundamentals. The third seems unlikely in that this constitutional change lacks a unifying purpose; it lacks a clear destination. Moreover, the British polity is so riven with contradictory forces and actors who disagree on constitutional fundamentals that gaining sufficient unity of purpose and

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<sup>464</sup> *Ibid* 536

<sup>465</sup> *Ibid.*

<sup>466</sup> See above and Stuart Lakin, ‘Debunking the Idea of Parliamentary Sovereignty: The Controlling Factor of Legality in the British Constitution’ O.J.L.S. Vol. 28, No. 4 (2008), 709-734.

<sup>467</sup> Choudhry, *Constitutional Design* n.292, 459.

<sup>468</sup> Walker, *Constitutional Unsettling* n.390, 541.

agreement in order to achieve a constitutional settlement appears improbable. Indeed, there exists a ‘paradox of initiative’ that ‘militate[s] against the generation of a common political will necessary’ to create a new settlement.<sup>469</sup> For example, Scottish nationalists form the Scottish government and seek to break the union; how could they agree in good faith to a new constitutional settlement for a United Kingdom?

### 5.3.2 *Constitutional Unsettlement*

This all leads to the sense that a third description of British constitutional arrangements is needed. For Walker, this is a constitutional unsettlement. This is

*... a combination of certain deep-lying, historically informed structural features of the constitution which contribute to and flow from the closing off of [the options outlined immediately above] as viable alternatives, together with the mindset this structural background tends to encourage.*<sup>470</sup>

Walker elaborates on this loose definition by identifying trends in recent constitutional history. Firstly the forces that have created the constitutional unsettlement are self-perpetuating. Parliamentary sovereignty remains the central tenet of the British constitution to which all constitutional reforms must refer, either in support of or opposition to it. The mechanisms of channeling these challenges are generally polarizing and do not encourage reconciliation or deliberation. Parliamentary sovereignty becomes “part of the problem, or at least to be viewed as such – staunchly defended or implicitly relied upon on the one hand, and treated as part of the very pathology to be resisted or overturned on the other” rather than a mechanism of resolving such tensions.<sup>471</sup>

Secondly, constitutional change has been ad hoc and disordered. The methods of constitutional change have been improvised. Sometimes Parliamentary committees, referendums and Commissions have been used to propose constitutional change. However, “they are often of uncertain authority” and “encourages a continuing disputation and accompanying meta-conversation about constitutional fitness for purpose, but one where by definition there is no authoritative method to resolve or even to hold the debate.”<sup>472</sup>

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<sup>469</sup> *Ibid* 542.

<sup>470</sup> *Ibid*.

<sup>471</sup> *Ibid* 543.

<sup>472</sup> *Ibid* 545.

Thirdly, the forces that create unsettlement – Scottish nationalism, opposition to Britain’s membership of the European Union – conspire against settlement. This, along with the nature of events surrounding the factors, means that unsettlement becomes insoluble and unavoidable.

Finally, “there are so many sites of uncertainty and fluctuating movements, and so interconnected are these, that the overall profile of the constitutional unsettlement is likely to remain fluid and changeable.”<sup>473</sup> The scale and profundity of the disputes surrounding the status of a separate Scotland’s international status demonstrates that unsettlement pervades all aspects of the constitution.<sup>474</sup>

Walker then argues that constitutional unsettlement is desirable, in that it recognises the reality of the British political situation. Importantly, he notes that

*unsettlement, if looked squarely in the face, may turn out to be a “least worst” solution for a world in which constitutional sovereignty, both as an organizing device and as a measure of belonging, is not what it used to be.*<sup>475</sup>

Walker’s thesis is a convincing depiction of the contemporary constitutional order. His depiction of a constitutional order in a state of fundamental flux, where there is not only limited consensus on constitutional fundamentals today, but also little hope for it in the future, seems increasingly accurate by the day. The key question is what this unsettlement means for parliamentary sovereignty in Scotland.

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<sup>473</sup> *Ibid* 546.

<sup>474</sup> Neil Walker, Graham Avery and Diana Planke, 'Scotland and the EU', in The Royal Society of Edinburgh, *Enlightening the Constitutional Debate* (Royal Society of Edinburgh, 2014) 21-34.

<sup>475</sup> N.390, 548.

## Chapter 6: Sovereignty Unsettled: Conclusions

What does this constitutional unsettlement mean for the Scottish Parliament's status in the British constitution? The changes to Scotland's constitutional status that have occurred in the last twenty years are undoubtedly vast. As Bagehot observed,

*[a] new constitution does not does not produce its full effect as long as all its subjects were reared under an old Constitution, as long as its statesmen were trained by that old Constitution. It is not really tested till it comes to be worked by statesmen and among a people neither of whom are guided by a different experience.*<sup>476</sup>

It may, therefore, be some time before the full ramifications of recent constitutional change will be felt. As Professor Little noted over a decade ago

*It should... be appreciated that the politics of post-devolution Scotland may, over time, bring powerful, complex and possibly irresistible pressures to bear on the orthodox doctrine of parliamentary sovereignty, making it increasingly difficult to reconcile with constitutional theory, and, ultimately, leading to the development of a new politico-legal order.*<sup>477</sup>

The position is fluid. Walker believes that the 'Scottish question is reaching a defining moment.'<sup>478</sup> But this need not necessarily be the case.

### 6.1 *Scottish Constitutionalism*

We have seen that claims to a peculiarly Scottish popular sovereignty are of limited historical value. However, in spite of its "romantic novelist"<sup>479</sup> approach to Scottish constitutionalism, this organizing myth has morphed into a practical reality as a consequence of the struggles of the Scottish Constitutional Convention and its endorsement in the Scotland Act 1998. The Claim of Right, signed by representatives of all parties and praised by the Labour government of 1997, has helped insert popular

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<sup>476</sup> N.462, 194.

<sup>477</sup> Gavin Little, 'Scotland and Parliamentary Sovereignty' *Legal Studies* 24 (4) 540-567, 566-7.

<sup>478</sup> *Ibid* 45.

<sup>479</sup> Bernard Crick, 'For my Fellow English' in Dudley Edwards n.193, 153.

sovereignty into the firmament of the Scottish constitutional order. The SCC filled the vacuum of legitimacy left by the British state and filled it with a claim to a modified form of popular sovereignty. It is now almost universally acknowledged that profound, ‘constitution-framing’ change in the Scottish constitution would require a referendum to possess any legitimacy.<sup>480</sup> The Scottish people’s constituent power is a force that has challenged the “juridical system from the outside” and now, even though it has been “institutionalised” can “re-emerge at any moment to destabilise it.”<sup>481</sup> It is in this sense that we can say that we have a dualist constitution, in the sense outlined by Bruce Ackerman described above. Through general acceptance, we can see that there is a *political* imperative to hold referendums in circumstances that implicate the foundations of the constitution in Scotland. This is very different to a *legal* imperative, however.

### **6.1.1 *The Scotland Act 2012***

A complicating factor in the argument that the use of referendums has inserted a form of popular sovereignty into the Scottish constitution is the transfer of powers within the Scotland Act 2012. In the aftermath of the 2007 Scottish Parliament election the unionist parties in Scotland formed the Calman Commission to examine the devolution settlement.<sup>482</sup> Its findings were largely accepted by those parties, and the coalition government enacted them in the Scotland Act 2012. This transferred many powers to the Scottish Parliament, most significantly wide powers to vary income tax.<sup>483</sup> It also invested in the Scottish Parliament the competence to legislate on drink driving and speed limits, and broadened the powers of the Scottish Ministers in some regards as well as changed the title of the Scottish Executive to the Scottish Government. This process was completed using traditional parliamentary procedures, without recourse to the people.

This lack of plebiscite is ostensibly a challenge to the thesis of this article. In fact, it is not. An examination of the 2012 Act demonstrates that it does not change the fundamental Scottish constitutional settlement. The powers transferred are substantial, but are broadly related to the competences of the Scottish Parliament. Even the substantial tax varying power can be conceived of as an extension of the existing tax varying power, which was

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<sup>480</sup> Bogdanor, *The New British Constitution*, n.221, 175 and McLean, *What’s Wrong with the British Constitution?* n.21, 334.

<sup>481</sup> Rios, ‘Five Conceptions of Constituent Power’ n.419.

<sup>482</sup> The Commission on Scottish Devolution, *Serving Scotland Better: Scotland and the United Kingdom in the 21<sup>st</sup> Century* (2009).

<sup>483</sup> Scotland Act 2012 Part 3 and Sch. 2-4.

ratified by the people in 1997. No new institution or arrangement is constituted which mediates the relationship between the Scottish people and the state; it is an extension of the principles accepted by the people in the 1997 referendum and constituting the 1998 Act. The settled will of the Scottish people was not the precise distribution of powers envisaged by the 1998 Act,<sup>484</sup> but the institution it created and the principle of devolution it confirmed. The constituent power sought an institutional solution in the Scottish Parliament to a political problem. The 2012 Act is a continuation of the existing devolutionary process rather than the beginning of a new one. A referendum would have been unnecessary.

The 2012 Act can be contrasted with the contemporaneous changes to the position of the Welsh Assembly. After a unanimous vote in favour of more powers to the Welsh Assembly by its members in 2010, the British Government held a referendum in 2011 on whether full primary legislative competency should be devolved to the Welsh Assembly. This is in contrast with the prior status of the Assembly, which between 1999 and 2006 had no primary legislative powers. After the introduction of the Government of Wales Act 2006 and until 2012 its primary legislation – which could only be introduced on limited terms – required Westminster’s assent. The granting of primary legislative competency to the Welsh Assembly was a clear alteration to the constitutional status of the Assembly, and the Welsh constitutional settlement. Therefore, it required the consent of the Welsh people.

## **6.2 Referendums**

What impact does this change and the two referendums have on the constitutional status of the devolution? One writer contends that use of the referendum ‘... seems one way in which constitutional reform can come to terms with the realities of social change at the end of the twentieth century.’<sup>485</sup> Another notes that ‘...the referendum offered dissenting political actors a vehicle for popular revolt, legitimizing and in due course foreclosing acts of constitutional rupture through direct popular intervention’<sup>486</sup> and that ‘...by the late twentieth century for the first time the referendum had become for many an automatic part of constituent constitutionalism and even of the constitutional amendment process.’<sup>487</sup>

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<sup>484</sup> Although it was in accordance with the broad thrust of the Act.

<sup>485</sup> Bogdanor, *The New British Constitution* n.221, 48.

<sup>486</sup> Tierney, *Referendums* n.363, 7.

<sup>487</sup> *Ibid* 10.

Due to the constitutional moment that we continue to live through, the referendum is now an axiomatic component of the Scottish constitutional order. As noted above, it does not supplant representative democracy. Instead, it intervenes when ‘issues of such fundamental importance that a parliamentary verdict is by itself insufficient to ensure legitimacy’ arise.<sup>488</sup> It now forms part of the Scottish constitutional architecture.

In law, however, there is no requirement for a referendum in any context in Scotland. Goldsworthy believes that ‘To seek to bind future parliaments by prohibiting the enactment of legislation without a referendum first being held is not consistent with the doctrine of parliamentary sovereignty.’<sup>489</sup> The effect of a constitutional moment in the UK is not to create a legal limitation, but a political one, as described by Dicey. But this does not make it any less influential on constitutional actions. The demand for a referendum in 2014 was purely political; there was no constitutional requirement for it to take place. Yet, in reality, it was no less certain to occur than if there were a statutory requirement for it. It is unlikely that a constitutional convention yet exists requiring a referendum on fundamental constitutional issues in Scotland, but the political constitution unambiguously requires it.

This means that there is no legal mechanism of enforcement for such a requirement. Similarly, the Edinburgh Agreement possessed no enforcement mechanism and possessed no direct legal significance. One writer’s words on the topic can be applied more broadly than the Edinburgh Agreement:

*No-one much cares whether the Edinburgh Agreement has legal status or not because it may simply not matter. The Agreement has perhaps all the ingredients for successful auto-enforcement: tight legal drafting, a culture of governments honouring formal commitments, and reciprocal self-interest locked down by the reputational costs of breach. It is difficult to see how the ‘added-value’ of a legal agreement - court enforcement - would help. These ingredients will either remain or will not: if the Agreement self-executes no court is necessary, while if a party for*

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<sup>488</sup> Bogdanor, *The New British Constitution* n.221, 185.

<sup>489</sup> Jeffrey Goldsworthy, House of Commons European Scrutiny Committee, *The EU and Parliamentary Sovereignty*, HC 633-ii, 2010-11, Ev 31, para 9. Cf Vernon Bogdanor, ‘Imprisoned by Doctrine: The Modern Defence of Parliamentary Sovereignty’ O.J.L.S., (2011), 1–17, 5-12

*some presently unpredictable reason pushes a 'destruct' button, no court is sufficient.*<sup>490</sup>

The lack of legal enforceability did not prevent the Edinburgh Agreement from possessing significant normative force. In the same way, the normative effect of the 1997 and 2014 referendums is substantial. There is now an “[i]mplied constitutional self-determination”<sup>491</sup> principle in the Scottish constitutional order.

### **6.3 Reflecting the Permanence of the Scottish Parliament**

The Smith Commission recommended and the UK government intends to include in legislation an unambiguous statement that reflects the constitutional permanence of the Scottish Parliament.<sup>492</sup> Clause 1 of the new Scotland Clauses proposes inserting a new declaration in to the Scotland Act 1998 that: “A Scottish Parliament is recognised as a permanent part of the United Kingdom’s constitutional arrangements.”<sup>493</sup> This echoes the writings of the former Prime Minister, Gordon Brown. Brown explains that

*Because the UK constitution is unwritten, or more accurately uncodified, there is an assumption that promises made in one parliament need not be honoured by the next or successive parliaments. So, in traditional legal theory at least, the Scottish Parliament could be dissolved or see its powers cut as one UK Parliament becomes another.*

*Of course Scotland’s position within the UK is, as it has always been, a matter that the Scottish people can decide. We know that in reality the vote of the Scottish people in the 1997 referendum has guaranteed the Scottish Parliament in a political sense.*

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<sup>490</sup> Christine Bell, *The Legal Status of the ‘Edinburgh Agreement’* accessible at <http://www.scottishconstitutionalfutures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/431/Christine-Bell-The-Legal-Status-of-the-Edinburgh-Agreement.aspx>

<sup>491</sup> Marc Weller, ‘Settling Self-Determination Conflicts: Some Recent Developments’ E.J.I.L. 2009 20(1) 111-166, 136.

<sup>492</sup> The Scotland Office, *Scotland in the United Kingdom: An Enduring Settlement*, (2015, Cmd.8990).

<sup>493</sup> *Ibid.*

*But in my view the parliament has not just to be, but also has to be seen to be, permanent, entrenched in the constitution and indissoluble. We would in effect be building a constitutional pillar that lays to rest the idea that devolution was simply at the discretion of the UK parliament, and replacing that outdated idea with an irreversible and enduring political settlement guaranteed by the constitution.*<sup>494</sup>

Something similar to this was enacted in relation to Northern Ireland. Section 1 of the Northern Ireland Constitution Act 1973 provided that

*...[It] is hereby affirmed that in no event will Northern Ireland or any part of it cease to be part of Her Majesty's dominions and of the United Kingdom without the consent of the majority of the people of Northern Ireland voting in a poll....*

The obvious distinction between the 1973 section and the proposed clause is the requirement for some form of plebiscite in the former. In any event, as was discussed in a previous chapter, its legal effect of the proposed clause would last only as long as the Act remained in force, i.e. parliament could repeal it at any time. However, as Dicey said

*... the enactment of laws which are described as unchangeable, immutable, or the like, is not necessarily futile--A sovereign Parliament--although it cannot be logically bound to abstain from changing any given law, may, by the fact that an Act when it was passed had been declared to be unchangeable, receive a warning that it cannot be changed without grave danger to the Constitution of the country.*<sup>495</sup>

It has been suggested that

*as a matter of legislative intent, in the forms used, as much as the alternatives foregone, there must be meaning. Taking the Supreme Court case-law together with the 'Scotland clauses', I suggest that a definite and entirely domestic boundary of*

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<sup>494</sup> Brown, *My Scotland, Our Britain* n.12, 242-3.

<sup>495</sup> Quoted in Vernon Bogdanor, 'The Consistency of Dicey: A Reply to McLean and Macmillan' [2008] P.L. 17, 19.

*Parliamentary supremacy is emerging. That is the meaning and intent of these clauses of the Scotland Bill.*<sup>496</sup>

But what gives the clauses meaning is the political intent. If this political intent alters in line with the will of the people, then the clauses would be animated by an entirely different set of principles. No permanent legal limitation on Westminster's sovereignty flows from the proposed clause.<sup>497</sup> As Elliot notes, there is no 'contingent entrenchment' proposed in the clauses. This would assert that 'section 1(1) of the Scotland Act 1998 could not be repealed or amended except in defined circumstances...'<sup>498</sup> Such an approach would be of dubious utility and wholly unnecessary as they are politically entrenched.

As noted above<sup>499</sup>, the Acts and Treaty of Union provide no mechanism for judicial enforcement of their terms. In fact, several less important terms have been breached. However, the essential terms – the retention of separate legal and education systems and a distinct established church – remain unaltered. They are part of the constitutional firmament, politically entrenched. The Scottish Parliament may be in a similar constitutional position.

#### **6.4 Can Westminster Abolish the Scottish Parliament Unilaterally?**

That legal form must march beside political reality is now axiomatic. The complicating factor is the indefinite constitutional unsettlement in which we live. The Smith Commission is unlikely to introduce much additional settlement into the Scottish constitutional order.<sup>500</sup> It is also not necessarily the case that it is a stepping-stone to yet further powers for the Scottish Parliament beyond those suggested by the Smith Commission. The fact that the institution's legitimacy is predicated unambiguously on popular sovereignty means that this legitimacy may be withdrawn at any point by the Scottish people. The Northern Irish experience of devolution, though mediated through sectarian and other tensions of less consequence in Scottish politics, is of waxing and

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<sup>496</sup> Kenneth Campbell, 'The draft Scotland Bill and limits in constitutional statutes' U.K. Const. L. Blog (30th Jan 2015) accessible at: <http://ukconstitutionallaw.org>.

<sup>497</sup> Iain McLean, Jim Gallagher and Gareth Lodge, *Scotland's Choice: The Referendum and What Happens Afterwards* (EUP 2013) 2.

<sup>498</sup> Mark Elliott, 'The Draft Scotland Bill and the Sovereignty of Parliament', Public Law for Everyone, (January 22 2015) accessible at <http://publiclawforeveryone.com/2015/01/22/the-draft-scotland-bill-and-the-sovereignty-of-the-uk-parliament/>.

<sup>499</sup> Chapter II.

<sup>500</sup> Contrary to the title of the UK government's Command Paper n.492.

waning support for Stormont and periods of intense displeasure with the devolutionary arrangements. Whilst Scottish self-government is far less contentious and bound up in external factors than Northern Irish devolution, it is not entirely unthinkable that a similar situation could arise. Its very possibility is a logical consequence of popular sovereignty.

It remains unlikely that any court would seek to prevent Westminster from unilaterally abolishing the Scottish Parliament. The *Welsh Asbestos Case* notwithstanding, we saw that the courts have generally adopted an increasingly nuanced and accommodative approach to the Scottish Parliament's constitutional status. Lord Hope's dictum in *Axa* is illustrative of a sensitive approach being adopted by the courts, focusing on the Scottish Parliament's democratic status. But, ultimately, the courts recognize that the Scottish Parliament is not a sovereign legislature and retain the kernel of relative judicial deference that continues to characterize the British judiciary. If the Supreme Court did seek to emulate its Canadian counterpart by adopting a *Quebec Secession Reference* style approach to constitutional first principles, it would attempt to do so in such a way that did not endanger the delicate comity that exists between the courts and Parliament. The courts would have to infer a principle of respect for devolution from relatively recent constitutional practice. However, much like in relation to the *Quebec Secession Reference*, this would be an example of the courts overstepping their constitutional position. It is not for courts to develop recent government policy and parliamentary practice into constitutional principle unilaterally. As Cane put it, "the idea that courts or the common law occupy some sort of moral high ground in the constitutional landscape is, I think, one of which we should be very wary."<sup>501</sup>

Broadly speaking, Westminster seeking to abolish the Scottish Parliament unilaterally would indubitably create a constitutional crisis.<sup>502</sup> In such situations:

*the popular political momentum carried by a referendum can bring with it vital constitutional imperatives which a supreme court, to remain relevant, can neither ignore nor approach through the mode of a narrow traditional positivism that does not speak to political reality.*<sup>503</sup>

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<sup>501</sup> Peter Cane, *Administrative Law* (Clarendon 2004) 211.

<sup>502</sup> Little n.477, 564.

<sup>503</sup> Tierney, *Referendums* n.363, 149-150.

Whether the Supreme Court sought a creative, principle-based solution similar to the *Secession Reference* or not, the result of such an act by Westminster would almost certainly be Scotland leaving the United Kingdom. It is for this reason that it is so unlikely to occur.

In practice, the recognition by successive governments of a right of self-determination has created an irresistible *political* requirement for referendums for significant constitutional change. The 1997 Referendum is an example of a constitution-changing constitution. The 2014 Referendum was constituted as a constitution-framing referendum, but has become a hybrid of the two in that, whilst it has demonstratively not created a new nation or constitution, it has brought about, albeit indirectly, a profoundly altered constitutional terrain. It has been a foundational act, ‘... bringing about a clear break in the old order... [and] imbu[ing] the new construct with a new popular source of legitimacy.’<sup>504</sup> Tierney explains that

*In a number of situations the referendum is in fact invoked within one constitutional order but in the course of the constitutional process of which it is the culmination the referendum comes to take on constitutive potential, rupturing and supplanting the existing system.*<sup>505</sup>

Thus, the 2014 referendum confirms the significance of popular sovereignty and principles of self-determination in the Scottish constitution. It also reaffirms the commitment of even those who wish to make Scotland an independent country to the practical mechanics of Parliamentary sovereignty.<sup>506</sup>

Such a political requirement, accompanied by long usage, may lead to the creation of a constitutional convention that a referendum be necessary for the abolition of the Scottish Parliament.<sup>507</sup> As Vermeule describes in relation to Declarations of Incompatibility under the Human Rights Act 1998, situations arise in which

*Parliament feels constrained to comply with declarations out of a belief—a possibly false but untested belief—that there will be a political backlash if it fails to do so, or at least if it conspicuously fails to do so belief persists for long enough, so*

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<sup>504</sup> *Ibid* 14.

<sup>505</sup> *Supra* 15.

<sup>506</sup> Tierney, *Referendums* n.363, 145-7 and The Scottish Government, *Scotland’s Future* n.393.

<sup>507</sup> Elliott, ‘Parliamentary Sovereignty and the New Constitutional Order’ n.86.

*that it comes to seem the normal state that Parliament complies, one can expect the growth of a constitutional convention that Parliament is obligated to comply. A departure from the norm would then provoke outrage among legal elites and the public, so that the initially false belief would have become true, but only because it produced a record of Parliamentary compliance that caused it to become true, and thus fulfilled itself.<sup>508</sup>*

A similar state of affairs may arise in relation to a referendum requirement to authorize the abolition of the Scottish Parliament. The provision indicating the Scottish Parliament's permanence further acts to 'supply a statement of intent that the politically inconceivable step of effecting such an abolition would not be taken by a sovereign Parliament legally capable of doing so.'<sup>509</sup> Although constitutional conventions and political necessities are not judicially enforceable, as we saw in relation to the Edinburgh Agreement, they are powerful normative forces.

The approach adopted by Westminster to the 2014 Referendum demonstrates a political sensitivity to the Scottish question. The relevant legislation was amended in order to sidestep legal challenges to the Scottish Parliament legislating for the referendum that the Scottish Government had been given a mandate to hold.

But it is also clear that no constitutional settlement has resulted from this. The 2014 Referendum has crystalized many more new and fundamental questions than it has answered. Bogdanor is correct to observe that Westminster's ability to abolish the Scottish Parliament is now "...perhaps somewhat theoretical..."<sup>510</sup> and that parliament's sovereignty over Scotland now amounts to something far less than Diceyan "unlimited power."<sup>511</sup> The use of referendums in Scotland has undermined the doctrine of parliamentary sovereignty in practice, but the internal logic of parliamentary sovereignty will not permit this theoretical power to be formally dismissed. In reality, the political principle of popular sovereignty in Scotland, as rendered by the Scottish Constitutional Convention and made concrete in the 1997 and 2014 Referendums as well as the daily existence of the Scottish Parliament, acts as a *de facto* barrier to Westminster abolishing or restricting Holyrood's powers unilaterally. But this cannot be acknowledged in a legal

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<sup>508</sup> Adrian Vermeule, 'The Atrophy of Parliamentary Powers' O.J.L.S. Vol. 32, No. 3 (2012), 421–444, 440.

<sup>509</sup> Mark Elliott, 'The Draft Scotland Bill and the Sovereignty of Parliament' n.498.

<sup>510</sup> Bogdanor, *The New British Constitution*, n.220, 113.

<sup>511</sup> *Ibid.* 114.

sense without dismantling parliamentary sovereignty. This is a major contributory factor to the constitutional unsettlement. As one writer put it:

*... [T]he [Scottish] Question will remain unanswered definitively not least because it is more than one question but crucially because it includes a series of relationships that need to be addressed anew in each generation. These relationships are, like nations, daily plebiscites. There can be no final resolution to the Scottish Question for that reason.<sup>512</sup>*

For some, such a position of perpetual unsettlement would be undesirable. Legal constitutionalists would certainly seek a settled constitution. But we have seen that such settlement is unlikely to come about. In any event, the universal contemporary challenges to classical conceptions of sovereignty – particularly globalization – mean that a monistic, immutable conception of constitutionalism is of decreasing relevance and accuracy. A recognition of the reality of the United Kingdom’s plurinational status, with competing conceptions of principles as fundamental as sovereignty, may be a more realistic approach than those of countries with ostensibly settled constitutions.

Disagreement and contestation is not to be feared; it is an accurate depiction of contemporary politics. For example, the 1997 Devolution Referendum was won with nearly 75% support, whereas only 55% of electors voted to stay in the UK in the 2014 Referendum. Consensus is increasingly illusive. The purpose of contemporary constitutionalism must be to create forums and mechanisms for tentative resolutions of disputes, rather than attempts to stifle debates on constitutional fundamentals with false and superficial consensuses. Such compromises are immanently political rather than legal in character. As Waldron puts it

*Disagreement on matters of principle is... not the exception but the rule in politics. It follows that those who value popular participation in politics should not value it in a spirit that stops short at the threshold of disagreements about rights. Such curtailment, I believe, betrays the spirit of those who struggled for democracy and universal suffrage... They did not do them simply for the sake of a vote on interstitial issues of policy that had no compelling moral dimension. They fought for the franchise because they believed that controversies about the fundamental*

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<sup>512</sup> James Mitchell, *The Scottish Question* (OUP, 2014) 285

*ordering of their society... were controversies for them to sort out, respectfully and on a basis of equality, because they were the people who would be affected by the outcome. Moreover, they did not fight for the vote on the assumption that they would then all agree about the issues that they wanted the right to vote on. Every individual involved in these movements was well aware that there were others standing alongside him who believed that his political views on matters of substance were mistaken. But they fought for the vote anyway on the ground that the existence of such principled disagreements was the essence of politics, not that it should be regarded as a signal to transfer the important issues that they disagreed about to some other forum altogether, which would privilege the opinions and purses of a few.<sup>513</sup>*

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<sup>513</sup> Jeremy Waldron, *Law and Disagreement* (OUP 1999) 15-16. See also Bernard Crick, *In Defence of Politics* (Bloomsbury 2013).

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