EUI DEPARTMENT OF LAW

Scottish Constitutional Identity

Brexit and Change

Catriona Mullay

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

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Department of Law

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Scottish Constitutional Identity

BREXIT AND CHANGE

CATRIONA MULLAY

Summary of Thesis

'Constitution' has no set definition. Some definitions focus purely on a text, while others consider the position of a constitution within its national context. To an extent, both approaches are necessary. Constitutions are legal instruments steeped in the history and identity of their nation; to be effective, the people under the constitution must buy into it. Constitutional identity is one analytical tool used to understand the link between a constitution and its people.

After discussing the nature of constitutions and constitutional identity, this thesis focuses on Scotland's constitutional position. In its broader context, devolution through the Scotland Act amounted to a constitution before 2016. That context included a cultural embedding of the devolution settlement through narratives about Scottish popular sovereignty. Constitutional identity and national identity overlap in Scotland, and it can be challenging to separate the two; devolution was, to an extent, the result of the evolution and increase in Scottish national identity across the twentieth century.

Several changes in the law of Scotland's constitutional position have taken place since Brexit. Some came through legislation, including the Internal Market Act. Other changes have come through case law. Some of these cases turned on the interpretation of aspects of the devolution settlement, such as the Sewel Convention, and formed another transformation of Scotland's constitution. After surveying these changes, the thesis turns to the implications for constitutional identity in Scotland. An important feature of the post-Brexit changes to Scotland's constitution is that they contradict the important popular sovereignty narrative. The thesis closes by exploring tensions in Scotland's constitution and constitutional identity through a discursive analysis of the events surrounding the Continuity Bill reference in 2018.

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This thesis argues that constitutions are founded in a moment that blends history with the future. As I add the finishing touches, it seems that this thesis also represents both the past and what lies ahead. A PhD is my ticket into the next chapter of my life as an academic. At the same time, the thesis closes the chapter in Florence. While I am sad, I am enormously grateful to have experienced the EUI. I am indebted to a number of people who have made this experience so positive.

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Chapter One: Introduction, Literature, Research Questions and Methods

Introduction

All legitimate constitutions are, on some level, anchored in their people's collective beliefs and identity. They are foundational to a legal order, at the sharp end of the fact that law only exists as far as people buy into it. Constitutional identity is one attempt to describe the dynamic between a constitution and its people.

The past decade has been tumultuous for the Scottish constitution. The first meaningful event was the referendum on Scottish independence in 2014. Although full independence was rejected, it was done so on the understanding that the British state would reform to better accommodate Scotland's constitutional desires. Brexit was the next major event. The 2016 vote to leave the European Union was a shock for many and formed a turning point for the Scottish constitution, too. As this thesis will discuss, the UK is much more centralised than before the referendum, going against the post-referendum promise of decentralisation. The meaning of this for the relationship between the Scottish people and their constitution is focused on in later chapters.

There is also a personal motivation for the thesis. I was nineteen during the referendum on Scottish independence and saw constitutional debates, often the preserve of academics and lawyers, break into mainstream conversation. The people of Scotland were deliberating over their future. For me, the link between this and identity is natural: I am from the Shetland Islands, where Scottish identity is traditionally rejected. I grew up told that I was a Shetlander and not Scottish; for my grandfather's generation, the Scottish were the local landowners or the people 'down south'. I moved to Edinburgh for university and realised that, despite my reservations, Scotland was less foreign to me than anywhere further abroad. My time in Florence has helped. Being far away confirmed my Scottishness, but it's still self-conscious.

Therefore, I have watched Scotland's constitutional conversation feeling like both an outsider and an insider. I wish to establish exactly who the people of Scotland are, what they have in common, and what their role is in anchoring constitutions in Scotland. I hope to explore how they drive constitutional change or if they always have a role in how Scotland's constitutional settlement evolves.

In this chapter, the scene will be set first: the justification for using constitutional identity and the main lines of enquiry for the thesis are fleshed out. A review of the existing literature on the topic is next. The research questions are then teased out from the gaps in the literature. Finally, the structure and methodology are discussed to show how the research questions will be answered in the thesis. This includes justifying later thesis chapters that serve as case studies.

Part One: Setting the Scene

Why Constitutional Identity?

The theory of constitutional identity has largely been formed through the work of two authors, Gary Jacobsohn and Michel Rosenfeld. The rise of constitutional identity in scholarship has also been driven by use at the boundary between the European Union's powers and the constitutions of its member states. Claiming that their constitutional identity is being infringed through Article 2(4) is a defence in the state's arsenal, essentially rephrasing the sovereignty debates of the past. However, constitutional identity is broader than its use in these disputes at the EU edge. It refers to the imaginary community created by a constitution, as the inescapable root of constitutions lies in their acceptance by the people. Constitutional theory expresses this partially through the construct of the constituent power. Under this ideal, all constitutions have been adopted by the people of a nation, who came together to ratify a mutual settlement. In practice, this rarely happens. Constitutions also serve as the foundation of a legal order, particularly sensitive to their social acceptance because the constituent power is an unrealistic ideal. They rely on the impression of popular consent. This may be done through collective myths and history; identity is also significant. We cannot possibly know all of the people who share our constitution, so we imagine the characteristics and history that we share. Through this process, constitutions can derive legitimacy.

In practice, constitutions are attached to nations and the nation-state model remains the dominant form of political organisation. The EU arguably attempted to transcend the nation-state. It however remains trapped by its reliance on the legitimacy and identity provided by its member states, unable to supplant them with a convincing legitimacy and identity of its own. National identity is an important part of this: that nations are such a powerful source of collective myths and history is undoubtedly an element of their persistence. How strong is the boundary between the myths and beliefs that underlie a constitution and those that underlie a nation, given that constitutions overwhelmingly attach to nations? In other words, how are constitutional and national identity related to each other?

Identity and Scotland

Constitutional identity is used in this thesis because national identity is particularly relevant to Scotland. National Identity in Scotland is a well-studied topic. Part of the Scottish fascination with the nation is driven by Scotland not conforming well with the concept of the nation itself. Scotland shares a state with England, Wales and Northern Ireland, breaking the typical nation-state formation. The United Kingdom is a unitary state that acknowledges its constituent parts as nations or a region in the case of Northern Ireland. Nonetheless, the legal nationality for citizens is British, pointing to the fact that Scots have a Scottish nation in some senses and a British nation in others.

The continued existence of Scotland is another aspect of the puzzle. First, why does Scotland exist at all? It has at least two competing native languages. Scotland was formed by different peoples and group and even its foundation myth is the uniting of the Picts and the Gaels under Kenneth Mac Alpin. Second, Scotland is dominated by England and the English language. Why did the Scottish nation survive in the face of losing its statehood and cultural domination from its larger neighbour to the south?

Scots have also contributed to the idea of the nation itself. Romantic Scottish authors inspired other national authors who fed the nationalism that created a mosaic of European countries. Why was Scotland never spurred on to independence by the awakening of national consciousness? Part of the answer is that Scots were an active part of the British Empire. Another part of the answer lies in British identity, which has never denied Scottish nationhood. This flexibility extends to the constitution of the United Kingdom, and always allowed a level of decentralisation. This goes back to the Acts of Union in 1707.

Constitutions and Scotland

To talk about Scottish constitutional identity, we first need to talk about the Scottish constitution. The question of whether Scotland has a constitution is itself contested. There are two ways one can explore the level of there being a Scottish constitution. The first is to look at the Scotland Act, which established governing institutions in Scotland. The second way is to look at Scotland's older legal identity. The second approach stems from the UK's structure. Since the Union between Scotland and England in 1707, the UK has been a single state with multiple nations, ensuring that Scotland's national identity can act as a lens on the British Constitution. The Union also expressly left Scots law intact and retained separate jurisdictions in Scotland and England. Scots law served as a marker of the old Scottish state, becoming a vessel of Scotland's sometimes tenuous identity in the United Kingdom. This has led to a distinct interpretation of the British constitution in Scotland. The distinctiveness lies in the focus on the Union as central to the constitution, in contrast to the Diceyan orthodoxy that nothing is fixed in the British constitution apart from Parliament's unfettered power to legislate. Otherwise, this first approach in exploring Scottish constitutional distinctiveness is a disparate set of beliefs and does not form a consistent school of thought, let alone a normative constitutionalism.

The Scotland Act serves as the source of and limitation on the Scottish Parliament's powers. In this way, it acts as a written constitution and forms higher law for the Scottish Parliament. The difficulty in describing the Scotland Act as a constitution lies in its lack of a deeper foundation: it is no more than an Act of the British Parliament. It has no entrenchment and amendment power lies outwith Scotland in the British Parliament. The law-making power of the Scottish Parliament suggests that the Scotland Act is more significant than other legislation that establishes institutions, but that is not reflected in the status or text of the Scotland Act. There are also no values in the Scotland Act, as one might find in a typical constitution. Calling the Scotland Act a constitution, therefore, seems tenuous, with an important caveat: it was less tenuous to call the Scotland Act a constitution prior to the Brexit process that began in 2016.

Constitutional Whiplash

The two approaches to Scottish constitutional distinctiveness described in the previous section are therefore intertwined. Prior to Brexit, the function of the Scotland Act, accompanied by a congruent Scottish belief in the centrality of the Union, amounted to a Scottish constitution. Since Brexit, the constitutional law has changed. The process of leaving the EU, and the political choices made as a part of that process, has led to a general weakening of the Scottish constitutional settlement. Some of the assaults on devolution have been through legislation, such as the Internal Market Act, that cuts across the powers of the devolved parliament. Others have come in case law, such as the *Miller* case. Finally, some changes have simply been the British centre flexing its constitutional muscles. The unwritten British constitution has always been somewhat open to interpretation. The lack of written law in the constitution means that it is inherently ambiguous, particularly given the apparent weakening of parliamentary sovereignty in the latter twentieth and early twenty-first century. In the Scotland Act, parliamentary sovereignty is expressly upheld in several sections, but the function of the Scotland Act was different and those sections were never used. Since 2016, those sections have been used, in addition to other important mechanisms such as the Sewel Convention breaking down. The sovereignty of the British Parliament appears to be back as the defining characteristic of the British Constitution. Scotland's constitutional context has therefore changed a great deal in recent years.

Constitutional Identity in Scotland

The interaction between constitutional change and the roots of that constitution in Scotland, be it the Scottish or British, is the main subject of this thesis. The Scotland Act was passed in the late 1990s and followed at least a century of political and cultural mobilisation in Scotland. In the late twentieth century, the movement was framed in terms of collective history and identity. How have the changes in the constitution since 2016 affected that?

The thesis argues that collective beliefs and narratives which make up Scottish identity are being used in the context of the post-Brexit changing constitution but, crucially, those narratives are not compatible with the material changes in Scotland's constitutional position. In this way, the nature of Scottish constitutional identity is being revealed, developed and altered.

Part Two: Research Questions

The thesis seeks to answer the following question: what is the nature of Scottish constitutional identity? This encompasses several elements . Addressing the research question requires supporting questions. First, what is constitutional identity? Clearly describing the concept is obviously needed to answer the broader research question. Second, does Scotland have a constitution? This is because Scottish constitutional identity could attach to the British Constitution, a potential Scottish constitution, or both constitutions. Finally, supporting questions are needed to explore the changes in constitutional law that have occurred since Brexit. These questions are set out below:

Research Question:

What is the nature of Scotland's constitutional identity?

Supporting questions:

1. Why describe the nature of Scottish constitutional identity?
2. What is the nature of constitutional identity?
3. What was Scotland's constitution before Brexit?
4. What impact did Brexit have on Scotland's constitution?
5. How has Scotland's constitutional identity changed since Brexit?

The thesis will describe the changes in the constitution and constitutional identity. As will be shown when the nature of constitutional identity is set out, constitutional identity has two broadly linked parts. These are its collective imaginary and a tangible constitution. Therefore, changes in the constitution will change constitutional identity, through both the tangible constitution changing and the relationship between the constitution and the collective imaginary changing too.

Finally, this thesis is generally descriptive as opposed to prescriptive. The aim is to propose constitutional identity as a way to understand constitutional change and the links between the constitution and the people in Scotland. This aim means that it does not make sense to make extensive proposals for legal reform or change, as the thesis is primarily concerned with a theory of the constitution as opposed to the constitutional law itself. Nonetheless, implications will be discussed in the latter part of the thesis, along with avenues for further research. Before this, the next section will demonstrate that the existing literature has not covered the overall research question.

Part Three: Contribution to the Literature

This thesis fills an obvious gap: no scholarship appears to discuss a Scottish constitutional identity. That does not mean that there is automatically merit in discussing Scottish constitutional identity. However, turning to work on both Scotland's constitutional law and Scottish identity more broadly demonstrates that there are insights to be gained by combining the two. This section will use several sources to illustrate what is missing in the existing literature and how this thesis will fix that. While many of these sources will be used throughout later chapters, the point here is that these sources are not sufficient to cover the entirety of the question asked by the thesis.

Scotland's Whole Constitution

There appears to be one major work which holistically covers the Scottish Constitution. This is Alan Page's *Constitutional law of Scotland.*[1] As his title suggests, this is a doctrinal account of constitutional law centred on Scotland as a subject, primarily covering the Scotland Act. William Elliott Bulmer has also produced work on a Scottish constitution, but his incisive discussion is on Scotland's potential constitution should it become an independent country.[2] This thesis is interested in the present constitution, starting with the issue of whether one can meaningfully talk of a Scottish constitution. Alan Page has addressed this question and argued that it does.[3] This point is discussed in later chapters, but for now it is worth noting that this question hinges on the definition of 'constitution' one uses.

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[1] A Page, *Constitutional law of Scotland* (W Green, Edinburgh 2015)

[2] W E Bulmer, 'An analysis of the Scottish National Party's draft constitution for Scotland' (2011) 64(4) Parliamentary Affairs 674; W E Bulmer, *A Model Constitution for Scotland: Making Democracy Work in an Independent State*. (Luath Press Ltd., Edinburgh 2013); W E Bulmer, "Building the ship in dry dock: The case for pre-independence constitution-building in Scotland' (2020) 41(5) International Political Science Review 681

[3] A Page, 'The Scottish Constitution' in M Keatings (ed.) *The Oxford Handbook of Scottish Politics* (Oxford University Press, Oxford 2020); Advocate Aidan O'Neill also used the frame of the 'Scottish Constitution' in his 2004 article on human rights protection to highlight how judges have been empowered under the Scotland Act in Scotland's constitutional settlement, but does not question the nature of that 'constitutional settlement' or

There is also more to a constitution than its legal rules and institutions. For example, constitutions are all unique in their functions and durability, even if they have very similar texts. Constitutions are inherently particularistic.[4] The modern Japanese Constitution demonstrates this point. Drafted in the aftermath of the Second World War and modelled by the occupying Americans after their own, the Japanese Constitution in function is nothing like the American. Factors outwith the law are important in moulding a constitution into an enduring settlement. The interaction between Scotland's constitutional norms and rules, on the one hand, and its broader culture and identity, on the other, has not been fully explored. In other words, there appears to be a space in literature on the Scottish constitution beyond the text. This point is further set out in the next part.

Culture, Identity and the Constitution

Scottish identity in general is a well-studied topic. Approaches include historical,[5] sociological,[6] cultural,[7] and political[8] ones. Devolution and the Scotland Act is a theme in some works on Scottish identity,[9] meaning that one could argue that the scholarship on identity and the Scottish constitution exists here. However, these works take devolution and the Scotland Act as an event, typically a political[10] one, as opposed to an ongoing process. There appears to be no work which considers the legal and constitutional features of the Scotland Act alongside the culture of Scotland.

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directly clarify why he appears to call the Scotland Act a constitution: A O'Neill, 'Judging democracy: the devolutionary settlement and the Scottish constitution' (2004) 8(2) Edinburgh Law Review 177, 184-186

[4] See e.g. Kim Lane Scheppele 'Constitutional Ethnography: An Introduction' (2004) 38(3) Law and Society Review 389. Constitutional borrowing also demonstrates this point: see e.g. Y Hasebe, 'Constitutional borrowing and political theory' (2003) 1(2) International Journal of Constitutional Law 224

[5] See e.g. M G Pittock, *The Invention of Scotland*: *the Stuart Myth and the Scottish Identity, 1638 to the Present*. (Routledge, London 2014).; C, Kidd *Subverting Scotland's past: Scottish Whig historians and the creation of an Anglo-British identity 1689-1830* (Cambridge University Press, Cambridge 2003)

[6] See e.g. L Moreno, 'Scotland, Catalonia, Europeanization and the 'Moreno Question'" (2006) 54(1) Scottish Affairs 1

[7] See e.g. C Craig, 'Scotland and hybridity' in G Carruthers and D Goldie (eds.), *Beyond Scotland: New Contexts for Twentieth-Century Scottish Literature* (Brill, Leiden 2004); M P McCulloch, *Scottish modernism and its contexts 1918-1959: literature, national identity and cultural exchange* (Edinburgh University Press, Edinburgh 2009)

[8] See e.g. M S Leith and D P J Soule, *Political Discourse and National Identity in Scotland* (Edinburgh University Press, Edinburgh 2012)

[9] See e.g. D P J Soule , M S Leith and M Steven, 'Scottish devolution and national identity' (2012) 14:1 National Identities 1

[10] *Ibid*

Other approaches focus on the existence of the devolved institutions as a source of identity and belonging.[11] The function of Scotland's constitution has not been studied in this way, only its foundation or the fact that its institutions exist. Another body of scholarship on identity uses a constitutional frame, but by this they mean the independence question.[12] While identity and independence are closely linked, Scottish identity shapes Scotland's current constitutional framework too. This thesis is the first scholarship to synthesise the law of devolution with its meaning for Scottish culture and identity.

Next, there has been no examination of Scottish identity from the lens of constitutional law, despite the vast amount of work on Scottish identity from other fields. The notable exception to this is Neil MacCormick, whose work is used extensively throughout the thesis. To discuss constitutional law and Scottish identity, the conversation must turn to themes within the British constitution. There are two readings of the British Constitution. These are an English understanding built around a unitary state and the Scottish vision of the union state.[13] The dominant English vision centres on the continuity between the English and British constitutions and the other nations of the UK being absorbed into the English system. The distinctly Scottish narrative of the British constitution is that the Act of Union was the coming together of two equal nations.[14] By this view, the Scottish constitution was not simply replaced by the English one. This leads to a determination to respect Scottish uniqueness within the United Kingdom.[15] Parliamentary sovereignty is also an English principle.[16] The high point of Scottish legal unionism was the *MacCormick* case.

[11] R Kiely, F Bechhofer and D McCrone, 'Birth, Blood and Belonging: Identity Claims in Post-Devolution Scotland' (2005) 53(1) The Sociological Review 150

[12] See e.g. A Henderson, C Jeffery, and R Liñeira. "National identity or national interest? Scottish, English and Welsh attitudes to the constitutional debate." (2015) 86(2)The Political Quarterly 265

[13] See e.g. N MacCormick, 'Is there a constitutional path to Scottish independence?' (2000) 54(4) Parliamentary Affairs 721, 727

[14] T Mullen, 'Brexit and the Territorial Governance of the United Kingdom' (2019) Contemporary Social Science 1, 2-3; C Kidd and M Petrie, 'The Independence Referendum in Historical and Political Context' in A McHarg, T Mullen, A Page and N Walker, (eds.) *The Scottish Independence Referendum: Constitutional and Political Implications* (Oxford University Press, Oxford 2016) 38- 39; S Tierney, 'Giving With One Hand: Scottish Devolution within a Unitary State' (2007) 5(4) International Journal of Constitutional Law 730, 736- 737

[15] *Ibid*

[16] There was no such principle in pre- Union Scotland: N McCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford University Press, Oxford 1999). 55

The case was about the coronation of Elizabeth II, and it was argued that this could not be the title for a British monarch as there had been no Elizabeth I of Scotland as there had been in England. The case was not successful but its significance lies in *dicta* made by Lord Cooper, who made strikingly unionist arguments about the nature of the United Kingdom.[17] His short comments were about the distinctly English heritage of parliamentary sovereignty. Neil MacCormick later connected this to contemporary constitutional issues and pointed out that devolution is perceived differently in England and Scotland.[18] In Scotland, devolution was a reversable modification of the British constitution, and in Scotland, a long overdue realisation of the constitution. MacCormick's work is outstanding but is now dated. Particularly because of the changes Scotland has seen through further devolution, the independence referendum and Brexit, this thesis seeks to discuss both the law and the identity of the Scottish constitution.

A Scottish Constitutional Identity

The Scottish constitutional narrative of the British constitution can be built on to discuss the nature of a Scottish constitution itself. Scotland enjoys autonomy from the UK in many areas. In 2012, the practices of the Scottish Parliament and Government led Aileen McHarg to argue that Scotland enjoys a constitutional distinctiveness from wider Britain.[19] Christine Bell has also argued that there is a separate Scottish constitutional identity, when Scotland negated the constitutional past with devolution and embarked on a new future.[20] This argument has not been developed further. I believe that a Scottish constitutional identity would have deeper roots.

[17] MacCormick v Lord Advocate (1953) SC 396

[18] In England, for example, MaCormick states that Prime Minister Tony Blair described the Scottish Parliament as the equivalent of a 'parish council': N MacCormick, 'The English Constitution, the British State and the Scottish Anomaly' (1999) 101 Proceedings of the British Academy 289, 302; on different views of the constitution more generally see M Keating, 'Reforging the Union: Devolution and Constitutional Change in the United Kingdom' 1998 28(1) Publius 217, 219- 220.

[19] A McHarg, 'Unity and Diversity in the United Kingdom's Territorial Constitution' in M Elliott, J N E Varuhas, and S Wilson Stark (eds.) *The Unity of Public Law (*Hart Publishing, Oxford 2018) 279- 280

[20] C Bell, 'Constitutional transitions: the peculiarities of the British constitution and the politics of comparison' 2014 Public Law, 446

There is a thread running through unionism, devolution and modern constitutional developments. This is pre-Union Scottish history. First, there are elements of the Scottish constitutional tradition which derive from the old independent Scottish constitution.[21] The Declaration of Arbroath is a good illustration. The Declaration of Arbroath was a 1320 letter written to Pope John XXII under the reign of Robert I.[22] It is largely propaganda.[23] The King's powers, according to the Declaration, were limited and subject to the 'consent and assent' of his people[24], but later chapters of the thesis will show how this was not a statement of constitutional principle. The Declaration was rediscovered in the 17th century and has since taken on symbolic meaning.[25] The Declaration has served as the basis for an argument that there was popular sovereignty in pre-Union Scotland.[26] For example, the Declaration of Arbroath inspired Lord Cooper's famous *dicta* in MacCormick, a cornerstone of unionist thought.

Second, the language of devolution was inspired by Scottish history and, in particular, the Declaration of Arbroath.[27] The campaign for Scottish devolution centred on claims of a Scottish constituent power.[28] The 1988 Claim of Right highlighted the 'sovereign right' of the 'Scottish people'[29] and turned into the groundwork for the Scotland Act 1998.[30] This simultaneously makes a statement about a Scottish constituent power, and links to a continuous narrative in Scotland on the sovereignty of the people.

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[21] MacCormick *Questioning Sovereignty* (n 16) 60

[22] E J Cowan, *For Freedom Alone: The Declaration of Arbroath,* (Birlinn, Edinburgh 2003), 1

[23] D Broun, 'The Declaration of Arbroath: Pedigree of a Nation?' In G Barrow (ed.) *The Declaration of Arbroath: History, Significance, Setting* (Society of Antiquaries of Scotland, Edinburgh 2001), 3

[24] Paragraph 5, translation of the Declaration of Arbroath accessed at <https://www.nrscotland.gov.uk/research/learning/features/the-declaration-of-arbroath>

26 G Simpson, 'The Declaration of Arbroath Revitalised' (1977) 56(1) The Scottish Historical Review 11, 11

[26] ` MacCormick *Questioning Sovereignty* (n 16) 55

[27] M Keating, *Plurinational Democracy: Stateless Nations in a Post -Sovereignty Era* (Oxford University Press, Oxford 2001), 37 -38

[28] S Tierney, 'We the Peoples: Constituent Power and Constitutionalism in Plurinational States' in M Loughlin and N Walker, (eds.) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press, Oxford 2008), 242- 243

[29] *ibid*

[30] I McLean, 'Challenging the Union?" In Devine, T and Wormald, J (eds.) *The Oxford Handbook of Modern Scottish History* (Oxford University Press, Oxford 2012), 642

Despite this, there only appears to be one article which considers Scottish popular sovereignty as a constitutional principle, written in 1995 by MacCormick.[31] This is striking given the continuing use of reference to the Declaration of Arbroath in constitutional events.

Third, there is a Scottish constitutional context that cuts across both sides of the independence debate. As Sionaidh Douglas – Scott points out, the 'native' constitutionalism of Scotland was used in the draft constitution for an independent Scotland in 2014.[32] Neil Walker also argues that both the unionist and the pro-independence positions in Scotland share the same basic outlook, and may in fact be degrees of the same argument.[33] This reinforces the point that there are particular Scottish parameters to constitutional debates.

To sum up, while unionism in Scotland has been studied, the possible constitutional distinction of Scotland has been studied, the possibility of the Scotland Act as an act of the Scottish constituent power has been raised, and the idea of a Scottish constitutional narrative have all been the subject of academic attention, these points have never been pulled together to ask what they amount to. Does Scotland have a constitution, or a constitutional identity? Is there a Scottish constituent power? These questions require answers given the developments around Brexit and the strength of the Scottish independence movement.

[31] N MacCormick, 'Sovereignty: Myth and Reality' (1995) 11(1) Scottish Affairs 1

[32] S Douglas- Scott, 'British withdrawal from the EU: an existential threat to the United Kingdom?' (*UK Constitutional Law Blog,* 13 October 2014) <https://ukconstitutionallaw.org/2014/10/13/sionaidh-douglas-scott-british- withdrawal-from-the-eu-an-existential-threat-to-the-united-kingdom/> accessed 13 May 2019

[33] N Walker, ''The Territorial Constitution and the Future of Scotland' in A McHarg, A Page, and N Walker, (eds.) *The Scottish Independence Referendum* (Oxford University Press, Oxford 2016).

Constitutional Identity and the British Constitution

Constitutional identity and the British constitution is also a relatively understudied subject. Paul Craig has attempted to describe British constitutional identity. He argues that its tenets would be parliamentary sovereignty, the principle of legality, constitutional statutes, the rule of law and devolution.[34] His account is not sufficient for purposes here for several reasons. First, he is concerned with a definition of constitutional identity in the style associated with claims under Article 2(4) TEU. Next, his account does not fully account for the changes in the UK Constitution since Brexit, nor does he account properly for why he included devolution beyond writing that changing the devolved settlements without the consent of the devolved parliaments was likely to be unacceptable.[35] Finally, it is not clear how all of the elements he lists relate to one another: Craig acknowledges that a traditional reading of parliamentary sovereignty would make it the only facet of British constitutional identity,[36] as it means that Parliament could simply abolish any other facet of constitutional identity that he lists. He gets around this problem by arguing that parliamentary sovereignty is the foundational norm of the UK Constitution and can also only exist so far as it is accepted by people living in the UK,[37] and it changes according to its social acceptance.[38] However, this faces two difficulties. The first is that its parliamentary sovereignty has not been endorsed by the people in any clear way. This is true of many constitutions, which instead rely on myth and narrative to legitimise themselves. It is here that the second difficulty arises: Craig does not acknowledge the Englishness of parliamentary sovereignty.

The English Parliament was central to the formation of the English national consciousness and to the creation of the state.[39] It has no such association with Scotland, Wales or Northern Ireland. Craig's account does not, therefore, properly address the multinational nature of the British constitution. He is right to point out that social acceptance is crucial to a constitution and this thesis explores that acceptance in Scotland.

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[34] P Craig, "Constitutional Identity in the United Kingdom: an Evolving Concept." In C Calliess and G van der Schyff (eds.) *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press, Cambridge 2019), 288- 298

[35] *ibid* 298

[36] *ibid* ,288

[37] *Ibid* 289

[38] *Ibid*

[39] M Loughlin *Foundations of Public Law* (Oxford University Press, Oxford 2010) 250

The Changing Constitution

There is a great deal of scholarship on constitutional law and Brexit. Scholars have covered individual events, cases and legislation and their constitutional affects, including on devolution. The work of Aileen McHarg and Christopher MacCorkindale is particularly outstanding[40] and is used at several points in this thesis. Other authors have also addressed individual events, such as the Internal Market Act.[41] However, no work appears to apply that analysis to Scotland's constitution. Therefore, the question of how Brexit has changed the Scottish constitution in a narrower, legal sense remains open.

A part of Brexit is narratives and the idea of a Scottish constitutional narrative has been raised again following Brexit. Brexit has led to a centralisation of the British constitution along a unitary state – parliamentary sovereignty path.[42] An example is the Supreme Court decision in *Miller*, which was described as an unhelpfully 'English' decision.[43] The idea of competing constitutional visions has also re- emerged. Examples of this include articles by Sionaidh Douglas-Scott.[44] She has argued that the UK has competing constitutional 'narratives'.[45]

[40] Examples include C McCorkindale and A McHarg, 'The Supreme Court and devolution: The Scottish Continuity Bill reference' (2019) 2 Juridical Review 190.

[41] M Dougan, L Hunt, N McEwen and A McHarg, 'Sleeping with an elephant: devolution and the United Kingdom Internal Market Act 2020' (2022) 138 Law Quarterly Review 650; T Horsley, 'Constitutional Reform by Legal Transplantation: The United Kingdom Internal Market Act 2020' (2022) 42(4) Oxford Journal of Legal Studies 1143

[42] C McCorkindale, 'Scotland and Brexit: The State of the Union and the Union State' (2016) 26(3)King's Law Journal 354, 354

[43] A Welikala 'The Need for a 'Cartesian Cleaning of the Augean Stables'? Miller and the Territorial Constitution' (*UK Constitutional Law Blog,* 7 February 2017) <https://ukconstitutionallaw.org/2017/02/07/asanga-welikala-the-need-for-a- cartesian-cleaning-of-the-augean-stables/> accessed 12 October 2018

[44] S Douglas-Scott, 'Brexit and the Scottish Question' In F Fabbrini (ed.) *The Law & Politics of Brexit*. (Oxford University Press, Oxford 2017)

[45] S Douglas- Scott, 'Brexit and the Future of the United Kingdom' (2019) DCU Brexit Institute - Working Paper N.2, 10 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3355782> accessed 1 June 2020

Vernon Bogdanor also raises this point and argues that the issue has been exacerbated since Brexit:

> For the meaning of the British constitution seems to depend on where one views it from, whether one views it from London, Belfast, Edinburgh or Cardiff[46]

His treatment of Scotland is brief, and he does not cover exactly *what* the competing meanings of the constitution are. He is also focused on an overall view of the British constitution. There does not appear to be literature that considers the implications of the different narratives in depth. Given that MacCormick's work is now decades old, and that Brexit developments are being driven by competing narratives, a gap has been described in the literature here, but it has not been filled. Political scientist Nicola McEwen's excellent article is an exception, and discusses the different understandings of sovereignty between Scotland and England which have been apparent in the Brexit process, pointing out how claims of Scottish popular sovereignty become more prominent in times of political incongruence with the rest of the UK.[47] She notes that it is the English idea of sovereignty that is a legal doctrine, as it is parliamentary sovereignty, and the Scottish sovereignty is not a legal doctrine.[48] As previously discussed, constitutional lawyers have to consider more than just legal doctrine when describing constitutions. This thesis is that consideration for Scotland.

[46] V Bogdanor, *Beyond Brexit: Towards a British Constitution* (I.B. Taurus, London 2019), 253
[47] N McEwen, 'Irreconcilable sovereignties? Brexit and Scottish self-government' (2022) 10(5) Territory, Politics, Governance 733, 741
[48] *ibid* 749

Part Four: Methods and Structure

This section outlines the means of addressing the research questions. It begins by describing the order that the questions are dealt with in the thesis, including the rationale for the structure. After that, the methodology and case study selection are discussed.

Structure

The research questions are not addressed in the order outlined above. Rather, they can be mapped onto the table of contents in the following way, with a short description of each chapter below:

Chapter One: Introduction, Literature, Research Questions and Methods	1.Why describe the nature of Scottish constitutional identity?
Chapter Two: Constitutional Identity: Theory and Definition	2. What is the nature of constitutional identity?
Chapter Three: the Declaration of Arbroath, Popular Sovereignty and the Scots Law Tradition	RQ: What is the nature of Scotland's constitutional identity?
Chapter Four: Scottish National Identity and the Constitution	RQ: What is the nature of Scotland's constitutional identity?
Chapter Five: the Scottish Constitution	3. What was Scotland's Constitution before Brexit?
Chapter Six: The Legal Position of Scotland within the British Constitution Since Brexit	4. What impact did Brexit have on the Scottish constitution?
Chapter Seven: Scottish Constitutional Identity and the Continuity Bill	5. How has Scotland's constitutional identity changed since Brexit? RQ: What is the nature of Scotland's constitutional identity?

Chapter two is straightforward: it discusses the theory of constitutional identity in order to produce a definition. Chapter three focuses on the Declaration of Arboath. It also begins the process of finding Scottish constitutional identity by discussing the existing legal work and narratives on Scotland's constitutional position. As will be shown, the material is limited and, in the case of MacCormick's work, is generally written from to advocate for narratives as opposed to discovering narratives. Chapters four and five deepen and broaden the process of capturing the nature of Scottish constitutional identity. Chapter four does this by breaking down identity in Scotland more generally in order to observe any themes that emerge. Chapter five focuses on the constitution, first by setting out the doctrinal account of the Scottish Constitution and then making a sketch of Scottish constitutional identity prior to Brexit. Chapter six covers changes in the constitution brought about by Brexit. Finally, chapter seven is a case study on the Continuity Bill affair, which serves to test how Scottish constitutional identity has been presented and used in the Brexit process. Constitutional identity is revealed as it changes and develops, meaning that the nature of Scottish constitutional identity and the ways in which that identity has changed since Brexit will be revealed simultaneously.

Supporting question one, or why we should seek to describe the nature of Scottish constitutional identity, has hopefully been answered in this chapter.

Methodology

This section sets out and justifies the methodologies used in the thesis, which does not use a single methodology throughout. This is due to the nature of the research question and supporting questions: some are doctrinal, others are theoretical and others are discursive. The main methodologies are summarised here and each chapter will have a brief statement on the methods used in its introduction. The final substantive chapter, chapter seven, is approached differently. It is based on adapting a discursive mythology to be used in constitutional law. Therefore, a substantial proportion of the chapter content is devoted to methodology, and while that methodology is touched upon here, it is not discussed fully.

Constitutional identity is not only a matter of doctrinal law, particularly in the UK. However, it is also not acceptable to abandon doctrinal methods and retreat into socio-legal methods entirely. The doctrinal parts of this thesis will focus on establishing if one can speak of a Scottish constitution, particularly in the narrower sense, by focusing on the Scotland Act and how that constitution has changed through the Brexit process. This doctrinal approach is essential in answering the overarching research question on the nature of Scottish constitutional identity. Chapter four is partially doctrinal as it engages with the Scotland Act and case law to identify what was legally established in Scotland through devolution. The second part of chapter four turns to theory to discuss whether the Scotland Act amounts to a constitution. The doctrinal method is returned to in chapter five, and legislation and case law are closely analysed for differences with the constitutional position of Scotland prior to 2016. The materials analysed attempt to provide a comprehensive account of the changes in the law since Brexit before considering changes from other lenses.

Doctrinal research alone is not enough to describe Scottish constitutional identity. This is not just due to the inclusion of identity: the whole of the British constitution itself, never mind the Scottish, cannot be found in legislation and case law. Principles, conventions and theory are central. Theoretical methodology is therefore used elsewhere in the thesis to explore the system of beliefs which lie behind the constitution and also form a part of its structure. A part of this overlaps with the doctrinal approach: for example, when analysing the constitutional changes brought by the first *Miller* case, a large part of that change was in the underlying weight given to the principle of parliamentary sovereignty within the British Constitution. Therefore, theoretical and doctrinal methodology will in practice be used alongside each other, with analysis of the letter of the law bleeding into discussion of that law in action. The section on whether Scotland has a constitution is also one of theory to a certain degree: while it starts with a doctrinal approach surveying the Scotland Act, later discussion on what that amounts to is constitutional theory.

Constitutional theory is the main approach in other parts, such as in chapter two. Here, secondary legal sources, such as legal scholarship, are used to build up a working definition of constitutional identity. Theoretical methodology will also be complemented by the analysis of materials and scholarship from other disciplines. This is done in various places throughout the thesis. Most prominently, chapter four surveys how Scottish identity is discussed in a number of other fields to better understand how the constitution in Scotland embeds itself in Scottish identity. A part of this is building up an understanding of Scottish identity itself from various fields including literature, sociology and history.

A separate methodology, discourse analysis, is used in chapter seven. This builds from an approach developed to analyse identity in discourse in Austria. The methods are adapted to be used in Scotland and in a constitutional context. The statements of actors in the events surrounding the Continuity Bill are then analysed to look for how identity is constructed and denied at the British Parliament, Scottish Parliament and the Supreme Court. By doing this, constitutional identity can be seen in its development and change in a moment of constitutional tension and change.

There are potential disadvantages in each of the methods used. First, doctrinal analysis is narrow in scope, particularly in a constitution such as the British without much black-letter law. Conversely, theoretical and discursive approaches are broader but arguably not legal enough. The discursive approach used in chapter seven, in particular, has arguably strayed from the law and into politics. The majority of the materials used are undoubtedly political: the records of debates in the British and Scottish Parliaments on Bills. This weakness can be countered by pointing out, once again, that the bulk of the constitution in the UK is not found in legal materials. Ultimately, the weaknesses in each of the individual methodologies are overcome by the fact that several methodologies have been used to produce a balanced approach. Arguably, this sacrifices depth in each individual methodology as none is given sufficient space in the thesis to be done comprehensively. The thesis is ultimately exploratory in nature and does not claim to be answer any questions totally. It attempts to describe Scottish constitutional identity for the first time and uses the soundest methodological approaches to do so.

Finally, there will inevitably be elements of bias throughout the arguments made in this thesis, including in the research question and the methodologies chosen. The author has done her best to minimise this.

Case Study Selection

Two chapters can be described as case studies and both are justified and explained here. Due to the exploratory nature of the thesis and the use of multiple methodologies, more case studies were not feasible within the scope of the PhD project.

The first of these is chapter three on the Declaration of Arbroath. The reason for devoting a chapter to the Declaration of Arbroath include that the document is cited explicitly and implicitly in contemporary constitutional debates. The implicit mentions reflect how the Declaration has led to narratives of popular sovereignty in Scotland, whether mentioned by name or not. Another reason is that the Declaration demonstrates the transformation that can occur from the true historical meaning of an event into a popular narrative with little basis in fact. Next, the Declaration leads into the role Scots law and Scottish legal nationalism have played in identity in Scotland, which is discussed in the next chapter on Scottish identity more broadly. Finally, the Declaration opens the discussion on the somewhat fluid boundary between national and constitutional identity in Scotland, as the constitutional characteristics of the Arbroath narratives are equally a part of national identity.

The second case study is on the Continuity Bill, the associated debates and case before the UK Supreme Court in chapter seven. This chapter is where the discursive methodology is used. The Continuity Bill was essentially a power struggle between the British and Scottish Governments and Parliaments that involved a case before the Supreme Court. This case study was chosen over other controversial legal changes brought by Brexit, such as the *Miller* case or the Internal Market Act, because it forms a complete package including legislation from the Scottish Parliament, legislation from the British Parliament and litigation before Supreme Court.

None of the other legal changes provide such a complete range of materials from different institutions in the same way. Therefore, the Continuity Bill was ideal for the discursive approach as statements from judges, Scottish politicians and politicians from elsewhere in the UK can be analysed.

Chapter Conclusion

This thesis fills a gap in the scholarship on Scotland's constitution in the time of Brexit. This is broken down into several parts: first, the constitution means a holistic study of the impact of Brexit on Scotland framed around the Scotland Act. Second, it is the constitution in context. Constitutional identity is the analytical tool used to study how Scotland's constitution relates to people in Scotland or the culture, history and narrative that are used to tether the constitution. In doing this, the thesis will also interrogate the concept of constitutional identity itself.

Scottish constitutional identity is the subject because the goal is to describe how Scotland's constitution is linked to the people in Scotland. The changes that the constitution has undergone are another important issue to be addressed. Several methodologies are used to these ends in the rest of the chapters; the first point of call is to set out the theoretical background of the thesis.

Chapter Two: Constitutional Identity: Definition and Theory

Introduction

Constitutional identity has become widely discussed in constitutional law. Despite this, there is no agreed meaning of the term. The goal of this chapter is to arrive at a working definition of constitutional identity. There are two strategies used to do this: first, the concept will be broken down, starting with the key terms of 'identity' and 'constitution'. Second, alternative or accompanying concepts to constitutional identity will be discussed. These theories are non-exhaustive, and have all been chosen because they seek to answer the same broad question: why do constitutions either succeed or fail? The overall goal of this chapter, building a working theory of constitutional identity, will also be gradually introduced as some elements of alternative theories are distinguished and others adopted.

This chapter is divided into three sections. The first will set out the concept of constitutional identity in order to find a definition suitable for this thesis. The second section continues the refinement of constitutional identity by contrasting it with similar and overlapping theories, teasing out the exact features of constitutional identity which make it the best frame. Finally, the last section will begin to apply constitutional identity to Scotland, making some suggestions which will be picked up later in the thesis. The next stage of identifying constitutional identity in Scotland is to sketch British constitutional identity: by doing this, the context of Scottish constitutional identity is revealed. Theoretical analysis will be the method for used in section of this chapter.

Part One: What is Constitutional Identity?

Introduction

Building up from the term 'identity' is the best way to understand the concept of constitutional identity. After this, collective identity is discussed. There are themes and questions that run throughout these paragraphs. From there, the constitution can be introduced to show how it relates to identity, particularly through the twin issues of legitimacy and of continuity and change. In the final part of the section, descriptions of constitutional identity will be introduced.

Identity

Personal identity is a set of characteristics or qualities which an individual feels ownership of.[49] These characteristics are varied and have differing levels of permanence. For example, the author is female, brown-haired, Scottish and an atheist. In the future, the author's hair will lose its brown, and the author could convert to a religion. However, the same sense of self would continue throughout these changes, setting up the tension between continuity and change. This identity is not clearly fixed and may change over time, raising questions over its persistence: is it the same identity if the characteristics have fundamentally changed? Evidently, it is not just the characteristics which define an identity, as there is a continuous identity despite changing characteristics. This suggests that the holder of those characteristics is significant too, as is the interaction between the characteristics.

Collective identities present new questions. It is not just an extended self-identity: the author knows that not all other Scots have brown hair, for example, but knows that other Scots live in Scotland like her, suggesting that some characteristics in personal identity can be elements of shared collective identities.

[49] H Noon and B Curtis, 'Identity' in E.N Zalta and U Nodelman (ed.) The Stanford Encyclopedia of Philosophy <https://plato.stanford.edu/entries/identity-personal/> accessed 5 May 2022

The continuity of a collective identity is less clear, given that the individuals under that identity will change over time. The best metaphor for this is a family through different generations. Now, the collective refers to not just itself but to both the predecessors of itself and a younger self. Although the personnel of the collective identity has changed, the identity, or family identity, does not. Therefore, there is a distinction between the continuity of an individual and a collective identity, with change accounted for. Continuity remains the key element throughout differing circumstances or generations, although the characteristics of or holders of an identity have completely changed.

The next issue is what characteristics those under a collective identity share and what marks them out as a distinct collective. Each individual in the collective will their own conception of the characteristics they share with the others. A collective identity, in practice, is a set of boundaries which exist within the mind of the individual, making it a component of each holder's personal identity. The family identity metaphor is not a perfect fit here. First, in a family, one personally knows a greater proportion of other members. A collective identity such as a nation is much larger, and so the imaginary element becomes key. Second, a distinction can be drawn between the object of and the holder of that identity. In other words, there are the identities of those who feel membership of the collective and the thing itself. Things can signify a collective identity, such as documents or places. Thus, we either have two linked identities, one of the nation and one of the collective national people, or we have some sort of identity able to bridge both elements.

In national identity, this problem is dealt with by adopting a linked two-phase definition: the individual and the collective. The first refers to the individual traits of members and the second to their community. Anthony Smith highlights how certain collective identities, such as ethnic castes, have symbols and other material things associated with them. As such, his definition encompasses both the individual's relation with their collective identity and the mechanics of change, done through the study of continuity and change in the 'things' possessed by that collective identity.[50] However, the two prongs of this definition are interdependent, and serve to identify a single identity.

[50] A D Smith, *Nationalism: Theory, Ideology, History* (Wiley, London 2013) 21- 22

On their own, neither prong is a holistic identity: both the things and the imaginations of the collective are central. This account of identity will be returned to later in this chapter. Next, the discussion is focusing on constitutions before returning to identity.

The Constitution

There is no single set definition of a 'constitution'.[51] At its most basic, a constitution describes the governing arrangements of a polity. Most definitions go a little further, setting out that a constitution both legitimises and constrains the exercise of power, otherwise known as constitutionalism.[52] Under the ambit of a constitution, there is some sort of governing structure or institutions which must abide by that constitution. Through this, it is possible to discriminate between effective constitutions and constitutions which are merely an artifice, as the latter are neither the source of power nor a restraint on power. Turning to history is helpful to further understand constitutions. The word has older meanings than its modern sense.[53] Once applied to the nation in the sense of describing its body and fundamental nature, this gradually evolved into meaning rules about governance with the Glorious Revolution.[54] This change in meaning carried through into the advent of the modern understanding of the constitution with the American and French revolutions. An idea of the people became key in the modern constitution, serving to legitimise the foundation of a legal order.[55] Therefore, constitutions are very diverse in their form, but all are associated with the people, and all effective constitutions legitimise and constrain power.

[51] See e.g. M Tushnet, 'Constitution' in A Sajó and M Rosenfeld (eds.) *The Oxford Handbook of Comparative Constitutional Law (*Oxford University Press, Oxford 2012) 217-218
[52] See e.g. Y Hasebe and C Pinelli, 'Constitutions' In M Tushnet, T Fleiner and C Saunders (eds.) *Routledge Handbook of Constitutional Law* (Routledge, Abingdon 2012) 9-19
[53] D Grimm, 'Types of Constitutions' in M Rosenfeld and A Sajo, (eds.) *The Oxford Handbook of Comparative Constitutional Law (*Oxford University Press, Oxford 2012) 101; Loughlin *Foundations of Public Law* (n 39) 275
[54] *ibid* 102
[55] *ibid*, Loughlin *Foundations of Public Law* (n 39) 275-276

Looking at a contested constitutional space is helpful in understanding what else is necessary for a constitution. There is disagreement over whether the EU has a constitution. Paul Craig analysed the meaning of constitutions in the context of an EU constitution and again highlighted that there is no set, consistent definition which can encompass constitutions in all of their forms.[56] Robert Schutze argues that there are three arguments commonly made about the nature of the EU: that it has no people, no constitution and no constitutionalism.[57] Joseph Weiler disagrees, writing in the 1990s that the EU had constitutionalism but no constitution.[58] This turns on his distinction between the sort of constitutionalism already possessed by the EU, and the lack of a constitution in the form of textual document. Weiler's take is convincing. The institutions of the EU do derive their legitimacy from legal instruments, and are in turn limited by those instruments, reflecting constitutionalism. Ultimately, the EU does not have a constitution in the traditional sense but is instead a plural space, with overlapping orders as opposed to a hierarchy.[59] This leads to the argument that it has no constitution, particularly as the EU relies on the legitimacy its peoples place on their respective nations. The EU example shows how having a people is regarded as essential components of a constitution in addition to the institutions and rules that the EU undoubtedly possesses. Therefore, the association of a constitution with a people is central.

A distinction can also be drawn between a constitution and a constitutional system. The EU has a constitutional system but less clearly possess a constitution. As the British constitution is a collection of principles, conventions and laws, the distinction is hard to ascertain because the constitution and the constitutional system in effect run into each other: the British constitutional system is the British constitution, as the constitution is just what happens.[60] In other words, it is the function of the constitutional system. Therefore, the distinction between the constitution and the constitutional system will be used generally, as it is not an important point within this thesis.

[56] P Craig, 'Constitutions, Constitutionalism, and the European Union' (2001) 7 Eur. L.J. 125, 126-127
[57] R Schütze, *European Constitutional Law* (Oxford University Press, Oxford 2021) 64
[58] J H H Weiler 'Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision' (1995) 1(3) European Law Journal 219, 220
[59] S Douglas-Scott, *Constitutional Law of the European Union* (Pearson's Education, Harlow. 2002) 515
[60] J A G Griffith, 'The Political Constitution' (1979) 42(1) The Modern Law Review 19, 21

Another distinction sometimes drawn is between a narrower, legal definition of a constitution and a broader view of constitutions. In advocating for a separation between constitutional law and the factors that lead to constitutional change, the nature of law is typically cited: law is unambiguous and normative. In contrast, constitutional change is generally seen to be driven by non-normative factors such as dispute, changing circumstances or popular action, which are then ascribed to non-legal forces. This is an overly simplified picture for a number of reasons. First, a great amount of time in law is dealt with interpretation, as even the most well drafted legal provision can have multiple, contrasting interpretations. Expanding on this point, even the question of objectivity in law is contested. As Robert Bennett argues, there are different meanings of the word 'objective': it can either mean that there is some incontestable right answer, or it can mean that the interpreting judge arrived at the conclusion through objective, non-biased reasoning, without positing that there is a definitive right answer.[61] The point here is that many legitimate interpretations are possible within the law, which in turn will inevitably be influenced by factors outwith the law.

Pure theories of law also concede that lawmakers may be influenced by factors beyond the law.[62] Without going too far into the debate around the normativity of law, the morality of law can be arguably derived from what the subject of a law believes it to be.[63] This means that positivist accounts of law, such as Kelsen's, can be harmonised with some extra-legal factors without breaching the normative logic of law. In addition, without engaging with morality there is a complex interplay between social facts and the law.[64] Thus there is already a role for the extra-legal and for uncertainty within the law before turning to constitutional law. This is also true of the legitimacy of law. Kelsen rejects social normativity, or that law is normative because it is regarded as such by people, but cannot overcome it, because he has to turn to what is essentially social normativity among lawyers under the guise of a special legal thinking.[65]

[61] R W Bennett, 1984 'Objectivity in Constitutional law' (1984) 132(3) University of Pennsylvania Law Review, 445, 447
[62] B Bix, 'Kelsen, Hart and Legal Normativity' (2018) Revus 34, 28
[63] *ibid*
[64] T Gizbert-Studnicki, 'Social Facts and Legal Facts: Perils of Hume's Guillotine' In T. Spaak & P. Mindus (Eds.), *The Cambridge Companion to Legal Positivism* (Cambridge University Press, Cambridge 2021), 432-433
[65] J Raz. 'Kelsen's Theory of the Basic Norm' (1974) 19 Am. J. Juris .94, 111

Constitutional law is particularly difficult to think about in these narrow terms because the question of constitutionality and constitutionalism appear. Simply, things can be constitutional but non-legal and vice versa. For example, constitutional conventions are an important part of the function of a constitution. Operating beneath the law of the constitution, conventions govern the behaviour of actors within the constitutional system. For example, one would be wrong to argue that the UK has no constitution on the grounds of its heavy reliance on convention. The UK is a constitutional democracy with functioning constitutionalism. In a stronger sense, an Act may be passed entirely within legal competence, but still contravene the constitution: the theory of unconstitutional constitutional amendments demonstrates this. Therefore, there is some element of the spirit or essence of the constitution which governs constitutionality as distinct from legality.

In short, a constitution's normativity is not innate.[66] Constitutional law is two-faced: on the one hand, it orders society and provides a constraining mechanism on politics. On the other hand, a constitution is the symbolic statement of the people, their identity, and their aspirations.[67] In this way, a constitution contains non-legal values such as 'moral' or 'traditional' ones.[68] As the constitution serves as the foundation of a nation's legal system, it needs to locate itself with authority and legitimacy in some way. Typically, this is done in preambles, which refer to national history and the nature of the people who came together to make that constitution. Therefore, constitutional law cannot be excised from its context, as its context is embedded within it. These themes of legitimacy and change are picked up in the next paragraphs.

[66] H Vorlander, 'Constitutions as Symbolic Orders: The Cultural Analysis of Constitutionalism' in P Blokker and C Thornhill, (eds.) *Sociological Constitutionalism* (Cambridge University Press, Cambridge 2017), 215- 216
[67] P Blokker and C Thornhill, 'Sociological Constitutionalism' in P Blokker and C Thornhill, (eds.) *Sociological Constitutionalism* (Cambridge University Press, Cambridge 2017),14; M Loughlin and N Walker 'Introduction' in M Loughlin and N Walker, (eds.) *The Paradox of Constitutionalism: Constituent Power and Constituent Form* (Oxford University Press, Oxford 2008), 1
[68] *Ibid*

Legitimacy, continuity and change: towards constitutional identity

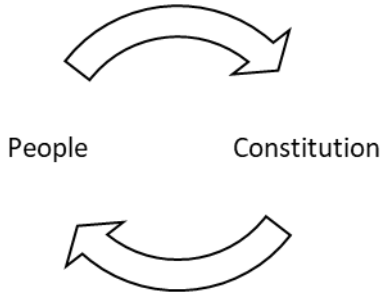
A constitution is the means of empowerment, legitimacy and restraint in the exercise of power. In liberal-democratic constitutionalism, there must be popular consent to a constitution. This is because, without such a contract, then dictatorship and arbitrary power exist. The idea of the consent of the people, however, must be abstracted to some extent; every decision-maker cannot ratify every decision directly with the people due to the complexity and size of modern states. The abstraction of the people often takes the form of, to some extent, an imaginary past people. The theory of imaginary community therefore comes into play, and points from the previous discussion on collective identity return. The collective and the passage of time are particularly important themes in constitutions, and are discussed below.

Even if my constitution was ratified an hour ago, then I can never know all of the collective who ratified it. The only unifying feature we share is that we had the authority at that moment. However, people die and are born every moment, so the people are already different. Thus, the transformation from the original people is immediate. The people bound by the present constitution are not exactly the same people who originally ratified the constitution. The latter were the constituent power: the people who came together to author the constitution. The modern people's subjection to the constitution is strictly done with the consent of the constituent power. This temporal aspect means that the relationship between the current people and the constituent power is important. As Luigi Corrias sets out, for example, populist constitutional thought improperly weights the constituent power and conflates it with popular sovereignty, tipping the balance away from the rule of laws towards the rule of people.[69] We must feel connected to the constituent power but also respect that we are not them, as they set out fundamental ground rules that we abide by. The constitution must give both the impression of continuity and of change. Continuity is necessary to give a constitution its rigidity and place above ordinary law. In other words, the ground rules remain stable.

[69] L Corrias, 'Populism in a Constitutional Key: Constituent Power, Popular Sovereignty and Constitutional Identity' (2016) 12(1) European Constitutional Law Review 6, 10-11

Change is important as the constitution will transform in many ways over its lifetime, including the make-up of the people under the constitution. Throughout all of this, the people must believe that they are the authors of the constitution, as their ancestors are the constituent power.

The focus has shifted here to the subjective beliefs of the constituted people. The basic figure below demonstrates the impression that a constitution must give to them:



The point here is not to adopt a sociological constitutionalism. Rather, it is to point out that constitutional theory cannot avoid so-called sociological factors because it centres on the interaction between people, things and the beliefs and behaviour of people. There is no clear division between the normativity of law and the beliefs of those governed by that law. However, the point is not to collapse into relativism: there are real, tangible parts of a constitution. Statutes, documents and case law are examples. Through these items certain narratives are entrenched and rules made normative. However, that very normativity is reliant on a popular consent that must be maintained. This is where broader factors such as narratives, identities, imaginations and beliefs come into play. Constitutional identity is central to this.

Constitutional identity

Constitutional identity is a contested concept, with much disagreement over what it entails. The definition used in a recent volume is a useful starting point:

> Constitutional identity is understood as the core or fundamental elements or values of a particular state's constitutional order as the expression of its individuality[70]

This captures the uniqueness of each identity, bespoke to its constitutional. The definition also shows how indeterminate constitutional identity can be: the core of a constitutional order is quite different from the values of a constitutional order. Constitutional identity is elsewhere described as the narrative of the constitution.[71] It is the story of a constitution, but constitutional identity is also the collective identity. The metaphor of sameness and selfhood can be used: constitutional identity is a collective self which is both constantly changing but fundamentally the same.[72] This is analogous to one's self-identity, as previously discussed on the topic of collective identity generally: I am the same person at all stages of life even though I am different as I progress through these stages.[73] In simple terms, a constitutional identity is the constitutional self; the nature of a constitutional order and its collective subjects. It is an imaginary community deeply tied to the past.

As Michel Rosenfeld observes, there are actually multiple constitutional selves: both the historical constitutional self and the present self, bound by social contract, are in tension, for example, as are the numerous contradictory selves bound by the present constitutional order who disagree on how they should be bound, reflecting the general identity metaphor.[74] So, dialogue and disagreement are central to constitutional identity.

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[70] G van der Schyff, 2019 'Member States of the European Union, Constitutions, and Identity: A Comparative Perspective' in C Calliess and G van der Schyff, (eds.) *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press, Cambridge 2019), 306

[71] G Jacobsohn, *Constitutional Identity* (Harvard University Press, Cambridge 2010), 90- 91

[72] M Rosenfeld, 'Constitutional Identity' in M Rosenfeld and A Sajo, (eds.) *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, Oxford 2012), 757; see also Corrias (n 70) 22- 25

[73] *ibid*

[74] M Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (Routledge, Abingdon 2009) 26

This includes how the past is conceived of, as constitutional identity contains both elements of history and a desire to distinguish that history.

Constitutional identity, then, may be better described as the space filled by multiple conceptions created by continuous dialogue and negotiation. As Jacohbson notes, these are "identifiable continuities of meaning within which dissonance and contradiction play out."[75] Defining constitutional identity in exact terms is impossible, and instead, one can identify certain markers that set out its the boundaries. Therefore, some fundamental core must be found, which can be shown to structure current constitutional disputes.

The final part of constitutional identity to be described is its origins. The creation of a constitution does not in itself create a constitutional identity.[76] Rather, it is the interaction between this constitution and its context which leads to constitutional identity.[77] It is forged through constitutional disharmony, disagreement and contradiction[78]. The process begins with negation,[79] according to Rosenfeld. Negation is the constitutional break; this is when a previous constitutional order is rejected. It is the first appearance of our constitutional subject: the first time they mark their identity out as distinct from others. In sum, a constitutional identity begins to emerge at negation within the context of continuous constitutional dispute and contestation.

Can one speak of a new constitutional identity emerging at a fixed point, when a constitution will always combine elements of the past, present and future? Rosenfeld solves this problem by casting constitution-making in terms of sameness and selfhood. Simply, a maker of a new constitution cannot step too far from the previous constitution, and the logic that binds this persistence is sameness and selfhood. In practice, some new constitutions are amendments to the old. Even without this direct link, a new constitution is defined against the old.

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[75] G Jacobsohn, *Constitutional Identity* (n 72) 4
[76] G Jacobsohn, "The Formation of Constitutional Identities," in T Ginsburg and R Dixon, (eds) *Elgar Handbook in Comparative Constitutional Law* (Elgar Press, Cheltenham 2011), 131
[77] *Ibid*
[78] G Jacobsohn, 'The Formation of Constitutional Identities' (n 77) 134- 135
[79] Rosenfeld 'Constitutional Identity' (n 73) 760

Crucially, a new constitution inherits the collective people of the old constitution along with their narratives and beliefs. Sameness and selfhood do not provide rigid guidelines for constitutional change. Rather, they provide that narrative and continuity are key, and that definitive start and finish points of constitutional identity are likely impossible to identify. It is both organic and constructed,[80] because it comes from the interaction of a constitution with a people. Nonetheless, there are identifiable markers of constitutional identity in a constitution that set out the terms of dispute and change.[81]

The open and indefinite nature of constitutional identity lies behind many critiques of it, which are now turned to. Article 4(2) TEU is responsible for much of this, as it has converted constitutional identity from an analytical term to describe constitutions into a legal term meaning a justiciable part of a constitution.[82] However, discussing the critiques is useful to further refine the definition of constitutional identity.

Critiques of constitutional identity

Constitutional identity, it has been argued, suffers from a number of shortcomings. These can be divided into two broad strands.[83] The first is that the concept is simply too indeterminate.[84] As Bosko Tripković points out, however, this critique relies on a highly formalist and narrow account of constitutional law which would exclude any legal concept that could not be 'sanitised' of elements from outwith the law.[85] The second critique builds on the first, arguing that constitutional identity is particularly open to abuse because of its fluid conception and use of the term 'identity'.[86] This appears to mean that constitutional identity is open to abuse. However, arguably any legal concept is open to abuse if abuse is defined as misuse.

[80] Jacobsohn, *Constitutional Identity* (n 72) 375
[81] H Klug, 'Constitutional Identity and Change' (2011) 47(1) Tulsa Law Review 41, 41-50.
[82] P Faraguna 'Constitutional Identity in the EU— A Shield or a Sword?' (2017) 18(7) German Law Journal 1617-1640, 1620
[83] B Tripković. "Constructing the Constitutional Self: Meaning, Value, and Abuse of Constitutional Identity" (2020) 2 Pravni zapisi 359, 362
[84] *Ibid*
[85] *Ibid*
[86] *ibid* 364

A key distinction can also be drawn between claims of constitutional identity and constitutional identity itself. Claims of constitutional identity, particularly under 2(4) TEU, are a use of constitutional identity, which is itself a neutral conception.

Federico Fabbrini and András Sajó attack constitutional identity from several angles, all focused on the Article 4(2) TEU conception. Among their critiques, they contend that the boundaries of the concept are fluid. They argue that this has allowed German judges to reference *Volkish* ideas when dealing with concepts such as the people instead of a stricter interpretation centred on the constituent power.[87] However, the constituent power or the people are different from constitutional identity. Constitutional identity is something that identifies the people within and as a part of a constitutional order, as opposed to *being* the people themselves. Other criticisms of constitutional identity draw it into broader criticisms of constitutional pluralism in the EU. R. Daniel Kelemen and Laurent Pech, for example, argue that pluralism was a 'serviceable fudge' at a time of genuine cooperation and good faith between actors at the national and EU level.[88] Once again, this criticism applies to the use of constitutional identity to serve a specific purpose as opposed to the concept itself. This thesis is also not concerned with the justiciable meaning of constitutional identity inspired by Article 4(2) TEU and is agnostic on the merits of that Article. That is not to say that constitutional identity is no longer of interest to constitutional lawyers. Being justiciable is different from being constitutional, particularly given the specifically constructed defensive nature of Article 4(2). It does not represent a neutral legalisation of constitutional identity and it must be seen within its own heritage, emerging in the 1990s amidst the tension between national governments and the EU.[89] One could argue that Article 4(2) itself represents the first (ab)use of constitutional identity.

[87] F Fabbrini and A Sajó., 'The dangers of constitutional identity' (2019) 25(4) European Law Journal 457, 466
[88] R D Kelemen, and L Pech, 'The uses and abuses of constitutional pluralism: Undermining the rule of law in the name of constitutional identity in Hungary and Poland' (2019) 21 Cambridge Yearbook of European Legal Studies, 59, 60
[89] Fabbrini and Sajo (n 88) 462-463; Tripković (n 84) 359-360

Conclusion

Defining constitutional identity shows the multiple faces of a constitution. The link between identity and constitution lies in the inherently collective and social nature of the latter, which ultimately derives its legitimacy from the imaginary community who author and live under that constitution. As previously argued, constitutions cannot be cleanly severed from the culture of their founding and the culture of their legitimacy.[90] Constitutional identity is indeterminate, but that indeterminacy does not mean that constitutional identity does not exist.

The next part will turn to theories which occupy a similar role to constitutional identity. The purpose of this is to refine the definition of constitutional identity to be used in this thesis. Some of these theories, it will be shown, are a part of constitutional identity, others occupy a similar territory, while others have been suggested by other scholars as a better fit than the constitutional identity label. The part will demonstrate why constitutional identity has been chosen as the framework of this thesis.

[90] J Scholtes, "Abusing constitutional identity." (2021) 22(4) German Law Journal 534, 549

Part Two: Alternative and Accompanying Theories

There are other theories which explain how constitutions persist, change and derive legitimacy. In addition, there is debate over the role of national identity vis-a-vis constitutional identity. This part shows the overlap between all of these ideas. Some of the other alternative theories here will be argued to be part of constitutional identity. This is because this thesis is not a thick use of constitutional identity in the sense of a constitutional identity claim. Rather, constitutional identity here can be described, broadly, as the successful attachment of a constitution to a people. In other words, what makes a constitution stick? Constitutional identity is the best frame for answering this question, but it is not the only potential frame for doing so.

The first sections of this part are devoted to national identity. This is not a direct alternative to constitutional identity but is another major location of collective identity that, in practice, shares characteristics with constitutional identity. Therefore, it needs to be set out and distinguished from constitutional identity. National identity is also returned to in later chapters, so it needs to be defined at this stage.

Defining National Identity

National identity can be conceived of as belonging to a collective self-identity.[91] These imaginary boundaries are shaped by the conflict of creating a nation, and the continued dialogue within the national community; a nation is 'embodied argument', in Alastair Macintyre's famous description.[92] Delving into theory, this fits well with the modernist account of national identity: all national identity is imaginary, as per Benedict Anderson's famous thesis, as one cannot possibly know all of the members of your nation.

[91] Rosenfeld 'Constitutional Identity' (n 73) 757
[92] Craig, 'Scotland and hybridity' (n 7) 248

Therefore, the characteristics you share with your co-nationals and the boundary of membership of your nationality are imagined by the individual.[93]

Modernism posits that the nation is a sociological construct, with all possessing a territory in addition to individual, particular cultures.[94] The modernist thesis of national identity, in addition to this basic core, relies on a particular understanding of history, whereby print media was central to the creation of national identities.[95] National identity was 'the political medium by which modernisation was managed', 'unpleasant' but 'necessary' in the ultimate goal of globalisation.[96] Modernists do concede that all nations need some older prerequisites, favouring either language or a state tradition as the necessary binder.[97] This is because the nation is a cultural and social phenomenon in contrast to the state, which is institutional.[98] As pointed out by David McCrone and Frank Bechhofer, national identity is a matter of 'cultural markers', such as birthplace or ancestry:

> There is nothing inherent in the markers as such; they operate as 'habitus' (Bourdieu, 1984), a set of everyday social practices and understandings which come to be internalised and hence 'objectified[99]

The markers of identity are not rigid but rather respond to their context and the understanding of actors at a particular time.[100] McCrone and Bechofer argue that national identities are real, but they have no inherent meaning beyond what is created in 'the process of interaction or description'.[101] This is a useful modernist take, and one which resonates with Jacobson's notion of contestable elements in constitutional identity. However, it is not a fully accepted theory of national identity.

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[93] B Anderson, *Imagined Communities: Reflections on the Origins and Spread of Nationalism – New Edition* (Verso, London 2006) 6-7
[94] A D Smith, *Ethnosymbolism and Nationalism: A Cultural Approach* (Routledge, Abingdon 2009) 7-8
[95] Smith (n 89) 10-11
[96] C Criag, Otherworlds: Devolution and the Scottish Novel in G Carruthers and L McIlvanney (eds.), *The Cambridge Companion to Scottish Literature* (Cambridge University Press, Cambridge 2012), 262
[97] Smith *Ethnosymbolism and Nationalism* (n 89) 8
[98] A D Smith, "National identity and the idea of European Unity" (1992) 68(1) International Affairs 55-76, 61-62
[99] F Bechhofer and D McCrone *Understanding National Identity* (Cambridge, Cambridge University Press 2015) 142- 143
[100] *Ibid*
[101] *Ibid* 143-144

Ethnosymbolism is a refinement of the modernist theory and accepts the imaginary nature of national identity. Ethnosymbolists, however, reject the idea that the badges of nationalism are entirely modern inventions, instead arguing that those seeking to build a nation have a set range of pre-existing features or narratives from which they must choose.[102] Therefore, nations are necessarily rooted in the past. The ethnosymbolist approach attempts to bridge the gap between pre-modern and modern nationalism, positing that myths, symbols and traditions have played a role in creating national kinship[103]. In addition, the markers of national identity must be suitably symbolic in what they represent in the current order and acknowledge the more guttural aspects of history: nations were not completely created at the invention of the printing press. Rather, there is an older set of symbols and values, and the shadow of ethnos, in each national identity's backstory. In this way, the modernist narrative that the nation is an entirely constructed artifice is rejected, and Smith's definition of collective identity is upheld more forcefully: there are certain tangible symbols, objects or practices which serve as a key part of a collective identity. These are rooted in something more than in the modernist account. Adding the second prong of Smith's definition, these things are understood by the individuals in the collective identity. Therefore, the ethnosymbolist account is a more realistic model – not an essentialist or ethnic account per se, but a refinement of modernist national identity into something more convincing. Going further, Adrian Hastings, in rejecting the modernist account of national identity, uses the following definition of national identity:

> A nation is a far more self-conscious community than an ethnicity. Formed from one or more ethnicities, and normally identified by a literature of its own, it possesses or claims the right to political identity and autonomy as a people, together with the control of specific territory, comparable to that of biblical Israel and of other independent entities in a world thought of as one of nation-states.[104]

[102] Leith and Soule, *Political Discourse and National Identity in Scotland* (n 8) 9-10
[103] A D Smith, *Nationalism and Modernism (*Routledge: Abingdon 2003), 195
[104] A Hastings, *The Construction of Nationhood: Ethnicity, Religion and Nationalism* (Cambridge University Press, Cambridge 1997), 3

This definition is used as the basis for exploring Scottish national identity later in the thesis. For now, it should be noted that we again have the two-pronged approach to collective identity earlier relied on by Anthony Smith. The collective imaginary is an important element. There are also tangible things here, most obviously the physical territory, to complement the collective identity.

National Identity and Constitutional Identity: Parallels and Differences

Constitutional identity has a clear overlap with national identity. In the EU context, national identity and constitutional identity are often used interchangeably. This is due to the wording of Article 4(2) TEU, which upholds that:

> …the Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government'.

Elke Cloots rejects combining constitutional and national identity on the grounds of constitutional theory. She points out that the phrasing of Article 4(2) suggests that it is the manifestation of national identity in forms such as legal order, as opposed to a broader notion of constitutional identity.[105] This leads to her instrumental argument that the EU respects national identity because national identity is popular and useful, making it effective as a means to entrench liberal goods.[106] In contrast, constitutional identity is more closely aligned with claims of national sovereignty as it has emerged at the UK level. In the UK case, the thought seemed to be that constitutional identity would defend the sovereignty of the UK and, by extension, the sovereignty of the British Parliament.[107] Cloots' arguments are convincing in the EU case and are not disputed here. However, while constitutional identity became a zeitgeist after Article 4(2) was enacted, the concept of constitutional identity is a older and broader as discussed in the previous part.

[105] E Cloots, 'National identity, Constitutional Identity, and Sovereignty in the EU' (2016) 45(2) Netherlands Journal of Legal Philosophy 82, 86
[106] *ibid* 86-87
[107] *ibid* 93

Francois-Xavier Millet draws a distinction between what he calls "national constitutional identity claims" (NCIs) and more general claims from national identity.[108] While challenging to separate, he argues that there is a discrete category of constitutional identity claims and national identity claims. Millet does not attempt to draw a distinction between constitutional identity and NCIs, but his writing deals only with uses of Article 4(2) and not constitutional identity more generally.

The framework of the EU serves as the background for Anna Śledzińska-Simon's account of constitutional identity too, which turns on the Polish example. She argues that there are two conceptions of constitutional identity in play: the one premised on a national identity and the other on liberal universalist values.[109] This dichotomy presents universalist values as foreign to Poland as there still is not a cohesive European identity.[110] Her key distinction lies in the fact that universalist values are regarded as foreign to Poland and not a part of national identity there.

Moving a little away from Article 4(2) claims, Kriszta Kovács highlights how easily conflated national and constitutional identity are in her outstanding article on the legal meanings of each term. Finding a distinction lies in the nature of national identity, whether it be ethnocultural or not. When ethnocultural elements come to be restrained by universalist values, civic identity is achieved – which in turn can then be conflated with constitutional identity.[111] Her own approach instead seeks to address the nature of the constitution itself as opposed to the collective identity, arguing that a constitutional identity only emerges in the interaction between the constitutional text and its interpretation.[112] Thus, constitutional identity does not pre-suppose a constitution and is instead derived from it.

[108] F X Millet, 'Successfully Articulating National Constitutional Identity Claims: Strait is the Gate and Narrow is the Way' (2021) 27(3) European Public Law 571, 573
[109] A Śledzińska-Simon, 'Constitutional identity in 3D: A model of individual, relational, and collective self and its application in Poland' (2015) 13 I•CON 124, 149
[110] *ibid* in particular 154-155
[111] K Kovács,'Constitutional or ethnocultural? National identity as a European legal concept' (2022) 8(1) Intersections: East European Journal of Society and Politics 170, 174
[112] *ibid* 176

Her general argument is that certain national identities can amount to constitutional identities, while others cannot. Essentially, moving back towards the EU space, a constitutional identity is a cultural or particular interpretation and application of universalist principles, which Hungary's exclusionary claim to constitutional identity cannot meet because it is just an ethnocultural identity.[113]

Separating national and constitutional identity without the Article 4(2) definition in play is a more challenging exercise. Tripković argues that, for a community to have a constitutional identity, it must have a constitution, and the values which emerge as constitutional identity must arise through virtue of having a constitution.[114] This shares similarities with Kovacs' approach, which also highlighted how a constitutional identity derives from a constitution. Jacobson highlights that, in his view, the distinction between national and constitutional identity lies in timing: in his Turkish example, the key point is the constitutionalising of a national identity.[115] While in that moment constitutional and national identity may have been identical, there is nothing to prevent either from changing according to the changing national and constitutional contexts and becoming quite different over time, even if there is continuity with that point of sameness.

To sum up, the key argument made here is that the boundary between constitutional and national identity is more fluid than accounted for in the present scholarship. Constitutional identity is not the same thing as national identity. While this is certainly true, the reverse may not be: could constitutional identity be a part of national identity? Ultimately, no: while in some systems they may be extremely alike, there are subtle differences. Returning to the two-part definition of collective identity shows this. The 'things' in a national identity differ from those in a constitutional identity, where the 'things' are laws. In an individual case, the things may be identical or similar. For example, the USA's national identity is built from its constitution to a fairly large extent, and civic national identity may be indistinguishable from a constitutional identity in content.

[113] *ibid*, 184-185
[114] Tripković (n 84) 368
[115] Jacobsohn, *Constitutional Identity* (n 72), 10

The imagined communities each may display the same characteristics, such as in Scotland, which will be argued later to have embedded universalist principles in its civic nationalism.

While constitutional identity may derive elements from national identity; it is the parts that derive from having a constitution. The 'having' is key: this allows pre-constitutional elements to be a part of constitutional identity, as opposed to being limited to identity which only derives from the constitution itself. The narratives around the founding of a constitutional order can therefore be included, for example, or the story of why a constitution was adopted. However, the constitution is clearly also one of the tangible things required within a collective identity, as previously identified by Anthony Smith. The constitution and the arising beliefs must also have a degree of compatibility. This is because although tensions and dispute are an ever-present part of constitutional identity, the two parts of constitutional identity are related to each other, and so cannot be contradictory. More accurately, the two parts cannot be perceived to be contradictory, as we are dealing with questions of identity and beliefs in this thesis. The next theories discussed in this section are all legal. The first, law as tradition, is not expressly constitutional, but it has interesting points to guide the discussion of constitutional identity here.

Law as tradition

Law as tradition, as the name suggests, is an approach which seeks to highlight the importance of tradition in the law. Constitutions, in their role as a source of legal legitimacy, their supremacy, and their supposed foundation by the constituent power, produce a law which is particularly reliant on tradition and the past. Central to law as tradition is the pastness of law; however, pastness is not the same as the historical past. As Martin Krygier points out, in traditions the past is used normatively in the present, as opposed to being an accurate analysis of the past. A large part of the law as tradition approach seeks to critique the association between tradition and a failure to be critical.

As Patrick Glenn put it:

> 'Traditional' societies are . . . ones that are not dynamic or self-critical or rational, and we see everywhere in Western society, and Western academic discussion, the dichotomy between tradition and modernity. It is as though the modern Western world sprang somehow from nowhere and did not itself develop over thousands of years[116]

Kyrgier shares this critique while not going as far as Glenn. First, he argues that seeking to find legal systems and maintain the post-Westphalian nation-state model as a map for law is misguided, particularly when the role of the past is played down. Instead, law is inherently bound by its context. Because law develops through tradition, speaking of overarching legal systems across orders is nonsensical. Kyrgier points out that Glenn objected strongly to reification under terms such as culture, believing that it homogenises law but also sets up conflict, as groups of people sorted into different sets will always lead to conflict.[117] Instead, all people are free to be guided by traditions, which are simply information from the past.[118] Kyrgier' critique lies with this oversimplification of tradition: pointing out that pastness is a normative concept incompatible with a view of traditions as non-normative information.[119] In other words, tradition is 'information-plus', the plus being the cultural and national factors needed to make traditions normative pastness. The plus is unavoidable and always has the potential for chauvinism – a more pessimistic but realistic take on legal tradition.[120]
Tradition is not an effect produced by law, but rather is central to law – law is, simply, a tradition[121]. Tradition is defined as tripartite: through its pastness, its authoritative nature, and as its continuous link with the past[122]. Pastness refers to the fact that a tradition is required to have come from a previous time, be it real or imaginary. The authoritative nature of tradition is derived from law's reliance on its past: tradition is not a matter of pure history.

[116] H Patrick Glenn, 'A Concept of Legal Tradition' (2008) 34 QLJ 427, 429.
[117] M Krygier 'Too Much Information' in H Dedecke (ed.) *A Cosmopolitan Jurisprudence: Essays in Memory of H. Patrick Glenn* (Cambridge University Press, Cambridge 2021), 125- 126
[118] *ibid* 130
[119] *ibid* 135
[120] *ibid* 142
[121] M Krygier, 'Law as Tradition' (1986) 5(2) *Law and Philosophy* 237, 239- 240
[122] *ibid* 240

Instead, traditions rely on conventions, social practices, and particular understandings to apply that tradition to the contemporary world – something that law does.[123]
Finally, this must be reinforced by continuity. This means that there must be a 'real or imaginary' continuity with this authoritative past.[124] This does not mean that tradition (or law) is rigid; rather, as an oral tradition would change over time through its different tellers, law changes over time through its different interpreters.[125] However, while the narratives and traditions which make up law may shift and fluctuate, and those narratives can be real or imagined, there is a general framework in which those narratives arise.

Bearers of tradition change it, whether consciously or unconsciously, by applying it to contemporary issues. In this way, narration is the method of transmission, organising the practices, beliefs or customs to create continuity in passing them on. Law as tradition is an individualised theory which pushes back against superficial notions of constitutional systems or types. Law is, by definition, organically created and specific to its context. This attaches law to the people who live under it, or as used here, a part of the factors which make a constitution attach. The crucial insight from law as tradition applied in this thesis is that pastness differs from factual history, and this is central to understanding the continuity and change dynamic. The next theories discussed in this part are expressly constitutional and are also attempts to account for the non-legal factors that attach a constitution to a people.

The Constitutional Imaginary

A concept which occupies much of the same area as constitutional identity is the constitutional imaginary. The imaginary can be described as a broad concept and is difficult to separate from belief in some contexts.[126] The key understanding of the imaginary in this context is the social imaginary.

[123] *ibid* 245- 250
[124] *ibid* 250- 251
[125] *ibid*, 251- 254
[126] See e.g. the critique of Jack Balkin's faith based imaginary in G Torres & L Guinier, 'The Constitutional Imaginary: Just Stories about We the People' (2012) 71 MD. L. REV. 1052

The constitutional imaginary is a subset of the social imaginary, as separated from the term 'imagination': the key point is the social nature of an imaginary as opposed to an individual's imagination.[127] While pervasive, the social imaginary frequently encounters and uses other aspects of the 'human condition', such as power or institutions.[128]

Social imaginaries, as applied to constitutions, form the scaffolding on which a constitution rests.[129] Jan Komarek uses the term constitutional imaginaries loosely, noting that it is:

> … constitutional imaginaries as sets of ideas and beliefs that help to motivate and at the same time justify the practice of government and collective self-rule. They are as important as institutions and office-holders.[130]

Jiri Priban takes a slightly different approach, describing the constitutional imaginaries as '…systemic constructs describing functionally differentiated modern society as one polity'.[131] This builds on the societal imaginary, which is how society constructs itself.[132] Essentially, a constitutional imaginary fills the gaps throughout a constitution by performing multiple roles. It is also a component of constitutional identity, as collective identities use the imaginary to form their beliefs about what makes them a collective. Therefore, the constitutional imaginary exists within the minds of the constitutional subject as a part of their constitutional identity, legitimising and providing familiarity to a constitutional order. The constitutional imaginary is used in this thesis under the ambit of constitutional identity.

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[127] J Krummel, S Adams, J Smith, P Blokker, N J Doyle, 'Social Imaginaries in Debate' (2015) 1(1) Social Imaginaries 15, 16
[128] *ibid* 19-20
[129] D Wincott, C R G Murray and G Davies 'The Anglo-British imaginary and the rebuilding of the UK's territorial constitution after Brexit: unitary state or union state?' (2022) 10(5) Territory, Politics Governance 696, 697
[130] J Komárek 'Why read The Transformation of Europe today? On the limits of a liberal constitutional imaginary' (2020) iCourts Working Paper Series no.213, 7 <https://drive.google.com/file/d/1c0J2ax1DxcHf-eS6Zuzga_6LNRlpPosU/view> accessed 5 May 2022
[131] J Přibáň *Constitutional Imaginaries: A Theory of European Societal Constitutionalism* (Routledge, London 2021), 15
[132] *ibid* 1

Constitutional Narrative

Constitutional identity relies on the idea of constitutional narrative, but what precisely is a constitutional narrative? Laurence Tribe captures the concept well when he describes the American constitution as a verb as opposed to a noun.[133] As he put it:

> …the Constitution truly is a verb - an ongoing act of creation and re-creation that we perform in courts, in the halls of Congress and in the White House, on the streets, in scholarly works, and in a dazzling array of other venues. These elements of practice are all essential to our charter's re markable capacity to constitute us as "We, the People." In this way, the story of the Constitution truly becomes America's constitutional narrative[134]

He believes that narratives are central to animating the text of the American constitution. While his assertion that the constitution is the overall narrative of the people may not be true of countries with less of a cultural attachment to their constitution than the United States, his point about the constant negotiation of the constitution is true in all contexts. He captures the relationship between narratives and counter-narratives within the constitution by discussing cases on the First Amendment:

> These cases each represent moments at which the Court - or a concurring or dissenting Justice - offered a story of who we are and what we value, sometimes joining this vision to a retelling of our imagined past, but always linking it to the same constitutional text and speaking in the name of the same trans-generational community. The many versions of these narratives are thus all part of our nation's collective narrative, which in turn consists of an ongoing conversation about the evolving and competing principles that bind us in order to make us more free[135]

[133] L H Tribe, 'America's Constitutional Narrative' (2012) 14(1) Daedalus 18, 19
[134] *ibid* 34
[135] *ibid* 26

In other words, a constitution is both a vessel for numerous narratives and is also itself a constitutional meta-narrative. There is constant dialogue about these competing narratives, with each connected to history. A constitutional narrative is particular to its constitutional order: it is the story of that constitution. However, as Tribe mentions, there are multiple possible narratives available within the greater story of the constitution. Once again, constitutional narratives can be subsumed under the definition of constitutional identity used here, as narratives are a part of pastness. The constant dialogue on competing narratives reflects the disharmony of constitutional identity, and the narratives are different interpretations within the boundaries of constitutional identity.

Constitutional Culture

Another term that covers similar grounds to constitutional identity is constitutional culture. 'Culture' is a notoriously difficult concept to describe. According to the Stanford Encyclopaedia of Philosophy, while culture is ambiguous, it is extremely important to people – and this importance is key despite the difficulties in defining culture.[136] Beginning with legal culture, this is generally taken to be the culture of the legal profession or those who work in the legal system. Legal culture in the EU can be understood as two things: the legal culture of the nation-state or the legal culture of the EU itself.[137] This is a different concept from that of this thesis, which is the interaction between identities, culture and history with the Scottish constitution.

Constitutional culture is defined by the fact that it cannot be replicated elsewhere. Also contested, constitutional culture can be broadly described as a concept which highlights the historical and traditional aspects of constitutional law, seeking to bridge the divide between the normative legal aspects of a constitution with the more 'guttural' aspects of a constitution.[138]

[136] P T Tamara, 'Culture' The Stanford Encyclopaedia of Philosophy <https://plato.stanford.edu/entries/culture/> accessed 7 June 2022
[137] R Hauser, M Zirk-Sadowski, and B Wojciechowski *The Common European Constitutional Culture: Its Sources, Limits and Identity* (Peter Lang GmbH Internationaler Verlag der Wissenschaften, Berlin 2016) 17-18
[138] A M Siegel 'Constitutional Theory, Constitutional Culture' (2016) 18(4) Journal of Constitutional Theory 1067, 1108-1109

There is a great deal of overlap between culture and identity here. In a sense, this thesis does not advocate for identity as opposed to a cultural approach; rather, constitutional identity is simply preferred, as it offers a better structured and more in-depth account. In particular, the focus on dispute and uses of the past allows for greater clarity about whose identity is being imagined. The point here is to be critical. Constitutions seek to create solidarity through a single collective narrative. In using pastness, we concede the imaginary role that history must have in the present, but that does not mean we can ignore undesirable aspects of the past. As Jacobsohn sets out, there must be a degree of dispute passed down as tradition,[139] meaning that minority views and counter narratives are taken into account. This thesis argues that pastness must serve egalitarian and universalist principles and is an important aspect of constitutional identity.

Conclusion

National identity has many parallels with constitutional identity, but it is not the same thing. Tripković's clarification that constitutional identity requires a constitution is key. It's a very simple observation that will be used to limit the boundary between national and constitutional identity in this thesis. Constitutional identity is two-part, made up of the constitution and the identity that arises as a result of having that constitution. In practice, constitutional and national identity may share many of the same characteristics.

While differing in nature, the function of each of these other theories is broadly the same: they are trying to account for the elusive factor which makes each constitution unique and adheres it to a people. A constitution can only take effect if it is bought into by the actors it intends to empower and bind. Constitutional identity can be designed or it can emerge organically, but it simply refers to what ties a constitution to a people, time and place. All of the theories discussed overlap to a greater or lesser extent and constitutional identity is simply the best way to frame this idea. In addition, as will be argued later, identity and constitutional ideas are closely interlinked in Scotland, suggesting a fluid boundary with broader identities, such as national identity.

[139] Jacobsohn, *Constitutional Identity* (n 72) 320

This thesis does not cover thicker claims of constitutional identity, such as Article 4(2) TEU, as these are individual attempts to operationalise constitutional identity as opposed to constitutional identity itself.

Moving towards the topic of the thesis, Scotland arguably has two constitutions: the British and the more contested Scottish in the form of the Scotland Act. Broadly, elements of Scottish identity which interact with the British constitution are Scottish constitutional identity, as are features of the Scottish Constitution and their interaction with identity. While a simple formulation, the reality is more interlinked between the two constitutions on the one hand and national and constitutional identity on the other. Nonetheless, the formulation is useful in shaping Scottish constitutional identity.

Part Three: Sketching British Constitutional Identity

This short part will attempt to sketch a British constitutional identity, applying the analysis of the previous part. Several difficulties arise in doing this. First, and most obviously, there is no written constitution. The British constitution also does not have a role for the constituent power. Finally, the UK is a multinational state, leading to questions over whether a single constitutional identity is possible. These issues are discussed in turn in the sections below.

Identifying the British Constitution and British Constitutional Law

The British constitution is famously unwritten, meaning that pinning down exactly what it is can be challenging. Virtually all accounts begin with the work of A.V. Dicey and his famous twin principles of parliamentary sovereignty and the rule of law. His much-quoted definition of parliamentary sovereignty is set out here:

> The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined 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[140]

This means that there is no entrenchment or higher law, as any Act may simply be undone by the British Parliament. The British constitution slowly modernised and evolved over the 20th century after discontent with the Diceyan framework.[141] Dicey was never expressly disavowed, but the language around the constitution shifted from unwritten to *uncodified* in the early 21st century. This is because certain legal texts and statutes were increasingly being ascribed constitutional meaning, making the British constitution less an absence of a text and more a mosaic of texts.

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[140] A V Dicey *Introduction to the Study of the Law of the Constitution* (MacMillan, London Eighth Edition, 1915), 3-4

[141] M Loughlin, "The British Constitution: Thoughts on the Cause of the Present Discontents." (2018) 16(1) New Zealand Journal of Public and International Law 1, 4

The Supreme Court has used the following formulation:

> 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.[142]

This approach was to argue that there were certain constitutional statutes or constitutional instruments which enjoyed some form of entrenchment. Common law constitutionalism, of which the constitutional statutes argument is a part, formed an attempt to synthesise parliamentary sovereignty with the legitimacy of a more typical constitutionalism by making the common law the parent and master of parliamentary sovereignty.[143] Under this, constitutional statutes were not subject to implied repeal, providing a weak entrenchment. Accompanying the common law turn were several practical reforms which made Dicey's formulation appear increasingly oversimplified. These included the Human Rights Act, EU membership and the creation of devolved parliaments and assemblies in the UK's minority nations and region. Identifying the British constitution was never an easy task, but it became even more complicated in the twenty years or so that preceded Brexit.

[142] R (on the application of HS2 Action Alliance Limited) (Appellant) v Secretary of State for Transport and another (Respondents) [2014] UKSC 3. Paragraph 208

[143] T R S Allan 'Questions of legality and legitimacy: Form and substance in British constitutionalism' (2011) 9(1) International Journal of Constitutional Law 155, 162

Incoherence

The definitions of the British constitution given above date from before 2016. Since Brexit, the British Constitution has shifted through significant case law, legislative changes and the removal of the EU from the British constitution. In one of these cases, the Supreme Court characterised the historic development of the constitution:

> Unlike most countries, the United Kingdom does not have a constitution in the sense of a single coherent code of fundamental law which prevails over all other sources of law. Our constitutional arrangements have developed over time in a pragmatic as much as in a principled way, through a combination of statutes, events, conventions, academic writings and judicial decisions.[144]

The Court then goes on to approvingly cite the work of Dicey.[145] This case and the constitutional changes brought by Brexit are discussed in more depth later in the thesis. For now, it can be noted that pinning down the British constitution is particularly difficult due to its rapid changes in recent years. The pragmatic development has been accelerated by several71 constitutional disputes, leading to a lack of coherence on the nature of the constitution. In this confused constitution, then, defining its identity is even more challenging. The next section focuses on one writer who has discussed this issue.

[144] R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant) [2017] UKSC 5. Paragraph 40
[145] *Ibid*; paragraph 43

English and British Constitutional Identity

In the literature review, Paul Craig's take on UK constitutional identity was briefly considered. As previously discussed, he argues that it would be made up of parliamentary sovereignty, the principle of legality, constitutional statutes, the rule of law and devolution.[146] However, he did not properly account for devolution beyond referencing the Sewel Convention.[147] Craig also acknowledges that a traditional reading of parliamentary sovereignty would make it the only facet of British constitutional identity,[148] as it means that Parliament could simply abolish anything else he lists. He avoids this problem by arguing that parliamentary sovereignty is the foundational norm of the UK Constitution and can ultimately only exist so far as it is accepted by people living in the UK,[149] and it changes according to its social acceptance.[150] Therefore, parliamentary sovereignty is not an unconstrained element but instead part of a negotiated constitutional settlement. However, this opens up the question of who socially accepts parliamentary sovereignty.

The Englishness of the narrative used to legitimise parliamentary sovereignty and the British constitution is crucial. Wincott et al. argue that a false assumption about territory underlies the dominant UK constitutional imaginary: the conflation of the UK and its largest constituent nation, England. This allowed for the persistent of the UK as a unitary state and primarily is derived from traditionalist accounts of the English constitution, namely Dicey's.[151] Dicey famously argued that the Acts of Union were no more significant than any other legislation due to the continuity and nature of parliamentary sovereignty.[152] The British constitution is riven with gaps and contradictions, particularly as this imaginary could not co-exist with the increasingly multinational turn in UK governance.

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[146] P Craig, "Constitutional Identity in the United Kingdom: an Evolving Concept." In C Calliess and G van der Schyff (eds.) *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press, Cambridge 2019), 288- 298
[147] *ibid* 298
[148] *ibid*,288
[149] *ibid* 289
[150] *ibid*
[151] Wincott, Murray and Davies 'The Anglo-British imaginary and the rebuilding of the UK's territorial constitution after Brexit: unitary state or union state? (n 130), 711
[152] Dicey (n 141) 141

Therefore, an imaginary can stand in contradiction with another, particularly when the imaginary is rooted in a territorial inaccuracy. The belief in English constitutional continuity essentially serves as the scaffold to the British constitution, guiding the ideas and beliefs which govern the United Kingdom and providing that Craig's account of British constitutional identity is, in many ways, a description of English constitutional identity with certain concessions, primarily devolution, tacked on. The very nature of parliamentary sovereignty means that those concessions can only ever be temporary. Turning to acceptance by the people does not fix the stranglehold of parliamentary sovereignty, as England is overwhelmingly the dominant nation in the UK.

Conclusion

There is no singular British identity in general because of the UK's multinationalty. The identity that arises from having the British constitution is an English identity, as Diceyan narrative is key to sustaining it. Scotland also has the British constitution, but the corresponding identity that arises is not English identity. While dissonance between different identities is inherent, this raises questions about the extent of disputes between the parts of a constitutional identity, the constitution and the corresponding identity, as the two are necessary components. Can the two be incompatible? This thesis will argue that they cannot *appear* to be contradictory to holders of the constitutional identity. Subsequent chapters will demonstrate how Scottish ideas of sovereignty, central to Scottish identity, and the British constitution can appear to be compatible in Scotland through unionism and the associated idea of the union state. A key aspect of this is the historic flexibility and ambiguity of the British constitution, allowing it to have several different interpretations.

Chapter Conclusion

This chapter has sought to break down the concept of constitutional identity. Constitutional identity is marked by constant dispute and disharmony, whether between the core of the constitution and its collective identity, between different conceptions of the constitutional core or fundamental nature, or between different conceptions of constitutional identity held by constitutional subjects. However, certain features exist: pastness, for example, as transmitted through narrative is an important feature in constitutional identity. The constitutional imaginary is also contained within constitutional identity, as it provides the imagined links between the holders of constitutional identity and their constitutional order. In essence, the constitution is two-part: first, it is a collection of laws or norms that form the basis of governance. Second, and no less importantly, it is the factors required to make that constitution attach to its people. In this sense, the factors that make a constitution persist are very similar to those that make an identity persist. It encompasses the package of factors which account for the 'buy-in' to a constitution by its people. It is a matter of collective beliefs and not one of accurate history. Rather, it is a blend of instrumental understandings of the past, of traditions, or myths. The best frame to analyse this is constitutional identity. Constitutional law has still not transitioned away from the nation and constitutional identity may resemble national identity. In essence, the identity of a constitution is amorphous and likely flows into national identity to greater or lesser degrees. The key point is that constitutional identity is identity that arises because of to the fact that there is a constitution, serving to demarcate constitutional identity and national identity. This accounts for another crucial part of constitutional identity: that it has two linked prongs. These are the tangible thing and the collective imaginary, with the tangible thing being the constitution.

British Constitutional identity is difficult to identify for several reasons. Whatever identity can be sketched out relies on the English narrative of Dicey, parliamentary sovereignty, and the unitary state. The next chapter explored an equivalent narrative in Scotland, that of the Declaration of Arbroath, beginning the process of describing Scottish constitutional identity.

Chapter Three: The Declaration of Arbroath, Popular Sovereignty and the Scots Law Tradition

Introduction

> THIS year we will celebrate the 700th anniversary of the Declaration of Arbroath ... a timely reminder that when the second Scottish independence ref-erendum is held Scotland, we will not be voting to secede from England but to break a 300-year-old union between two nation states. We will be voting to resume a statehood of long standing[153]

> The Declaration of Arbroath is without doubt the most inspirational document in Scottish history. It continues to radiate universal ideas about freedom and constitutionalism that are shared worldwide in countries which revere democracy…. How was it possible that such sophisticated, valued and universal ideas as, for example, the sovereignty of the people, were confidently articulated so early in such an allegedly remote and apparently insignificant little country as Scotland?[154]

The Declaration of Arbroath is the most famous document in Scottish history.[155] Written in the aftermath of the Wars of Independence, the Declaration of Arbroath (DoA henceforth) was a letter written to the Pope asserting Scotland's right to independence and self-defence. It is nonsensical to argue that constitutional principles were set out in 1320, well before the era of constitutional democracy. Nonetheless, this chapter argues that a Scottish constitutional community has since emerged, anchored to the historical myth of the DoA. All communities, in addition to countries, are imaginary. The myth of the DoA has been key to creating such an imaginary community in Scotland, providing a foundation for constitutional claims.

[153] Taken from a speech made by Joanna Cherry MP QC at the University of Edinburgh. Edited version published in the National: J Cherry, 'Scottish independence – the two things we MUST do' (*The National,* 1 March 2020) <https://archive.fo/jHPdA#selection-1243.3-1247.193> accessed 1 June 2020

[154] Cowan (n 22) 4

[155] M Lynch, *Scotland: A New History* (Pimlico, London 1992), 111

The purpose of this chapter is a case study to sketch the broader hypothesis: that there is a Scottish constitutional identity, whereby modern constitutional arguments are understood in line with native Scottish constitutional traditions. The conclusions are twofold: first, the DoA was central to the establishment of a Scottish constitutional identity and a 'cultural imagining' of popular sovereignty. This means the creation of the imaginary Scottish constitutional community and their ability to initially authorise devolution, and now their ability to consent to or leave the United Kingdom. In other words, the DoA is used to argue for self-determination. The second conclusion is that beyond this point, references to the DoA are made in an inconsistent and incoherent way in terms of constitutional law. This is because the DoA is important to two overlapping but ultimately separate communities in Scotland: the national and the constitutional.

These two communities and their intrinsic links are a reflection of the dual interpretations of the DoA: a largely historically accurate one as a statement of nationalism and a second as a sort of constitutional act of the Scottish people. Ultimately, this chapter will show that the existing literature on the DoA points to it having an important role in Scottish constitutional thinking. However, precisely what this means has not been discussed, either in its nature or implications. To begin doing this, the next chapter turns to identity more generally in Scotland.

This chapter will refer to unionists and nationalists. Nationalists are those who favour the independence of Scotland. By unionists, reference is made to those who wish for Scotland to remain a part of the United Kingdom. The thesis argues that unionism is, especially today, a weak form of nationalism. This means that both exist on the same continuum, which recognises the Scottish nation and its importance but differ on what the constitutional position of that nation should be. Therefore, 'legal nationalists' who are politically unionists, such as Lord Cooper, will simply be called unionists.

This chapter mainly engages with secondary sources to interpret the Declaration of Arbroath. This includes sources on the historical interpretation of the Declaration as well as sources on its contemporary interpretations. Many quotes are used as this chapter is a case study on the understanding of a document.

Part One: The Declaration of Arbroath

Introduction

The Declaration of Arbroath is remembered today as a statement of popular sovereignty and Scottish nationhood. However, the accuracy of this interpretation is questionable. This part begins by breaking down the DoA to see what it said in its own time. The translated text is quoted and analysed, accompanied by secondary literature, to reveal the original meaning behind the words and the basis for modern interpretations. Later sections in this part summarise the changing interpretation of the DoA up until the 20th century.

The Myth and the History

The Declaration of Arbroath dates from 1320, written during the reign of Robert I (or the Bruce) of Scotland. The Bruce had emerged as the King following the Wars of Independence, which were partially resolved when Robert decisively defeated the English Army at the Battle of Bannockburn. The DoA is one of three letters written to the Pope. The first came from the King, the second from the clergy, and the final letter from the nobles which has survived and become known as the DoA. The most famous passages are five and six:

> But from these countless evils we have been set free, by the help of Him who though He afflicts yet heals and restores, by our most tireless prince, King and lord, the lord Robert. He, that his people and his heritage might be delivered out of the hands of our enemies, bore cheerfully toil and fatigue, hunger and peril, like another Maccabaeus or Joshua. Him, too, divine providence, the succession to his right according to our laws and customs which we shall maintain to the death, and the due consent and assent of us all have made our prince and king. To him, as to the man by whom salvation has been wrought unto our people, we are bound both by his right and by his merits that our freedom may be still maintained, and by him, come what may, we mean to stand.

> Yet if he should give up what he has begun, seeking to make us or our kingdom subject to the King of England or the English, we should exert ourselves at once to drive him out as our enemy and a subverter of his own right and ours, and make some other man who was well able to defend us our King; for, as long as a hundred of us remain alive, never will we on any conditions be subjected to the lordship of the English. It is in truth not for glory, nor riches, nor honours that we are fighting, but for freedom alone, which no honest man gives up but with life itself[156]

One way these passages have been interpreted is as a statement of popular sovereignty – in other words, the King's power was rooted in the Scottish people.[157] This understanding emerged later. As Dauvit Broun has argued, there were actually immediate political motivations behind the DoA. The Bruce lineage was precarious and the likely successor, should the line fail, was Edward Balliol in England.[158] Broun therefore argues that this is the true meaning of passages five and six: it is a safeguard against the real possibility of a pro-English king.[159] Geoffrey Barrow makes a similar point but instead points out that Balliol was incompetent.[160] Robert I was also struggling to legitimise his rule, given his earlier excommunication[161]. Some have gone as far as calling the DoA 'Bruce propaganda'.[162] Finally, the Pope was keen for Scotland to resolve its differences with England and commit forces to the crusades.[163] The DoA, therefore, was an attempt to set out the relationship between Scotland and England from a Scottish point of view and to shore up the royal line of succession.

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[156] Translation of the Declaration of Arbroath
[157] G W S Barrow, *The Declaration of Arbroath: History, Significance, Setting* (Society of Antiquities of Scotland, Edinburgh 2003),Preface 1
[158] Broun (n 23) 1- 3
[159] *ibid*
[160] G W S Barrow, *Robert Bruce and the Community of the Realm of Scotland* (Edinburgh University Press, Edinburgh 2013) Near footnote 154 (no page numbers)
[161] L S Harrison, 'That famous manifesto: The Declaration of Arbroath, Declaration of Independence, and the power of language' (2017) 26(4) Scottish Affairs 435, 436
[162] M Brown and S Boardman, 'Survival and Revival: Late Medieval Scotland' in J Wormald, (ed.) *Scotland: A History* (Oxford University Press, Oxford 2021), 72
[163] Harrison (n 162) 436

The DoA sets out the importance of Scottish sovereignty, probably as another way to strengthen the weak Bruce position. Passage two, which asserts this sovereignty, is deeply nationalistic, and an almost entirely false piece of propaganda.[164] Nonetheless, it is a statement of independence which would have been easily understood at the time:[165]

> Most Holy Father, we know and from the chronicles and books of the ancients we find that among other famous nations our own, the Scots, has been graced with widespread renown. It journeyed from Greater Scythia by way of the Tyrrhenian Sea and the Pillars of Hercules, and dwelt for a long course of time in Spain among the most savage peoples, but nowhere could it be subdued by any people, however barbarous. Thence it came, twelve hundred years after the people of Israel crossed the Red Sea, to its home in the west where it still lives today. The Britons it first drove out, the Picts it utterly destroyed, and, even though very often assailed by the Norwegians, the Danes and the English, it took possession of that home with many victories and untold efforts; and, as the histories of old time bear witness, they have held it free of all servitude ever since. In their kingdom there have reigned one hundred and thirteen kings of their own royal stock, the line unbroken by a single foreigner.

The DoA came during the Wars of Independence, and so stating the existence of the Scottish nation was important in the face of potential English annexation. The DoA was the most important part of the creation of a Scottish history, or a Scottish national narrative to deal with the instability brought by the Wars of Independence.[166] Murray Pittock, for example, argues that the DoA is a remarkably sophisticated statement of Scottish nationality.[167] Whatever Scotland was before, the DoA clearly defined Scotland as a nation and has since been central to claims of Scottish sovereignty.[168]

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[164] Broun (n 23) 3
[165] *ibid*
[166] Lynch (n 156) 121; S Mapstone, Scotland's Stories in Wormald, J (eds.) *Scotland: A History* (Oxford University Press, Oxford 2011) 251
[167] M G H Pittock, *Scottish Nationality* (Macmillan: London 2001) 28- 29
[168] *ibid*

The DoA was therefore instrumental in its purposes: providing stability in an era of unstable succession and defining the Scottish nation to the wider world. This meaning changed in later centuries.

Rediscovery and Transformation

The fate of the DoA did not appear to be promising, as it was lost. It was then, however, rediscovered and published in 1680. In the meantime, the writings of George Buchanan had gained traction in Scotland. He wrote on popular sovereignty and produced theories of contractual monarchy.[169] His work was combined with the rediscovered DoA to create the Whig vision of the Scottish nation in the 17th century and was used to justify both the Claim of Right and the Glorious Revolution on the grounds of ancient constitutionalism.[170][171] The DoA was, therefore, used to provide a narrative to the Scottish constitution prior to the Union with England and changed in interpretation according to contemporary ideas.

The 20th century saw another transformation in the understanding of the DoA through the previously discussed *MacCormick v Lord Advocate.* Again, the case turned on the naming of Queen Elizabeth as Elizabeth II, despite there being no Elizabeth I of Scotland.[172] The case was not successful, but the presiding judge, Lord Cooper, made a striking comment in his *dictum,* stating that parliamentary sovereignty was an 'English Principle' with no equivalent in pre-union Scotland.[173] Lord Cooper's famous *dicta* stated that the Act of Union was fundamental law, in contradiction to the Diceyan view.[174] Lord Cooper was one of the leading figures in Scots law during the 20th century.

[169] R Mason, 'Renaissance and Reformation: The Sixteenth Century' in J Wormald (ed) *Scotland: A History* Oxford University Press, Oxford 2011), 118
[170] Kidd *Subverting Scotland's past: Scottish Whig historians and the creation of an Anglo-British identity 1689-1830* (n 5) 28; Kidd does make the overall argument that the DoA and the use of medieval texts was not a part of Enlightenment thinking, but Cowan argues that the DoA was drawn upon by thinkers in the period: Cowan (n 22) 141- 145
[171] *Ibid*
[172] *MacCormick* (N 17)
[173] N MacCormick, 'Does the United Kingdom have a Constitution? Reflections on McCormick v. Lord Advocate' (1978) 29(2) Northern Ireland Legal Quarterly 1, 6
[174] MacCormick *Questioning Sovereignty* (n 16)*,* 53- 54

His *dicta* in the MacCromick is generally regarded as based on his study of the DoA, as he was an enthusiastic legal historian, although Lord Cooper himself never confirmed this.[175] The idea of a contractually limited monarchy, which began in the 17th century, was adapted for the democratic age and became something akin to popular sovereignty. While the case had little legal effect, a narrative started to form.

The notion of 'sovereignty' was propelled to importance in nationalist thought by the MacCormick case.[176] All strands of SNP opinion in the late 20th century were united by the belief that the Scottish people must be the authors of their constitutional future, or in other words, Scottish popular sovereignty.[177] Neil Walker characterises Scotland's turn towards 'the people' as 'reflexive nationalism' and links it to other nationalist movements in Europe.[178] In Scotland, this sovereignty of choice can be reinforced by citing the supposed constitutional principles of the DoA, giving the claims an apparent legitimacy in a historic source.

Conclusion

The DoA was written with clear goals in mind. The first was a statement of the distinct Scottish nation in the context of the wars of independence. The second was to provide a justification for the removal of a potential king, as a weak candidate was high on the list of successors to the Scottish throne. The DoA's second instrumental goal was given a constitutional meaning by later readers, who interpreted it along their own constitutional circumstances. The next part moves into contemporary uses of the DoA to see how modern actors interpret the DoA.

[175] H MacQueen, Legal Nationalism: Lord Cooper, Legal History and Comparative Law (2005) 9(3) Edinburgh Law Review 395, 395; Cowan (n 22), 6; A McHarg, 'The Declaration of Arbroath and Scots Law' In K P. Muller (Ed) *Scotland and Arbroath 1320-2020: 700 years of fighting for freedom, sovereignty and independence* (Peter Lang, Lausanne 2020), 425- 426

[176] L Bennie, R Johns and J Mitchell, *The Scottish National Party: Transition to Power* (Oxford University Press, Oxford 2012), 19

[177] Ibid

[178] N Walker, 'When Sovereigns Stir' in B Leijssenaar and N Walker (eds.) *Sovereignty in Action* (Cambridge University Press, Cambridge 2019), 53- 54

Part Two: Contemporary References to the Declaration of Arbroath

Introduction

This section deals with how the DoA is applied to contemporary constitutional issues in Scotland. Three issues are used as a structure: devolution, independence and Brexit. For each, quotes and references to the DoA are analysed in order to discuss the themes that emerge.

Devolution

The campaign for Scottish devolution was long and spanned the 20th century. The marked change in the successful 1997 referendum on Scottish devolution was a resurgence in Scottish national identity, along with the Scottish Constitutional Convention, which deliberately referenced Scottish history and entwined itself with the 'Scottish people' by encouraging the participation of civic Scotland.[179] The Campaign for a Scottish Assembly, the forerunner of the Constitutional Convention, published a Claim of Right, which argued for the 'submerged' Scottish tradition of popular sovereignty.[180] It begins with the following statement:

> We, gathered as the Scottish Constitutional Convention, do hereby acknowledge the sovereign right of the Scottish people to determine the form of Government best suited to their needs[181]

The Scotland Act has since been amended twice, with both amendments taking their lead from the actions of the Scottish electorate.

[179] C Craig, 'Unsettled Will : Cultural Engagement and Scottish Independence' (2016) 18 Observatoire de la société britannique, paragraph 38

[180] Bogdanor, *Beyond Brexit: Towards a British Constitution* (n 46) 251; Tierney also highlights the centrality of the concept of a Scottish constituent power: Tierney, 'We the Peoples: Constituent Power and Constitutionalism in Plurinational States' (n 28) 242- 243

[181] D Torrance, 'Claim of Right for Scotland' (*House of Commons Research Briefing*, 3 July 2018) <https://commonslibrary.parliament.uk/research-briefings/cdp-2018-0171/> accessed 1 February 2020

The Scotland Act 2012 was a largely cosmetic reaction to the landslide victory of the Scottish National Party in the 2011 Scottish Parliament Election. The second amendment is more important: the Scotland Act 2016 came as a result of the so-called 'Vow', a last-ditch commitment made by British political leaders to reform and respect Scotland as an 'equal partner' if Scotland voted no during the 2014 Scottish independence referendum.[182] The opening section of the Act makes the Scottish Parliament and Government permanent, which plays into the vision of the union state and pushes against the sovereignty of the British Parliament.[183]

There has been some dissent to the general narrative. For example, unionist and Labour MP Tam Dalyell opposed devolution to Scotland on the grounds that an elected assembly was an essential part of nationhood and would eventually make its own claims of sovereignty.[184] However, as Michael Keating points out, most unionist contemporary politicians recognise the Scottish nation and the necessity of their consent for the Union.[185] The campaign for Scottish devolution shows how unionism grew to accept its 'weak nationalism'. The Campaign for a Scottish Assembly, when formed in the late 1970s in order to campaign for home rule, drew its members from across all of the major political parties in Scotland with the exception of the Conservatives.[186] The aforementioned 'submerged' Scottish tradition of popular sovereignty[187] was bought into by the majority of civic Scotland from across the spectrum of unionist and nationalist views.

Devolution was championed by unionists and nationalists alike in a campaign that drew heavily on Scotland's constitutional heritage, including the DoA. The devolution process reflected the collective myth of Scottish popular sovereignty that the DoA has created.

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[182] The 'vow' was originally published in the Daily Record: see M Foote, 'Inside THE VOW: How historic Daily Record front page which changed the course of Britain's constitutional settlement was born' (*Daily Record,* 2018) <https://www.dailyrecord.co.uk/news/politics/inside-vow-how-historic-daily-6464878> accessed 3 January 2019

[183] Scotland Act 2016 c.11 section 1

[184] M Keating, *The Independence of Scotland: Self-government and the Shifting Politics of Union* (Oxford University Press, Oxford 2009), 39- 40

[185] *ibid 81*

[186] T M Devine, *The Scottish Nation: A Modern History* (Penguin Books, London 2012), 607

[187] Bogdanor, *Beyond Brexit: Towards a British Constitution* (n 46) 251

The expressly national framing of devolution also shows the importance of the national sovereignty that can be drawn from the DoA. In the period before Brexit, devolution was strengthened in response to the views of the electorate in Scotland and by the Conservative majority British Government. The narratives of the DoA are embedded into the story of devolution and have become non-controversial collective beliefs.

Independence

Unsurprisingly, the DoA was referred to during the 2014 independence referendum. The Scottish Government published a draft interim constitution for an independent Scotland. The accompanying Bill passed in the Scottish Parliament opened with the statement: 'In Scotland, the people are sovereign'.[188] The next section of the draft constitution sets out how this sovereignty was to operate. The will of the people is to be enacted through their elected representatives, referendums, and by 'other means provided by law'.[189] As W. Elliot Bulmer has argued, there was no means of entrenchment envisioned for the new constitution, which would have therefore reduced the constitution of Scotland to a new parliamentary sovereignty – a 'populist parliamentarism, in which power would be popular in its origins, but parliamentarian in its exercise'.[190] However, the Bill also set out a commitment to a written constitution.[191] Other writers, such as Andrew Tickell, argue that there is an existing tension within nationalist thought between popular and legal sovereignty.[192] The draft constitution shows the limit of Scottish popular sovereignty derived from the DoA: it is used for singular choices, such as independence, and then as authorisation for a legalised constitution. Within the UK, the SNP argue for Scottish popular sovereignty. In an independent Scotland, this popular sovereignty is conceived of as more of a constituent power simply founding the new order. The draft constitution shows how incoherent thinking about Scottish popular sovereignty is at present.

[188] The Scottish Independence Bill: A Consultation on an Interim Constitution for Scotland <https://www2.gov.scot/Resource/0045/00452762.pdf> accessed 12 December 2018, section 2
[189] Section 3(3)
[190] W E Bulmer, 'The Scottish Constitutional Tradition: A Very British Radicalism?' (2015) 7(1) Perspectives on Federalism 31, 41
[191] Section 33
[192] A Tickell, 'The Technical Jekyll and the Political Hyde: Scotland's Independence Neverendum' in A McHarg, T Mullen, A Page and N Walker (eds.) *The Scottish Independence Referendum: Constitutional and Political Implications* (Oxford University Press, Oxford 2016), 337- 338

Finally, those on either side of the independence debate are not opposed to using the nationalist symbolism and rhetoric of the DoA for their own political ends.[193] For example, Prime Minister Ted Heath made a 'Declaration of Perth' in 1968 in a move to appease Scottish voters through minor concessions towards Home Rule.[194] The symbolism of Arbroath is also important to Scottish nationalists. First Minister Alex Salmond unveiled his own 'Declaration of Arbroath' as a part of the 2014 independence referendum campaign.[195] As a part of the unveiling, he stated: 'True popular sovereignty will come to Scotland. This will be our moment – our time'.[196] The contents of this 'new Declaration of Arbroath' were entirely political, featuring issues such as the NHS and food banks.[197] This shows how the DoA is used to both state constitutional principle, but is also used as a purely nationalist political device. Not all references to the DoA are expressions of collective beliefs and narratives.

The Brexit Process

The Brexit process has led to several significant court cases and two are discussed here. The legal ramifications of the cases are covered in detail elsewhere in the thesis, and only references to the DoA are considered in this section. The first of these cases is *Miller.*[198] The case turned on whether the British Government could trigger Article 50 TEU using the Royal Prerogative, as opposed to passing legislation in the British Parliament. The Scottish Government joined the case as an intervener and was represented by the Lord Advocate. The IWGB (Independent Worker's Union of Great Britain) also joined the case and was represented by Aidan O'Neill QC.

[193] J Mitchell, *the Scottish Question* (Oxford University Press, Oxford 2014), 84- 85
[194] Cowan (n 22) 113
[195] S McNair, 'Scottish independence: Salmond invokes Bruce' (*The Scotsman,* 19 August 2014) <https://www.scotsman.com/news/politics/scottish-independence-salmond-invokes-bruce-1528695> accessed 15 December 2018
[196] ibid, see also L Brooks, 'Scottish independence referendum weekly review: from Arbroath to Edinburgh, via my wisdom teeth' (*The Guardian,* 22 August 2014) <https://www.theguardian.com/politics/scottish-independence-blog/2014/aug/22/scottish-independence-referendum-weekly-review-from-arbroath-to-edinburgh-via-my-wisdom-teeth> accessed 15 December 2018
[197] 'Scottish independence: One month to go in referendum campaign' (*BBC News* 18 August 2014) <https://www.bbc.co.uk/news/uk-scotland-scotland-politics-28828332> accessed 16 December 2018
[198] *Miller* (n 145)

These submissions are striking and directly reference the DoA to argue that it establishes 'the sovereignty of the people limiting the powers and rights of the Crown (and Parliaments)'.[199] The claim is also made that popular sovereignty was an active principle in pre-Union Scotland, drawn from the DoA and the writings of Buchanan.[200] The narratives of the DoA are argued to be virtually justiciable and directly relevant to the Brexit process. In the judgement of the Supreme Court, these issues were avoided, as there was no mention of the DoA, popular sovereignty, or any arguments that could be connected with the DoA. Instead, Scotland was viewed only through the prism of devolution legislation.[201] Therefore, the deeper constitutional questions behind the British constitution were ignored as the court instead chose to turn to parliamentary sovereignty. The questions raised by the DoA within the British constitution were avoided. However, it is striking that the submissions framed their arguments in the way that they did.

The arguments in the second *Miller* case also made use of the DoA. The case concerned the prorogation of the British Parliament by the Boris Johnson government at a crucial juncture of the Brexit process, allegedly as a way to force through Brexit.[202] Several cases were brought across the UK. The Scottish case was successful, with the Inner House of the Court of Session ruling that the advice for prorogation was unlawful, and the Supreme Court later confirmed the verdict. The pursuer, Joanna Cherry MP QC, made this statement in the British Parliament while questioning the advice of the Attorney General to advise the government to prorogue Parliament:

> Yesterday was a very special day for Scots law and the Scottish legal tradition going back to the declaration of Arbroath that the Government are not above the law[203]

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[199] Written Intervention For The Independent Workers Union Of Great Britain (IWGB) accessed at <https://www.supremecourt.uk/docs/independent-workers-union-great-britain.pdf>, paragraph 2.3

[200] *ibid* paragraph 3.6

[201] The judgement does refer to the Claim of Right 1689, but locates it in a British context, calling it one of a series of important statues from the era and draws an equivalence with the Bill of Rights 1688/89: *Miller* (n 145) paragraph 41. The location of the devolution settlement in Scottish history and constitutional tradition by the applicants is not mentioned in any part of the judgement

[202] R (on the application of Miller) (Appellant) v The Prime Minister (Respondent) Cherry and others (Respondents) v Advocate General for Scotland (Appellant) (Scotland) [2019] UKSC 41

[203] HC Deb 25 September 2019 Vol 444 Col 652

This argument is an interesting distortion of the DoA and, in a sense, a more historically accurate one than the popular sovereignty myth, as the DoA was designed to restrain the powers of a potentially weak or pro-English king. The DoA is being used here to argue for the constitutional restraint of the British Government. In addition, the statement goes beyond what the Court of Session actually ruled.

The Court of Session made reference to the DoA in its judgement. The Court also made the argument that parliament is subject to the law in Scotland.[204] This was rooted, however, in the legacy of Buchanan and the Claim of Right of 1689, which is then placed in the British constitutional narrative of the Glorious Revolution. In the subsequent UK Supreme Court case, the respondents, who included Joanna Cherry, made submissions which argued that the DoA established the tradition of 'popular sovereignty limiting the powers and rights of the Crown', which sits against the 'English historical myth' of the Magna Carta and parliamentary sovereignty.[205] This is justified by arguing that the DoA sets out two constitutional arguments with regards to 'sovereignty and kingship': first, the phrase 'assent and consent', and then the passage which focuses on the nobles' right to 'drive out' the King if he becomes weak in the face of the English.[206] The argument is entirely reliant on the misinterpretation of the DoA. The judgment of the Supreme Court makes no reference to the DoA or popular sovereignty.[207] The only mention of Scotland in the reasoning of the Court refers to an argument made by the British Government, which simply draws equivalence to the effect of the Claim of Right 1689 with the English Bill of Rights 1688.[208] Like at the Court of Session, Scottish history was placed into British narrative. Therefore, the prism of the decision was the British constitution as opposed to including the arguments for native Scottish popular sovereignty or a limit on governmental powers. Again, the issue of the DoA was sidestepped by the Supreme Court. Nonetheless, it is notable that legal arguments are being constructed using a Scottish constitutional narrative at odds with the dominant British constitutional narrative.

[204] *Joanna Cherry QC MP and Others v Advocate General* [2019] CSIH 49. Lord Carloway at paragraphs 30- 31
[205] Case for the Respondents (J Cherry) <https://www.supremecourt.uk/docs/written-case-for-joanna-cherry-qc-mp.pdf> paragraph 4.5
[206] *Ibid* note 80
[207] *Miller II/Cherry* (n 203).
[208] *ibid* paragraph 63 & 64

The DoA has been turned to again by nationalist politicians and the nationalist press in light of Brexit.[209] Brexit has also revealed the belief in the choice of the Scottish people which unites unionists and nationalists. This does not seem immediately apparent, as Brexit hinged on the 'will of the people' of the UK, as opposed to the will of the peoples.[210] Therefore, it is comprised of a single British *demos* which could override the position of its smaller Scottish fraction. Nationalists have objected to Brexit by arguing that it violates the will of the Scottish people.[211] The unionist position does, in fact, not dispute that the consent of the Scottish people is necessary. The dispute is a matter of degree: nationalists argue that the consent of the Scottish people was necessary to enact Brexit, while unionists argue that the Scottish people gave their consent to remain in the UK in 2014 and, by extension, decisions taken by the UK.[212] The present argument has been reduced to semantics. The SNP are arguing that Brexit amounts to a 'material change of circumstances' from the terms Scotland consented to in 2014 and so, therefore, another independence referendum is necessary to gain that consent again. Unionists deny that Brexit is such a change. Everyone in Scotland, however, is arguing within the same framework, which is centred on the right of the Scottish people to choose. It would be a mistake, however, to claim that there is uniformity in references to the DoA. The most unusual use of the DoA come across is an article written by Lord Forsyth, the former Secretary of State for Scotland.

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[209] See e.g T Ahmed-Sheikh, '.The Declaration of Arbroath is as relevant as it has ever been' (*The National* 16 October 2019) <https://www.thenational.scot/news/17970101.declaration-arbroath-relevant-ever/> accessed 17 May 2020

[210] See e.g. M Fletcher, 'Brexit Day is no cause for celebration – this is a moment of profound national shame' (*New Statesman* 31 January 2020) <https://www.newstatesman.com/politics/brexit/2020/01/brexit-day-no-cause-celebration-moment-profound-national-shame> accessed 16 May 2020. Fletcher notes how the 'will of the people' actually excludes remain- voting areas such as Scotland and London.

[211] 'Brexit vote: Nicola Sturgeon statement in full' (*BBC News* 24 June 2016) <https://www.bbc.co.uk/news/uk-scotland-36620375> accessed 15 May 2020. In particular: 'As things stand, Scotland faces the prospect of being taken out of the EU against our will. I regard that as democratically unacceptable'

[212] See statement of First Minister Nicola Sturgeon above, in particular: 'Indeed for many people the supposed guarantee of remaining in the EU was a driver in their decision to vote to stay within the UK. So there is no doubt that yesterday's result represents a significant and a material change of the circumstances in which Scotland voted against independence in 2014'; for the unionist response see e.g. the statements of Scottish Secretary Alistair Jack in response to a request for a second independence referendum by the Scottish Government: 'I don't believe that it's a democratic mandate because the Scottish people decided in 2014 and that was only five years ago' 'Scottish independence: Boris Johnson to 'carefully consider' indyref2 request' (*BBC News* 20 December 2019) <https://www.bbc.co.uk/news/uk-scotland-scotland-politics-50866247> accessed 15 May 2020

He cites the famous words, 'for freedom alone', to make his pro Brexit, pro- Boris Johnson argument.[213] This is not a typical view and associating a Scottish statement of national sovereignty with Brexit seems simply political.

Conclusion

The DoA still has a resonance in contemporary constitutional issues. The two ideas of sovereignty, national and popular, continue as broad threads in contemporary uses of the DoA. The next part will show how it is no easy feat to untangle these threads. They cannot be separated by nationalist or unionist usage, for example. By turning to Scottish constitutional thought, law and the DoA, the deep connection between national and popular sovereignty in Scotland will be demonstrated.

[213] M Forsyth, 'Forget Boris or Brexit – the real threat to the Union comes from giving in to nationalists' demands' (*The Telegraph* 4 June 2019) <https://www.telegraph.co.uk/politics/2019/07/04/forget-boris-brexit-the-real-threat-union-comes-givingin-nationalists/> accessed 17 May 2020

Part Three: The Declaration of Arbroath, Scots Law and the Constitution

Introduction

This part goes deeper into what the continuing use of the DoA means. It will begin with Scots law and Scottish legal nationalism, and then turn to constitutional thinking and ideas of popular sovereignty. This part also accounts for the 20th century in more detail, and how the DoA acquired its modern character of a statement of Scotland's fused popular and national sovereignty.

Scots Law and Scottish Legal Nationalism

Scots law is unique, distinct and plays a role in broader Scottish identity. On a simple level, Scots law is linked to national identity because it represents a Scottish system which may come into conflict with, or be subordinated by, external systems.[214] In this sense, Scotland's separate laws have been invoked for the purposes of asserting Scottish nationality for centuries.[215] This was, however, not particularly unique to Scotland.[216] In addition, Scots lawyers have been open in noting similarities between English and Scots law for centuries.[217] However, replacing Scots law with English law at the time of the Union would have been practically impossible, as it would have upended the system of land tenure that the ruling Scottish class relied upon.[218] MacQueen persuasively argues that the Scots legal profession, courts, private law and criminal law served as the vessels of Scottish distinctiveness throughout the Union, as the locus of public law moved south. In educational terms, Scots law was taught as private law, while the chair of public law at Edinburgh university became more concerned with general public and international law.[219]

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[214] H L A MacQueen, 'Public Law, Private Law, and National Identity' in C Mac Amhlaigh, C Michelon, and N Walker (eds.) *After Public Law* (Oxford University Press, Oxford 2013), 171
[215] *ibid* 172-173
[216] *ibid* 175-177
[217] J W Cairns *Law, Lawyers, and Humanism: Selected Essays on the History of Scots Law, Volume 1,* (Edinburgh University Press, Edinburgh 2017), 92-93
[218] J W Cairns page 93
[219] MacQueen 'Public Law, Private Law, and National Identity' (n 215) 182-183

Nonetheless, there was a constitutional aspect to Scotland's different private law because of its status as a mixed jurisdiction containing elements of common and civil law. Scots private law required protection from the dominant English common law, as the Union united the political powers of England and Scotland, but Scotland retained residual statehood through features such as its laws.

A thicker 'ideology' of Scots legal nationalism came to the fore in the mid twentieth century.[220] It can be characterised as thus:

> Scotland's legal tradition as more European, cosmopolitan and outward-looking than the insular English common law[221]

The key figure in this ideology was Lord Cooper, who was driven by his fear of the extinction of Scots law borne out of his narrative of Scots law as endlessly comparative and borrowing in nature.[222] Thus, his motive was to show the unique strengths of Scots law. Cooper's nationalism was not political, in that he did not favour Scottish independence and was a staunch Unionist. However, he played a key role in propelling the DoA into a living document with significance for Scots law, as his *dicta* has held a 'tantalising reticence' over Scottish legal thought.[223] Contemporary uses of the DoA go beyond Scots law, as will be turned to next.

[220] MacQueen 'Legal Nationalism: Lord Cooper, Legal History and Comparative Law' (n 176), 396
[221] B Jackson *The Case for Scottish Independence: A History of Nationalist Political Thought in Modern Scotland* (Cambridge University Press, Cambridge 2020) 37
[222] MacQueen 'Legal Nationalism: Lord Cooper, Legal History and Comparative Law' (n 176) 401-402
[223] Kidd *Subverting Scotland's past: Scottish Whig historians and the creation of an Anglo-British identity 1689-1830* (n 5) 130

The Development of Arbroath as a Constitutional Principle

Neil MacCormick was the central figure in studying the DoA as a constitutional principle and taking it beyond Scottish legal nationalism. He seized upon the 1953 case of *MacCormick v Lord Advocate* and developed an argument for a Scottish constitutional tradition.
He shared a name with the case due to his father, Scottish National Party co-founder John MacCormick, being one of the parties.

In its original form, of course, the DoA was not a statement of constitutional principle: in 1320 Scotland did not have a constitution, and the DoA in its historical context does not suggest that its drafters intended constitutional meaning in our own sense. Its modern meaning as a statement of popular sovereignty and democracy has nothing to do with its medieval content, which was actually fairly typical.[224] The reality of a continuous tradition of Scottish popular sovereignty was also doubted by Neil MacCormick himself.[225] He instead believed in the 'cultural imagining' of Scottish popular sovereignty.[226] The precise meaning of this will be turned to now.

At its most simple, popular sovereignty is the belief that ultimate authority rests with the people. Popular sovereignty has a tension, as the doctrine may signify several democratic practices.[227] What, then, for a 'cultural imagining' of such sovereignty? The real power of the Scottish people to govern themselves, the extent of this power and how this power would realistically function is not clear. It is also difficult to separate the DoA from its nationalism. There is an intrinsic link between popular sovereignty and all nationalisms,[228] because all acts of 'the people' are nationalistic in that they rely on 'a people'.[229]

[224] Harrison (n 162) 2
[225] H L A MacQueen, 'A Post- Positivist Outlook from the Thistle' in N Walker (ed.) *MacCormick's Scotland* (Edinburgh University Press, Edinburgh 2012), 8-10
[226] N Walker, 'Scottish Nationalism for and Against the Union State' in N Walker (ed.) *MacCormick's Scotland* (Edinburgh University Press, Edinburgh 2012), 189
[227] K Olson, *Imagined Sovereignties: The Power of the People and Other Myths of the Modern Age* (Cambridge University Press, Cambridge 2016), 52
[228] B Yack, 'Popular sovereignty and nationalism' (2001) 29(4) Political Theory 517, 517
[229] *Ibid*

As Kevin Olsen points out, the very conception of 'the people' goes together with their normative power, and so thus 'imagined communities' have an 'imagined sovereignty'.[230] In Scotland, however, the narrative of popular sovereignty is expressly buttressed through the DoA. This demonstrates that the nationalistic and the constitutional are linked in Scotland.

The operation of the DoA as popular sovereignty remains problematic, and there may be an alternative understanding of the DoA. This is the idea of the DoA as the foundation of a Scottish constituent power. As described above, the meaning of the DoA beyond a basic core of the right to decide Scotland's constitutional position is contested. Through the DoA, the Scottish people are viewed as potential constitutional founders, whether within the UK or outside of it. Stephen Tierney argues that Scotland has carved out a role as a constituent power. This came through devolution: 'revolutionary constituent power' was used, but to reaffirm the sub-state's understanding, and endorsement of, the broader state constitution.[231] In other words, devolution was an expression of the union state narrative, Scotland's narrative of the broader British constitution. He bases his argument on the fact that devolution was a bottom-up reform, coming from Scotland itself. This constituent power was able to emerge because of the narrative of Arbroath, which has a rhetorical legacy and a legacy as a part of Scotland's national identity.

The Union State and Challenging the State

Drawing a legal line from the DoA is clearly impossible. However, law, in particular constitutional law, is more than a set of norms. It also represents the aspirations and self-image of a people. The source of a constitution's normative power is disputed, as previously argued, and constitutions do not automatically have legitimacy.[232] They are symbolic and rely on narratives.[233] In this way, constitutions are more than a set of laws.[234] They have narratives and counter narratives.

[230] Olson (n 228) 97
[231] Tierney, 'We the Peoples: Constituent Power and Constitutionalism in Plurinational States' (n 28) 243- 244
[232] Vorlander, 'Constitutions as Symbolic Orders: The Cultural Analysis of Constitutionalism' (n 66) 215- 216
[233] Blokker and Thornhill, 'Sociological Constitutionalism' (n 67)14
[234] *Ibid*

Building on this, there are contrasting interpretations of the British constitution: the aforementioned Diceyan understanding built around a unitary state and the Scottish vision of a union state.[235] The union state interpretation hinges on the Act of Union 1707 as the foundation of a new state, leading to a determination to respect Scotland's place within the United Kingdom.[236] The consent of the Scottish people is key, as sovereignty rested with the Scottish people prior to the Union and continues to do so. Therefore, the UK contains multiple peoples as opposed to a unified *demos.*[237] This counter-narrative is the lens used on the British constitution and contrasts with the dominant Diceyan narrative.

Historian Iain McLean reads the 'English' and 'Scottish' visions of the constitution back to the drafting of the Acts of Union themselves. He calls these visions the 'Defoe' and the 'Dicey' and links these narratives to contemporary constitutional law[238]. He identifies these two poles as the belief in a contractual union and the belief in an incorporating union. Scottish unionism is a 'political doctrine' which has become entwined with the idea of the Union[239]. McClean calls it 'nationalist unionism', the preservation of Scottish institutional separateness, and identifies it as both a key concern at the creation of the Union and a political movement which regained importance from the 1950s onwards[240].
The Treaty of Union contained, in the words of Michael Clancy, certain 'opt-outs' which in turn maintained Scottish identity: namely, education, the law and the church.[241] The two visions contrast: the Diceyan can be described as the model built around the sovereignty of the British Parliament, in which the English constitution simply absorbed Scotland[242]. The 'Defoe' view is that the Union must be contractual. While simple, this basic frame is useful to capture the dominant narrative of the British constitution and the basic Scottish counter-narrative.

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[235] MacCormick, Is there a constitutional path to Scottish independence? (n13) 727
[236] Mullen, 'Brexit and the Territorial Governance of the United Kingdom' (n 14) 2-3; Kidd and Petrie, 'The Independence Referendum in Historical and Political Context' (n 14) 38- 39
[237] A McHarg, 'The Future of the United Kingdom's Territorial Constitution: Can the Union Survive?' in A Lopez-Basaguren, and L E San- Epifanio (eds.) *Claims for Succession and Federalism* (Springer, Cham 2019), 142- 143
[238] I McLean 'Understanding the Union' in M Keating (ed.) *The Oxford Handbook of Scottish Politics* (Oxford University Press, Oxford 2020), 131- 134
[239] M Keating, 'Scotland as a Political Community' in M Keating (ed.) The Oxford Handbook of Scottish Politics (Oxford University Press, Oxford 2020), 4
[240] McLean 'Understanding the Union' (n 239) 120
[241] M P Clancy, 'Scots Law and Scots Identity: A legendary Tale' (2018) 27(1) Scottish Affairs 73, 74
[242] McLean 'Understanding the Union' (n 239) 125- 126

The work of James Tully can shed light on the nature of constitutional counter-narratives and the nation and the relationship between nation and state. Tully collapses nationalist constitutional counter-narratives into what he calls 'calls for constitutional recognition of cultural diversity'. Essentially, all minority groups seek self-rule according to their own terms, perceive their present constitutional arrangements to be unfair, and all place their unique *culture* at the core of politics.[243] Thus, they form constitutional counter-narratives against the dominant narrative of the state. Recognition as an independent nation-state remains the most esteemed form of cultural recognition, and the link between a culture demanding recognition becoming a nation and then ultimately a nation-state has been the chief idea in constitutional thinking for around three hundred years.[244] He draws a sharp distinction between the constitutional tradition of unfixed, pre-set constitutions with the needs and claims of multiple groups.[245] Tully's central argument is ambitious: he argues that a constitution must be conceived of as unfixed, a 'multilogue' between diverse cultures.[246] This challenges the typical assumption about constitutional recognition for groups, which is as follows:

Culture= Nation= Nation State

Simply, Tully seeks to challenge the presumption that a culture must amount to a nation, and a nation to a nation-state. Claims for Scottish recognition are not always as ambitious. In fact, a key element of Scotland's push for autonomy is justified through Scotland's status as a nation as opposed to a culture or regional grouping. More practically, the nation and the nation-state remain in vogue, and the weaknesses in more ambitious ways of organising societies, namely the EU, are well documented. However, Tully's approach is right to acknowledge the role of the nation and of culture in constitutions along with highlighting the fluidity and pluralism in identities under a constitution.

[243] J Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press, Cambridge 1995), 4-6
[244] *ibid* 8
[245] *ibid* 28 -29
[246] *ibid* 24- 29

Do the calls for recognition within the UK amount to a call for a more ambitious form of cultural recognition which breaks Tully's tripartite assumption? The link is broken at the final stage: Scotland is a nation within a broader state, but, adding complexity, the Scottish nation retained some aspects of a state such as independent law. Scottish unionists and nationalists lie upon a spectrum of nationalism, all beginning from a premise of Scottish nationhood. A simple table, based on Tully's categorisations, can illustrate this point:

Claim for Constitutional Recognition in Scotland	**Unionist**	**Nationalist**
Culture = Nation	Yes	Yes
Nation = Nation State	No	Yes

More ambitious arguments are made about the nature of the Scottish nation in line with Tully's thoughts. Michael Keating, for example, draws attention to the problematic phrase 'stateless nation' to describe Scotland:

> Scotland is less an anomaly or an unfulfilled nation and more the harbinger of a new post-sovereign, complex, and multi-level political order in which nation, territory, and state are not necessarily coterminous but are in continual flux[247]

This is behind much of the writing on Scotland and the description of the UK as 'plurinational'. This is the idea that there are multiple nations connected to a single state. Plurinationalism challenges the traditional tripartite assumption at the first stage, arguing that there is a separation between nation and state.[248] Plurinationalism can be separated from multiculturalism through the existence of territorial units which, in many ways, mimic the functions of a nation-state, as opposed to simple minority groups.[249] Thus, Scotland does not need an individual state to attach to in an increasingly nested and plural legal order, which also encompasses the post-sovereign European space. The nature of nation, state, sovereignty, and the law are increasingly complex and overlapping.

[247] Keating, 'Scotland as a Political Community' (n 248) 3
[248] Tierney, 'We the Peoples: Constituent Power and Constitutionalism in Plurinational States' (n 28) 229- 230
[249] *ibid* 232

This overlapping framework is also, however, distinctly national, because the concept of the nation cannot be supplanted with culture in the plurinational account. This is demonstrated by plurinationalim only arising in states which are structurally and territorially multinational and not occuring in states which are merely multicultural. Plurinational states are separately created between territorially bound groups. Therefore, the narrative of Scottish nationhood maintained through the Act of Union is key to the thinking about Scotland today, including the DoA and its narrative of Scotland voluntarily consenting to the Union.

The European Union has called the nature of the British state into question: essentially, decentralisation of the UK from both above through EU membership and below through devolution has weakened the traditional conception of the unitary British state. The EU created a forum for post-national or 'post sovereign' ideas.[250] However, this vision has arguably never been accepted in England:

> Two visions of the nature of the state thus co-exist. In England, there is a unitary vision, focused on a unitary and sovereign parliament. In the other nations, there is a multilevel vision, based on divided authority and diffused sovereignty[251]

Arguments for Scottish independence embrace Tully's tripartite model in that they seek to link the Scottish nation to an independent Scottish state. This does not mean that they necessarily reject plurinationalism, or more plural approaches to nation, state and law. To complicate matters, there is a political connection between those who seek Scottish independence and EU membership. 'Independence in Europe' has been the longstanding goal of Scotland's largest nationalist party, the Scottish National Party (SNP).[252] Neil MacCormick sought to intellectually reconcile his beliefs in both Scottish independence and post-sovereignty.[253]

[250] M Keating, 'Brexit and the Territorial Constitution of the United Kingdom' (2018) 98 Droit et Societe 53, 57
[251] *ibid* 56
[252] *ibid* 57
[253] Walker, 'Scottish Nationalism for and against the Union State' (n 227) 173

He sympathised with a sort of 'reflexive nationalism', in which the goal was constantly shifting as opposed to the lodestar being only nation-state independence: this could account for the impossibility of the nation-state in a more interconnected world.[254] He also appreciated elements of the union-state model, appreciating its flexibility and gradualism.[255] In other words, there is a great deal of complexity in the goals of constitutional counter-narratives in Scotland. One observation is that there appears to be a shared vision of the flexible British state between the narratives of the union state, plurinationalism and more plurinational approaches in Scottish nationalism, as advocated by MacCormick.

Unionists and nationalists in Scotland therefore share a constitutional counter-narrative: this is rooted in the core of unionism, the claim for Scotland to be treated as an equal nation within the UK.[256] While this contrasts with the Diceyan understanding of the UK built around a unitary state,[257] It would be a mistake to overstate the total rejection, historically, of parliamentary sovereignty in Scottish constitutional thought.[258] However, the broad sweep of Scottish interpretations of the United Kingdom are based on the premise of the multinationality of the new state and the rejection of the idea of absorption by England. The union state model is able to accommodate such diversity through its nature: the separation and institutions left intact by the Union provided for a 'commitment to continued distinctiveness'.[259] Thus, the narrative of Scottish differentiation was also left intact in the form of the Union, which is asymmetrical, evolutionary, flexible and constantly negotiated.[260] Scotland, through devolution, was not revolutionising the British constitutional order or Scotland's place within it. Rather, devolution affirmed the British constitution as unionists conceived of it.

[254] *ibid* 188- 189
[255] *ibid*
[256] D McCrone, *The New Sociology of Scotland* (SAGE, London 2017) 15; Keating, *The Independence of Scotland: Self-government and the Shifting Politics of Union* (n 185) 40- 43
[257] MacCormick, Is there a constitutional path to Scottish independence? (n13) 727
[258] Kidd *Subverting Scotland's Past: Scottish Whig Historians and the Creation of an Anglo- British Identity* (n 5) 128- 129
[259] Walker, 'Scottish Nationalism for and against the Union State' (n 227) 178
[260] *Ibid*

One can see this in the famous statement of Scotland's inaugural first minister following the establishment of the parliament in 1999 -

> We look forward to the time when this moment will be seen as a turning point: the day when democracy was renewed in Scotland when we revitalized our place in this our United Kingdom

As this quote shows, there was nothing new created: rather, devolution was a matter of 'renewal' and 'revitalisation' of Scotland within the British order. In terms of constitutional identity, then, negation appears to have happened, with a new people marking themselves out as distinct. However, that people do not seek to break with their constitutional order. Instead, they want to uphold their vision of it, which has always been of distinct peoples. The very foundation of the United Kingdom provides the difference which marks out Scots as a separate group.

The DoA is an important point in constitutional thinking in Scotland. Narrative are central to constitutional identity,[261] and the DoA provides a meta narrative. The contested constitutional self[262] in Scotland exists within the boundaries set out by the Declaration's interpretation. James Mitchell argues that 'Scottish nationalists who see some unbroken line reaching back to Bannockburn and the Declaration of Arbroath' are 'making a mistake' because all nations are imaginary and artificial.[263] He is correct, but downplays the importance of the DoA. This is MacCormick's 'cultural imagining' of sovereignty. It is not a hard legal concept, nor a correctly derived historical one. Rather, a sort of Scottish constituent power has been created on the false belief of the DoA and reinforced through rhetoric, devolution and referendums. This does not make it any less powerful today. The DoA is a 'living document', constantly being cited and reinterpreted throughout history.[264]

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[261] Jacobsohn, *Constitutional Identity* (n 72) 90- 91
[262] Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (n 75) 26
[263] Mitchell, *the Scottish Question* (n 194) 3
[264] G Hassan 'The Declaration of Arbroath is Alive and Kicking in Modern Scotland' (29 January 2020) <https://www.gerryhassan.com/blog/the-declaration-of-arbroath-is-alive-and-kicking-in-modern-scotland/> accessed 27 August 2020

This has given the DoA the ability to appeal to both unionists and nationalists, as it is being constantly reinvented to fit with contemporary events.[265]

Conclusion to Part Three

The DoA is a part of Scotland's legal and constitutional self-understanding. First, in a shallower sense, the rhetoric and the meaning of the Scottish nation as independent is clearly nationalistic and is recalled and used as such. Second, the attempts to craft a civic, modernist and institutional Scottish national identity, such as through unionism and legal nationalism, lend themselves well to the second interpretation of the DoA as some sort of statement of popular sovereignty.

The roots of Scottishness do not have to be ethnic, as the DoA foundation myth creates a national identity which is legalistic and free from factors such as language. Entangled with this is the narrative of the Union as the coming together of two equal nations, which entails that the UK is more flexible than the English narrative of parliamentary sovereignty suggests. Again, the point can be made that separating the constitutional from the nationalistic with regard to the DoA is impossible.

[265] I Brown, *Performing Scottishness* (Palgrave Macmillan, London 2020),27

Chapter Conclusion

There is no legal continuity to be derived from the Declaration of Arbroath. The idea of popular sovereignty being enshrined in the document is nonsense and it is absurd to believe that the Scottish constituent power asserted itself in 1320. An idea of the Scottish people has taken root in subsequent history built around the myth of the DoA. The idea of the Scottish people as authors of their constitutional future is fundamentally anchored in the DoA and forms the basis of constitutional debate in Scotland today. The 700th anniversary of the DoA was marked in April 2020. The pro-independence National newspaper wrote:

> TODAY is the 700th anniversary of the Declaration of Arbroath, the first time that the sovereignty of the people of Scotland was articulated, the first time that we see the dawning of realisation that all of us who belong to this ancient collectivity that constitutes this nation should have an equal say, an equal right, an equal voice. All those many hundreds of years ago, our ancestors stood up and declared that it would be the people of Scotland, not a king or a monarch, who had the ultimate right to decide the path that their nation treads[266]

The unionist Scotsman carried a piece by Scottish Conservative MSP Murdo Fraser:

> Historical misconceptions aside, the importance of the Declaration of Arbroath can be recognised by all, regardless of political persuasion. It reiterates that after the Wars of Independence Scotland was a self-governing country, meaning that, unlike Wales and Ireland, Scotland became part of the United Kingdom not as a consequence of conquest by an English army, but rather as voluntary choice taken by the Scots Parliament of the time. It meant that two free and independent countries came together in a Union…

[266] 'Wee Ginger Dug on the Declaration of Arbroath anniversary' (*The National,* 6 April 2020) <https://www.thenational.scot/news/18359973.looking-ahead-different-scotland-declaration-arbroath-anniversary/> accessed 18 June 2020

> It is precisely because Scotland's Union with England was voluntary that the Declaration of Arbroath can be celebrated today by unionists as much as nationalists[267]

There is a Scottish constituent derived from the DoA, to the extent that the Scottish people are believed to have the fundamental right to decide whether to remain a part of the United Kingdom or become an independent country as a national and constitutional community in their own right. More ambitious arguments may be made using the DoA, but at present, the living document provides a fused idea of national and popular sovereignty. The force of this justification and its use in contemporary events is a key part of this thesis. This chapter on the DoA has served to demonstrate how Scottish constitutional identity may be captured: it lies between history, narrative and the law. However, the focus has been narrow and identity has not been fully explored. The next chapter, therefore, delves deeper into Scottish identity.

[267] M Fraser, 'Why Scottish Unionists Can Celebrate the Declaration of Arbroath' (*The Scotsman,* 7 April 2020) <https://www.scotsman.com/heritage-and-retro/heritage/why-scottish-unionists-can-celebrate-declaration-arbroath-murdo-fraser-2532137> accessed 18 June 2020

Chapter Four: Scottish National Identity and the Constitution

Introduction

The choice will be upon us soon tae set oor destiny
I'll drink a toast tae Scotland Yet, whatever Yet may be[268]

The quote above is taken from *Scotland Yet,* a song composed by traditional singer Davy Steele in the wake of the devolution referendum in the 1990s. Its lyrics weave together that event with Scottish history, creating a dynamic picture in which devolution - or the very choice over devolution through the referendum- is only a step in the story of Scotland. We live in 'Scotland yet', a constantly evolving and negotiated place. Taken this way, devolution was a fulfilment of that Scottishness, as it was a change brought about by the choice of people in Scotland. Simply, this highlights how national and constitutional narrative threads are interwoven in the tapestry of Scottish identity. We previously saw how the Declaration of Arbroath has two strands of national and popular sovereignty that are interlinked. How can we, therefore, identify a constitutional identity?

The argument made here is that Scottish national identity is highly concerned with the constitution, supporting the argument made in previous chapters that the identity of a constitution has a fluid boundary with national identity. Using an interdisciplinary approach, this chapter seeks to explore Scottish nationality more fully than simply focusing on the legacy of the Declaration of Arbroath. This includes its link to legal institutions, such as the Scottish parliament, and constitutional issues more broadly. More concretely, this chapter lays the foundation for a definition of Scottish constitutional identity. Part One will begin by defining national identity before introducing the Scottish case. Next, Part Two will explore different expressions of Scottish identity. Part Three turns to the constitution; first, the relationship between Scottish identity and the UK constitutional context before arriving at a working frame of Scottish constitutional identity.

[268] Lyrics from *Scotland Yet* by Davy Steele

This chapter takes a theoretical approach to the issue of identity in Scotland. Materials from other subject areas, particularly sociology, are used to first define the nature of nationalism and national identity. The nature of Scottish identity is similarly explored through sources from other disciplines. The final part moves into constitutional theory and draws on the discussion from the previous chapters.

Part One: National Identity in Scotland: A Closer Analysis

National identity was once regarded as an objective thing, a means of unifying the nation and the source of all political legitimacy.[269] This essentialist view has been challenged since the 20th century by theorists who point out that national identity is subjective and created. This part will begin by discussing Scottish national identity; this is not definitive but rather serves to begin the discussion of the topics in this chapter.

Scottish National Identity: a background

Scotland is a country located in the north of the British and Irish Isles. Its only land border is its southern boundary with England. Scotland has an expansive coastline and around 800 islands; the total area of Scotland is around a third of the United Kingdom and slightly less than that of Austria or Hungary, for example, but larger than Ireland or Denmark. Scotland's population is heavily concentrated in the 'central belt' or central lowlands, a small strip of land which runs between Edinburgh and Glasgow, with 1 in 5 Scots living in the Greater Glasgow region alone.[270] Other than the central belt, Scotland is marked by low population density and harsh, if striking, landscapes across the highlands and islands, which form over half of Scotland's total area. While geographically not much smaller than England, Scotland's population is around one-tenth of the English population. Scotland has three native languages in English, Scots and Gaelic. Gaelic is the traditional language of the highlands and most of the islands. Conversely, Scots is the language of the lowlands and the basis of the Scandinavian-influenced dialects of the Northern Isles.

[269] Smith, 'National Identity and the Idea of European Unity' (no 93), 61
[270] Population Estimates for Settlements and Localities in Scotland, Mid-2020 (*National Records of Scotland*, 2022) <https://www.nrscotland.gov.uk/files/statistics/settlements-localities/set-loc-20/set-loc-2020-report.pdf> 4. Accessed 15 June 2022

Scotland emerged as a kingdom in the early medieval period[271] and developed laws and institutions.[272] The Scottish Kingdom engaged in diplomacy on the European stage and was a sovereign nation-state until 1707, when the Union with England was signed to create the new state of Great Britain. This did not destroy the Scottish or English nations and instead created a single state for both nations. Since then, Scotland has been a constituent nation of the United Kingdom, which has evolved from the Kingdom of Great Britain.

The UK is assymetric on several levels. First, the modern UK has three constituent countries and one constituent region: England, Scotland, Wales and Northern Ireland respectively. Second, the population is heavily concentrated in England with approximately fifty of the UK's sixty million people residing there. Third, the UK contains three distinct legal jurisdictions in Scotland, England and Wales and Northern Ireland. Finally, the UK's system of quasi-federalism has led to devolved parliaments and assemblies in the three minority nations (and region) but not in England, which is governed directly by the British Parliament.

The asymmetry of the UK complicates Scottish identity. Defining 'what makes us *us'* necessarily entails finding what is not us. The need for an other in Scottish identity is confused by the layered national identities within the UK. The usual 'other' for Scottish identity is English, but the existence of British identity introduces another axis. 'British' as an identity is itself complex. For example, in her study of Welsh and Basque national identity, Sophie Williams observes that the relationships of Basque-Spanish or Basque-French are equivalent to Welsh-English, but there is no equivalent for Welsh-British[273]. Britishness can be conflated with Englishness; it can be the organs of the British state, or it can be a pan-British identity. In other words, Britishness can just be Englishness under another name, it can be the overarching state resting upon four national identities, or it can be an overarching national identity of its own. There are additional issues: 'English' identity has greater racial connotations than Scottish identity.

[271] The traditional founding figure was Kenneth mac Alpin. His role is contested, but retrospectively his reign appears significant: see e.g. Lynch (n 156) 40-42

[272] Scotland was an early modern country by the time of the Acts of Union: K Bowie 'New Perspectives on pre-Union Scotland' in T E Devine and J Wormald (eds.) *The Oxford Handbook of Modern Scottish History* (Oxford University Press, Oxford 2012), 7

[273] S Williams, *Rethinking Stateless Nations and National Identity in Wales and the Basque Country* (Palgrave, London 2019) 213

This leads to an understanding of Britishness as more open than Englishness, particularly for people of an ethnic minority.[274] It is too simplistic to only view Scottish identity vis-à-vis either England or Britain when Scottish identity is a layered identity. The flexibility of the British state and its multinationalism opens up areas of overlapping and competing identities.

Scotland is typically considered something of an outlier in the study of nations, nationalism and national identity. There are several reasons for this, all deriving from the persistence and strength of Scottish national identity. First, why has Scottish identity survived, given the incorporation into the broader United Kingdom with the much larger and culturally dominant English nation? Second, why is this Scottishness a *national* identity as opposed to a cultural or regional identity? Thirdly, why is this Scottish nation still within the UK, particularly given that Scots were central to movements that led to the formation of new European nation-states across the past couple of centuries? These issues will be included in the discussion of Scottish identity in this chapter. Before this, it is useful to return to the definition of national identity. This quote from Adrian Hastings was given earlier in the thesis:

> A nation is a far more self-conscious community than an ethnicity. Formed from one or more ethnicities, and normally identified by a literature of its own, it possesses or claims the right to political identity and autonomy as a people, together with the control of specific territory, comparable to that of biblical Israel and of other independent entities in a world thought of as one of nation-states.[275]

This covers several elements, broadly stated as the territorial aspect, the claim to autonomy aspect and the self-conscious aspect, with the final including the crucial point of literature and culture. This definition will be used to provide a framework for describing Scottish national identity in this chapter. Scotland's claim of a territory is not controversial and does not need discussion.

[274] F Bechhofer and D McCrone *Understanding National Identity* (n 94), 149- 153
[275] A Hastings (n 99),3

First, therefore, the role of ethnicity in Scottish national identity will be explored, before turning to expressions of that identity in literature. The final part will focus on the political claim of Scottish identity before identity and the constitution are discussed.

All identity necessarily has an other.[276] Bechofer and McCrone use the term 'vis-a-vis' to capture this process, whereby holders of a national identity constantly compare and evaluate against other identities to mould their own.[277] Collective identity has two mirror questions: who are we, and why are we different from others? Therefore, what do we do, or what are we like, or what do we have, that makes us *us* in Scotland? The next section discusses one account of this: Scottish civic nationalism.

Scottish Civic National Identity

Scotland today, as popularly argued, is a leading example of civic nationalism.[278] The goal of civic nationalism is to seek the difference between 'us' and the 'other' in non-ethnic, civic terms.[279] For example, Neil MacCormick makes the civic- institutional case strongly and argued that the Anglo-Scottish Union preserved Scotland's institutional separateness through the courts, church and education, creating a continuous civic identity which has unified and preserved the Scottish nation within the Union.[280] There are links with the Scots legal nationalism discussed in the previous chapter. Scots law was popularly thought to be a major source of post-union identity, although Colin Kidd argues that this is a selective and political interpretation of history. He makes the point that this is a part of Scots legal nationalism, which seeks to promote the idea that Scots law is open and internationalist, as well as deeply connected to the Scottish people.[281]

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[276] F Bechhofer and D McCrone, *Understanding National Identity* (n 94), 141

[277] *ibid*

[278] See e.g. M Russell 'Scotland's civic nationalism is about freedom and equality' (*Yes Scotland,* 30 May 2022) <https://www.yes.scot/civic-nationalism-about-freedom-and-equality/> accessed 10 June 2023; E Green, "Scottish nationalism stands apart from other secessionist movements for being civic in origin, rather than ethnic" (*LSE,* 16 September 2014) <https://blogs.lse.ac.uk/politicsandpolicy/scottish-nationalism-stands-apart-from-other-secessionist-movements-for-being-civic-in-origin-rather-than-ethnic/> accessed 30 May 2019

[279] D E Paul, 'The "Civic" Road to Secession: Political Ideology as an Ethnic Boundary Marker in Contemporary Scotland' (2020) 26(2) Nationalism and Ethnic Politics 167, 177

[280] MacCormick *Questioning Sovereignty* (n 16), 60

[281] Kidd *Subverting Scotland's Past: Scottish Whig Historians and the Creation of an Anglo- British Identity* (n 5) 144-145

He draws the work of MacCormick into this school of legal nationalism, and arguments about Scots law's unique position as a mixed jurisdiction in Scotland, a link between the European and Anglo-American legal traditions.[282] Kidd is a historian, and his argument is that Scots law was more important post- Union instrumentally rather than intrinsically.[283]

As Stephen Tierney points out, despite its historical misinterpretation, the Union plays an important role in the Scottish imagination. The current trend of civic nationalism is firmly rooted in the preservation of Scottish civic life through the Union.[284] The Union was political and economic but deliberately made the preservation of national identity possible. It was not designed to create an assimilationist British nation.[285] Modern Scottish civic nationalism is perhaps best encapsulated by the definition of Scot upheld by the Scottish Government: that everyone who lives and works in Scotland is a Scot.[286] In sum, the loose collection of ideas around Scottish civic nationalism seeks to find a non-ethnic basis for Scottish identity. Some ideas make an institutional case with a particular focus on Scots Law, but the central concept is that Scottishness is something outwith ethnicity or ethnocultural factors.

Civic nationalism has problems and inconsistencies. First, it almost seems circular: starting with the Scottish Government definition, everyone who lives in Scotland is simply everyone who lives in Scotland, because Scottish residency is Scottish identity with no distinction drawn. Them and us is created through Scottish residency alone.

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[282] *ibid*

[283] *ibid*; *ibid* 164- 165

[284] S Tierney, 'Spectre at the feast: Parliamentary Sovereignty and the Union Settlement of 1998' in I Boure and A Mioche,(eds.) *Bonds of Union: Practices and Representations of Political Union in the United Kingdom (18th-20th Century)* (Presses universitaires François-Rabelais, Tours 2017), 191

[285] C Munro, 'Scottish Devolution: Accommodating a Restless Nation' in Tierney, S (ed.) *Accommodating National Identity: New Approaches in International and Domestic Law* (Kluwer law international, the Hague 2000) Page 138

[286] R Rose, 'A Scottish independence vote: a win-win for Johnson' (*UK in a Changing Europe,* 17 December 2019) <https://ukandeu.ac.uk/a-scottish-independence-vote-a-win-win-for-johnson/> accessed 17 May 2021; 'Why SNP believes we are the people … wherever we're from' (*The Herald,* 25 October 2009) <https://www.heraldscotland.com/default_content/12609498.snp-believes-people-wherever/> accessed 17 May 2021. See e.g. the terminology of 'new Scots' to describe refugees and asylum seekers in Scotland: 'New Scots Refugee Integration Strategy 2018-2022' (*Scottish Government,*10 January 2018) <https://www.gov.scot/publications/new-scots-refugee-integration-strategy-2018-2022/documents/> accessed 19 May 2021

Second, polling suggests that most people believe that there is more to being Scottish than simply considering oneself Scottish or being resident in Scotland,[287] such as growing up in Scotland[288], being born in Scotland[289] or having Scottish parents.[290] Next, civic identity is a thin identity that has implausibly survived 300 years of union with a much larger polity. This also creates a problem around the origin of Scottishness. No nation has a foundation which can be divorced from ethnicity. In the Scottish case, civic nationalism attaches to the idea of Scots as some kind of polity within the broader United Kingdom. This is demonstrated in the Acts of Union. However, the problem is *what* made Scots an identity group before that? Scotland was an independent kingdom which, in simple terms, was created from conquest and diplomacy like any other. On a factual level, Scotland's current formation is reliant on an ethnically rooted past, which will be discussed in the next section in more detail.

In terms of the modern interpretation of Scotland's origins, civic nationalism appears to draw on two narratives. The first is its civic institutions in the Kirk or the law, as described previously. The second is a tacit argument that, facing the challenges of union with England and the lack of an ethnolinguistic core, institutions stepped into the gap and sustained the Scottish nation. The ability of an institution such as the law to generate a popular national identity for a people is somewhat dubious. This is also a sanitised reading. The courts and the Kirk were the preserve of people with wealth, who inevitably sourced their wealth from those lower down the hierarchy in Scotland or abroad. In many cases, identity claims and othering strengthened this rigid structure. Civic nationalism covers up a multiplicity of ethnocultural identities rather than a lack of them, as will be shown next, and builds upon the skeleton left by ethnic identity.

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[287] 'YouGov / The Times Survey Results' (*What Scotland Thinks,* 31 August 2016) <https://www.whatscotlandthinks.org/questions/do-you-think-considering-themselves-to-be-scottish-makes-a-person-scottish/> accessed 24 May 2021; most respondents (58%) also answered that being resident in Scotland for over 10 years does not make a person Scottish: <https://www.whatscotlandthinks.org/questions/do-you-think-living-in-scotland-for-over-10-years-makes-a-person-scottish/>

[288] *ibid*

[289] *ibid*

[290] *ibid*

Another important feature masked by civic nationalism is the internal diversity of Scotland. By making Scottish identity a badge which anyone adopts through residence, being a Scot is not negotiable: one must have this characteristic to participate in the constitutional dialogue. The 'other' for Scotland, in a constitutional sense, is non-Scots. Interestingly, this adoption has led to Scotland's largest ethnic minority, Scottish Pakistanis, adopting a Scottish identity more easily than English migrants to Scotland: Scottish identity draws upon what it is not, in other words, English identity.[291] Ethnicity will now be turned to in more detail.

Ethnicity, Religion and Language

Scotland does not have a single ethnolinguistic group that dominates the nation. The narrative of different groups forming Scotland has been present from the very start: Scotland's mythological foundation was through the uniting of Pictland and Dal Riata by king Kenneth mac Alpin, bringing together the two largest polities among several in the territory that is today's Scotland.[292] The new kingdom of Alba gradually conquered the groups around it, coming to encompass the Anglic Northumbrians in what is now the Scottish Lowlands. Scotland expanded to include the Danish-Norwegian provinces of Orkney and Shetland in the late 15th century, completing the territory of the modern nation.

An important point in Scotland's supposed lack of ethnicity is the failure to produce a national language. Again, the lack of a national language is not a lack of language, but rather at least two competing languages in Scots and Gaelic. Scots, which is Germanic, originates from the old English of the Northumbrians. Gaelic, by contrast, derives from medieval Irish and is a Celtic language. While around 1.5 million people in Scotland can speak Scots and only 57,000 can speak Gaelic,[293] there is not a clear categorisation of majority and minority language. Both have a claim to be the prestige language of Scotland, and both were languages of the royal court over the lifetime of the Kingdom of Scotland.

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[291] A M Hussain, and L Miller *Multicultural Nationalism: Islamophobia, Anglophobia and Devolution* (Oxford University Press, Oxford 2006), 196- 198

[292] D Broun 'Defining Scotland and the Scots Before the Wars of Independence' in D Broun, R J Finlay and M Lynch (eds.) *Image and Identity: The Making and Re-making of Scotland Through the Ages* (Birlinn, Edinburgh 2021)

[293] Figures taken from the 2011 census as the 2022 figures are not yet available. <https://www.scotlandscensus.gov.uk> accessed 16 November 2022

Gaelic does have very few speakers today. The badges of Scottishness, however, such as kilts, whisky and bagpipes, are largely Gaelic in origin, pointing to how important Gaelic heritage is as a symbol of the country.[294] The promotion of Gaelic identity has not always been a part of Scottish identity, however, and the situation was very different prior to the late 20th century.

The root of divided heritage grew into narratives about race and nationhood in Scotland, particularly in the Victorian era. The reasons behind this fervent debate include the legacy of the Scottish Enlightenment and its focus on finding 'scientific' explanations for the world around us.[295] the language boundary could be exploited in broader questions over Scotland as a Celtic nation or a Germanic one. In the nineteenth century many divided the Celtic Highlands of Scotland from the 'Teutonic' rest of the country[296] and argued it to be racially inferior. Scotland's origin as the fusion of two separate ethnic groups has been a matter of contestation among historians since. For example, in the Victorian era, it became popular to argue that the Picts were not only the founding people but were also, in fact, a Germanic group.[297] This provided Scotland with all-important separation from Ireland and Catholicism, but adding complexity, the previous goal of interpreting national origins in both Scotland and Ireland was to prove that they were not English.[298] These goals were in line with the politics of the time: in the first case, buttressing protestant Scotland from both the racially inferior Irish and Scottish Highlanders and, in the second, resisting absorption of either into England.

Smaller groups also made racial claims: for example, Shetland writers of this era cited their Scandinavian history and links as proof that the Shetlander was above the Gaelic-speaking highlanders and closer to a pure Germanic race than even the lowland Scot.[299]

[294] F Bechhofer & D McCrone, 'What makes a Gael? Identity, language and ancestry in the Scottish Gàidhealtachd' (2014) 21(2) Identities 113, 118
[295] C Kidd, 'Race, Identity, Empire and the Limits of Nineteenth Century Scottish Nationhood' (2003) 46(4) The Historical Journal 873, 878- 881
[296] *ibid* 875- 876
[297] D McCrone, 'History and National Identity' (1999) 27 Scottish Affairs 97, 99
[298] *ibid*; *ibid* 100
[299] A Grydehøj 'Ethnicity and the origins of local identity in Shetland, UK – Part II: Picts, Vikings, Fairies, Finns, and Aryans' (2013) 2(2) Journal of Marine and Island Cultures 107

Race ultimately fed into Scotland's unionist identity; this is because Scots wanted to prove their equality with the supposedly Germanic English and their superiority to Celts such as the Irish.

The ethnic narrative of primitive highlander and cosmopolitan lowlander was disrupted by another aspect of Scotland's relationship with race: Scotland's role in slavery and the transatlantic slave trade.[300] Kidd argues that the Scottish desire to explain their nation in racial terms was easily transferred into their thinking about and participation in the British Empire, although many who opposed imperialism and slavery also cited racialised ideas.[301] Other prejudices could be justified in the belief of Teutonic superiority, such as Highland inferiority and discrimination against Scotland's quickly growing numbers of Irish immigrants. Religious identity in Scotland has been important in the development of Scottish nationhood. However, this tended to blend well with Germanic racial identity to produce compatible strands of Scottish nationhood and British identity under a reinforced unionism.[302]

It seems to, therefore, be a paradox that the Scottish Home Rule Movement, forerunner to the later push for the devolution that has been so central to underlining civic national identity, should have emerged in the 1880s and tended to be espoused by lowlander Scots as narratives of their Teutonic kinship with England. However, the beliefs could be compatible by casting Home Rule as a movement for a federation of Teutonic peoples between Scotland and England.[303] Teutonism was the core of nation-building, with Scotland's diversity cast as a Celtic 'fringe' beyond the Germanc centre.[304] While Home Rule is an important forebear of more modern constitutional movements in Scotland such devolution, the associated myths and identity creation are strikingly different.

[300] M Morris, 'Yonder Awa: Slavery and Distancing Strategies in Scottish Literature' in T E Devine (ed.) *Recovering Scotland's Slavery Past* (Edinburgh University Press, Edinburgh 2015), 53
[301] Kidd 'Race, Identity, Empire and the Limits of Nineteenth Century Scottish Nationhood' (n296) 882
[302] *ibid* 877
[303] *ibid* 890
[304] *ibid* 891

It is not simple to say why ethnicity declined as the primary factor in Scottish identity. One factor is the demise of the British Empire and, with it, the association with Scottish Home rule. Part of the answer also lies in the selective construction of a civic Scottish national identity by political elites, as popularly reinforced by the campaign for a Scottish Parliament in the later twentieth century.[305] Another factor is that Victorian 'racialist' ideology has fallen out of favour more generally, with ideas of a *volk* not taken as seriously as they once were. Today in Scotland, ethnicity does still play a role: the previously cited polling shows that people regard Scottish parentage, Scottish birth or being raised in Scotland makes one Scottish. However, even this is distinct from the racialists, who sought to highlight alleged differences between different people born in Scotland and draw conclusions about the nation from there. Race in modern Scotland is therefore a less prominent facet of national identity. In Scotland, there are two axes of exclusion: ethnicity and nationality.[306] These axes have a different relationship today when compared to how the Victorians constructed their views on race and the nation. The Victorians would have blurred the distinction between the two.

Scottish identity and post-colonial hybridity have attracted scholarly attention.[307] This is usually in the frame of *cultural* colonisation, as Scotland has never suffered colonisation and was itself a coloniser. Hybridity is the idea that a hybrid culture is created by colonisation as two cultures come into contact with each other. Cairns Craig rejects hybridity in Scotland for several reasons. First, hybridity presumes that there are two cultures which interact. Craig points out that this is oversimplified: Scottish identity is defined by its interaction with other identities through all time and from all over the world. While cultural domination by England and resistance to being absorbed into England are important aspects of Scottish identity, the point here is that they are not the only aspects in play.

[305] A Kearton ''Imagining the 'Mongrel Nation': Political Uses of History in the Recent Scottish Nationalist Movement' (2005) 7(1) National Identities 23, 27; 30-31; 39-40
[306] R Bond, 'Belonging and Becoming: National Identity and Exclusion' (2006) 40(4) Sociology 609, 610
[307] See e.g., A Niven 'New Diversity, Hybridity and Scottishness' in I Brown (ed.) *Edinburgh History of Scottish Literature: Modern Transformations: New Identities (from 1918)* (Edinburgh University Press, Edinburgh 2006), 320

The ‘non-Scottish’ aspect of an identity may also be oversimplified in the hybrid account: the work of Bashabi Fraser, for example, demonstrates the complexity of south Asian identity in Scotland by featuring Sikh, Hindu and Muslim weddings, and Pakistanis, Bangladeshis and Indians carving out lives in Scotland.[308] Identity formation is an ongoing process; fluid as opposed to fixed.

Finally, Scotland’s role in the wider world raises questions of ethnicity and identity. Craig points out that Scotland had an imperial, expansionist national identity within the British Empire.[309] Craig argues that this exported nationalism collapsed after the world wars with the independence of previous strongholds of Scottish culture such as Australia, Canada and New Zealand, and the new promotion of a pan-British identity through institutions such as the BBC.[310] Scottish culture was assumed to be soon extinct in the mid-twentieth century, something Craig links to the first (failed) referendum on Scottish devolution in 1979.[311]

Today, the Scottish diaspora is estimated to be significantly higher than the modern population of Scotland. For example, the diaspora was estimated to be between 28 and 40 million people in 2009.[312] The Scottish diaspora, however, is not entirely at ease with present iterations of Scottish national identity. This is because a diaspora is defined by factors other than living in a place and is essentially an ethnocultural concept in any thicker sense.

[308] M Fraser, ‘From Bengal to Scotland: Hybridity, Borders and National Narratives’ in C Fagerlid and M Tisdel (eds) *A Literary Anthropology of Migration and Belonging* (Palgrave Macmillan, Cham 2020), 163
[309] Craig, Unsettled Will: Cultural Engagement and Scottish Independence (n 180) 18
[310] *ibid* 24
[311] *ibid* 29- 30
[312] ‘The Scottish Diaspora and Diaspora Strategy: Insights and Lessons from Ireland” *(Scottish Government,* 29 May 2009*)* <https://www.gov.scot/publications/scottish-diaspora-diaspora-strategy-insights-lessons-ireland/pages/6/> accessed 20 October 2021

Conclusion

Returning to the question, 'what makes us *us*?', there is a general desire to transcend race or ethnicity through the civic nationalist account. However, there is no clear agreement over what should be used to define Scottish identity instead. The Scottish Government account substitutes Scottish residence for identity, while more traditional accounts situate civic nationalism in institutions. A history of racial thinking about Scottish identity further complicated the background. In addition, the civil nationalist approach seems to be an elite one, with polling showing that factors such as place of birth or parentage are most important in defining Scottishness for the general public.

Part Two: Perspectives from Literature

Introduction

The peculiarity of Scottish national identity has guided many aspects of Scottish culture. This short exploration of Scottishness and Scottish literature is not a comprehensive literature review. Rather, it is to discuss the following question: who are the holders of Scottish identity? This will be considered along with the previously raised questions, such as why Scotland still exists and why Scotland remains in the United Kingdom. Another point kept in mind is the complex relationship with England. This section is included to fully explore Scottish identity in the terms set out above by Adrian Hastings.

As this section is intended to answer the narrower supporting research questions addressed in this chapter, this literature review has been kept separate from the broader literature review in chapter one. That literature review demonstrated the importance of the research question and highlighted the gaps that the thesis seeks to fill.

Initial Themes

The earliest significant Scottish literature is usually dated from about the 14th century. The subject was the Wars of Independence.[313] After the Union, Scottish writers could be characterised as longing for a past nation which had been 'annexed by the British idea'.[314] Robert Burns and Walter Scott can both be included in this. Scottish literature also became caught up in the racialist debates, which were central to the idea of Scotland.[315]

[313] Examples include John Barbour's *Brus,* along with *The Wallace* by Blind Harry
[314] G Carruthers and C M M Macdonald, 'Fictive Pasts and Past Fictions' (2013) 92 The Scottish Historical Review 137, 139
[315] G Carruthers *Scottish Literature* (Edinburgh University Press, Edinburgh 2009), 5-12

Robert Louis Stevenson's *Dr Jekyll and Mr Hyde,* for example, can be interpreted as depicting the divisions in Scottish identity between the civilised lowlander and the uncivilised highland, Irish or colonised other.[316] Otherwise, the 'Kailyard' genre dominated 19th-century Scottish literature. This depicted Scotland as rural and nostalgic.[317]

From the 20th century onwards, Scotland's culture and identity have been framed by the nation's constitutional status.[318] Scotland's continuing existence, despite being 'unconstituted' (or sometimes 'stateless') as neither a region of England nor a nation-state in its own right, has guided much discussion. In simple terms, why does Scotland still exist? And what does that say about the nature of the nation? On the first question, different conclusions have been reached. Some point out that, as nationalism is conceived of as a reaction to modernity, Scotland's achievement of technological advancement through the Industrial Revolution prior to the advent of modernism was key.[319] Because there was no modernism to react to, Scotland instead looked to its romantic tradition as embodied through the works of Robert Burns and Walter Scott, but this was a deformed and limited nationalism. In short, Scotland was an important part of the romantic nationalisms that swept Europe in other stateless nations during this era, such as Poland or Hungary, but also a place where that nationalism was depoliticised because the bourgeois did not need it to advance with their economic goals.[320] Why, then, did Scottish national identity not die?

[316] Craig, 'Beyond Scotland' (n 7) 229- 236
[317] A Nash, 'The Kailyard: Problem or Illusion?' In I Brown, T O Clancy, S Manning and M Pittock (eds.) *The Edinburgh History of Scottish Literature Vol.2* (Edinburgh University Press, Edinburgh 2007), 319
[318] C Craig, 'Constituting Scotland' (2001) 28 The Irish Review 1, 2
[319] *ibid* 3
[320] *ibid*

One explanation is that this failure to develop a normal nationalism led to Scotland's 19th century 'Anglo-British Constitutionalism', in which Scotland was a depoliticised 'cultural sub-nationalism'.[321] Craig, for his part, argues that Scotland developed its own Scoto-British identity:

> … what nineteenth-century Scotland developed was a Scoto-British constitutional identity whose nationalism consisted in the long-drawn-out struggles to maintain the independence of precisely those institutions: church, law and education which had originally been guaranteed by the Act of Union. The paradox, in other words, is that Scotland's nationalism was already enshrined within the Act of Union, and defence of the Union was the first and immediate resort for those defending the rights of Scottish culture[322]

This was a rump identity of protection, as opposed to a political identity. But it was the foundation of Scottish identity, tangled with British identity, which had to be negated if Scotland was to have a more normal national identity.[323] Essentially, this account argues that Scotland did not die because it had a culture, but that culture did not lead to political independence like elsewhere in Europe because the British Union was an expression of it. The Union was the fulfilment of Scottish identity as opposed to a threat to Scottish identity and Scotland didn't need to develop a traditional 'defensive nationalism' as elsewhere, because Scots thought of the British Empire as built upon the 'sister kingdoms' of Scotland and England as partners.[324]

Craig points out that, despite this, the common expectation in the 20th century was that this weak identity would soon die. With the Scottish Literary Renaissance of the 1920s, culture was pessimistic, negative and passive – Burns and Scott were 'sham bards of a sham nation', in the words of Edwin Muir,[325] as authors sought to discover something more authentic and ditch the Kailyard.

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[321] *ibid* 5-6
[322] *ibid* 5
[323] *ibid* 7-9
[324] Kidd 'Race, Identity, Empire and the Limits of Nineteenth Century Scottish Nationhood' (n296) 876
[325] E Muir, Scotland 1941 <https://www.poemhunter.com/poem/scotland-1941/> accessed 19 May 2022

Other examples of this include Lewis Grassic Gibbon's Sunset Song, where the backwards Scottish reality conflicts with the English-speaking future.[326] Scots were a group, but what they thought held them together, their culture, was mawkish and imposed by others. Although the tone was pessimistic, the period saw a great deal of focus on Scottish identity. Hugh McDiarmid's celebrated work, among others, shifted focus away from Scottish identity as backward and towards an account of heterogeneity, making Scotland's lack of an ethnolinguistic core not some fatal weakness in its identity but instead a central characteristic of its diverse identity.[327] He himself called this 'Caledonian antisyzygy', a term he borrowed from another writer and defined as contradictory poles within the same entity. McDiarmid was sometimes contradictory, but relatively unusual in not condemning antisyzygy. This can be turned against Edwin Muir, who was so negative about the Scotland he found partially because he diagnosed the mismatch between English language use and Scottish authenticity as fatal.[328] The ability of Scots to express themselves in three native languages can instead be seen as a strength.[329] Muir, along with other figures from early 20th century Scottish literature, revealed a longing for an essentialist nation in their agonising over Caledonian antisyzygy.[330] This changed in later decades, but the critical tone remained.

A greater confidence grew in the later 20th century, as Scottishness was reframed as a continuous, active and developing identity through works across academia and culture, and through institutions such as the Scottish Poetry Library and the newly developed National Museum of Scotland.

[326] R Watson, *The Edinburgh Companion to 20th Century Scottish Literature* (Edinburgh University Press, Edinburgh 2009), 84
[327] *ibid* 76- 81
[328] D Gifford, "Sham Bards of a Sham Nation?: Edwin Muir and the Failures of Scottish Literature" (2007) 35(1) Studies in Scottish Literature 339, 344
[329] *Ibid*
[330] Carruthers, *Scottish literature* (n 316) 5-10

Around the period of devolution, a new class of Scottish writing emerged. The two most prominent, Irvine Welsh and James Kelman,[331] portrayed life in gritty urban areas of Edinburgh and Glasgow. *Trainspotting* was considered a cultural landmark and set the tone for a new authentic Scottish voice.[332] Welsh's book is a bleak take on Scotland in the late 80s and early 90s, lamenting Scotland's delusion of oppression by the English. Ethnicity and regionality is drawn into this: Irish against British, Catholic against Protestant, Edinburgh against Glasgow, Edinburgh against Leith, communal against consumerist, and resisting easy binaries within identity.[333] However, the main character Renton's use of collective words shows that he regards himself as a Scot, despite his scorn for the group. He is critiquing Scottishness from within, and also acknowledging its multiple overlaps and contradictions. This multiplicity has become a feature of modern writing about Scotland.

Graeme MacDonald argues that devolution has given rise to a more sophisticated analysis of Scottish identity, particularly in the area of race.[334] He argues that Scots are now using their own space to talk about issues of identity as opposed to only being a resistant identity against Englishness. Writers such as Jackie Kay had been exploring pluralism in Scottish identity for longer, highlighting the tensions between race, language, gender and more. Kay's poetry and writing centres on themes of belonging and multiplicity within her own identity. She ultimately locates herself both in and outwith Scottish identity: the child of a Scottish birth mother and Nigerian father, adopted and raised by a white Scottish couple. She shares the belief that Scottish identity is beset with contradiction, but resists the liberal optimism of other writers by keeping the racism and prejudice that still exists in Scotland in focus.[335]

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[331] On winning the 1994 Booker Prize, James Kelman famously defended the profanity-filled Glaswegian language he wrote in: S Lyall, 'In Furor Over Prize, Novelist Speaks Up For His Language' (*New York Times,* 29 November 1994) <https://www.nytimes.com/1994/11/29/books/in-furor-over-prize-novelist-speaks-up-for-his-language.html> accessed 19 May 2022

[332] K Innes 'Mark Renton's Bairns: Identity and Language in the Post-Trainspotting Novel' in B Schoene (ed.) *The Edinburgh Companion to Contemporary Scottish Literature* (Edinburgh University Press, Edinburgh 2007), 333

[333] I Welsh *Trainspotting* (Sacker and Walburg, London 1993), 60-69

[334] G Macdonald, 'Scottish Extractions: 'Race' and Racism in Devolutionary Fiction' (2010) 65(2)Orbis Litterarum 79, 81-82

[335] M Brown, 'In/outside Scotland: Race and Citizenship in the Work of Jackie Kay' in B Schoene (ed.) *The Edinburgh Companion to Contemporary Scottish Literature* (Edinburgh University Press, Edinburgh 2007), 219-220

In sum, Scottish national identity can boast a rich literature. The contents of this have been fertile ground for exploring Scottish identity. Themes which emerge are the desire to differentiate from English identity, and later a push to move away from dependence on an English other. In addition, while Scottishness is a national identity, the uneasy relationship between race and nationality remains. Race does not lead to Scottish nationality, but there appears to be some inextricable racial or ethnic thread in Scottish identity, whether it is found in the weakness of civic nationalism or the othering faced by Jackie Kay in Scotland. Finally, the mawkish ideas of the Kailyard haunt Scottish identity, which still seeks to define itself as something more authentic. This authenticity does not mean essentialism, as multiplicity is a central feature of literature in Scotland.

Critiquing Modernist National Identity

Certain aspects of Scottish literature and literary criticism help clarify some of the questions about the nature of national identity raised in previous chapters. First, on the question of modernist national identity, this thesis will adopt an ethnosymbolist approach. Craig has done much to highlight the tensions within modernism. His problem with Anderson's approach is dual-faced: on the one hand, it is too essentialist. On the other, it is not essentialist enough. One the first point, Craig highlights how modernist theory is still very unitary. It is one people, a singular *demos* with no room for plural or overlapping identities. Thus, while Anderson's conception of the nation is progressive in dismissing essentialist features of the nation, his theory instead argues that such an identity is crafted artificially and does not provide a pluralist account of the nation. Craig points out that the nation is a fundamentally pluralist space made up of competing cultures, languages and regional identities. The thesis has already described Scotland's fusion origin, beginning with the Picts and Gaels at its very birth. Scotland has at least three living languages, all of which have a claim to be the 'prestige' language of the nation. The imagined community, therefore, must be plural, multifaceted and layered.

This leads to Craig's second critique of the imaginary community: culture is not completely artificial. He shares the doubt about nationalism only appearing after the dawn of printing with the ethnosymbolists. The ethnosymbolists make a more convincing argument as medieval ideas of nation and community cannot be discounted.[336] One must also fundamentally have some stake in the national community in order to have its identity. Essentially, this point is similar to Anthony Smith's argument that a national identity cannot be created *tabula rasa.* Modernist theories of the national community go too far in eschewing older traditions and histories. Craig's argument is that the nation is a constant blending of pre-existing cultures, and he does not fundamentally disagree with the concept of imaginary communities. Still, he thinks that this imagination is made up of genuine cultures and beliefs, all of which are in constant flux. His conception of the nation is as a source of endless dialogue which creates a national community. In sum, national identity is much less static than the modernist account presents, as Scottish identity is in the discourse and contradiction as opposed to in universally held cultural perceptions.

Earlier in this chapter, three questions were posed. One can now be answered: Scottish identity is not an ethnic or linguistic identity because it cannot be: there is no such thing as the Scottish race or ethnicity. Entirely transcending ethnicity is also not possible. Ultimately, civic nationalism cannot resolve competing identities in Scotland by simply ignoring them. Civic nationalism and the modernists' account of national identity share a crucial flaw: they cannot account for the past. Civic nationalists point to supposedly civic identity markers in Scotland, such as the law, but the community that made those laws were defined by non-civic factors.

[336] See e.g. S Reynolds, 'Nations, Tribes, Peoples, and States' (2015) 2 Medieval Worlds 79

Conclusion

Linking this section together, national identity in Scotland is clearly contested and multifaceted. There is a long tradition of civic nationalism. Behind this, however, there is a complex picture of culture, ethnolinguistic contestation, and historical narratives. There is also a fundamental dispute about what a national identity is. This thesis adopts the modernist account with essential caveats: ethnosymbolists are right to point out that the historical account of national identity in the theories of Anderson is inaccurate. In addition, Cairns Craig is right to highlight how modernist theory is both too abstract and too unitary in its conception of the nation. However, the basic premise of the nation as an imaginary community is accepted.

Across the 20th century, shedding twee accounts of national identity has been a key focus in Sottish literature. The racism of the Victorians gave way to the pessimism of the literary renaissance. Urban Scotland has become more central to Scottish identity in recent times, and there is arguably less reliance on lochs, bens and glens. A key theme in these examples of Scottish identity is a desire to transcend defining Scottish identity as non-Englishness. Scottish identity has not only strengthened over the past century; it has also been renovated. Like the culture of Scotland, this chapter will now argue that Scottish constitutional identity is undergoing a similar process of growth and renovation.

Part Three: Scottish national identity and the British Constitution

Introduction

This part moves into the main topic of the thesis: Scottish constitutional identity. First, the political mobilisation of Scottish identity is discussed, completing the description of national identity given by Adrian Hastings. The approach is not detailed and the goal is to give a broad sweep of the history. Following this analysis, Scottish constitutional identity is described, including the role that devolution has played.

A Political Scottish Identity

Scottish political identity was generally dormant when compared to its cultural counterparts over the 20th century, although it significantly strengthened across the period. In terms of tying Scottishness to a political philosophy, a libertarian streak in unionism served as a counterargument to the centralising policies of the Labour Party.[337] A Scottish economic policy, neither from the left nor from the right, was pushed, and centred on a simple republican ideal that governance should be closer to the people and more intrinsically linked to the people. Labour contravened this by dictating policy from London. Scotland, popularly thought to be a relatively communitarian nation, thus had a natural inclination towards an unradical equality. Scottish nationalism was 'counter-cultural', in Ben Jackson's wording, on the issue of class because it claimed to transcend class as opposed to following class-based philosophies. Beyond this, Scottish sovereignty was only distilled into a somewhat coherent narrative as the 20th century progressed.[338] Historian Richard Findlay describes Scottish nationalist constitutional thought as 'piecemeal'.[339]

[337] Jackson *The Case for Scottish Independence: A History of Nationalist Political Thought in Modern Scotland* (n 222) 69
[338] *ibid* 135-136,
[339] R I Finlay *Scottish Nationalism: History, Ideology and the Question of Independence* (Bloomsbury, London 2022), 89

A fluid concept of Scotland's constitutional position as a continuous process originated in SNP gradualism before being adopted by Labour,[340] emerging as a constitutional narrative. The root of Scottish sovereignty rested below this.

The push for Home Rule was present at the start of the 20th century. Following the world wars, the Home Rule issue became less prominent but did not entirely disappear. This was politically anchored in the fact that Scotland lacked the ability to govern its own interests.[341] Eventually, the Home Rule issue, now under the moniker of 'devolution', led to the first referendum on a Scottish Assembly in the 1970s. The referendum controversially failed. While a majority of those who voted did vote for a Scottish Assembly, this was not enough: at least 40% of all those on the electoral register in Scotland had to endorse a Scottish Assembly and this threshold was not reached. The political difference between Scotland and English became more prominent during the premiership of Margaret Thatcher. who pursued policies of rapid de-industrialisation under her 'Thatcherism' philosophy. The negative results of these policies were felt in Scotland's industrial communities and unemployment reached all-time highs.

Scott Hames attempts to integrate the narratives of the rise of cultural and political nationalism in Scotland, noting how the demand for constitutional accommodation was merely the politicisation of Scottish identity.[342] Thus, the increasing solidity of Scottish cultural identity over the past decades is the driving factor in Scotland's ever-growing demands for constitutional recognition through devolution.[343] This thesis argues that these identities overlap, with political identity growing from cultural (or national) identity and constitutional identity then emerging later but containing elements of the two preceding identities.

[340] Jackson *The Case for Scottish Independence: A History of Nationalist Political Thought in Modern Scotland* (n 222) 137
[341] *ibid* 13
[342] S Hames, 'Twin Tracks: Cultural and Political Nationalism after 1967' in M Keating (ed.) *The Oxford Handbook of Scottish Politics* (Oxford University Press, Oxford 2020), 192
[343] *ibid* 197

National and Constitutional Identity in Scotland

Distinguishing national and constitutional identity in Scotland is not straightforward. Many principles ascribed to the constitution, such as fidelity and collectively, are better ascribed to the nation. In Scotland, constitutional and national identity appear to be particularly linked due to the civic characteristic of Scottish national identity and its reliance on institutional separateness. Constitutional patriotism is a theory that advocates for the locus of collective pride and solidarity moving from the nation to the liberal-constitution order. This appears to be applicable to Scotland, but it is not without issues. As Jan-Werner Muller asks, does the commitment to the particular society, or the commitment to universal liberal values, come first?[344] The particularism is key, as constitutional patriotism does not call for the abolition of existing nations. Constitutional patriotism cannot be freestanding and requires the scaffold of existing culture and politics.[345] Like constitutional identity, national identity cannot be dispensed with. National and constitutional identity are distinct, but in practice may be 'interwoven', as is seen in countries such as the USA.[346] This also appears true of Scotland: the tradition of nationalism defined by territory and elements of statehood preserved through the Union have led to a nationalism which, at times, is rather *constitutional.*[347] The predominance of civic nationalism, which seeks to downplay or entirely remove the ethnic components of national identity, has led to a territorial conception of Scottishness.

The civic conception of Scottishness has implications for the nature of Scottish constitutional identity. Ethnos is the construction of the constitutional self around ethnicity. Rosenfeld describes it as: '… an ethnocentric model built around a single ethnic group will tend to define the self in terms of belonging to the dominant ethnic group and the other in terms of membership in other ethnic groups'.[348] Ethnicity is the predominate characteristic of this form of identity.

[344] J W Muller, *Constitutional Patriotism* (Princeton University Press, 2008), 73
[345] *ibid* 76
[346] Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (n 75) 127
[347] Walker, 'Scottish Nationalism for and Against the Union State' (n 227) 189
[348] Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (n 75) 150

Demos, on the other hand, is a model of the constitutional self which downplays or eliminates the place of ethnicity within the constitution and, with it, ethnicities' role in forming the boundary with the other.[349] Sottish civic identity would appear to fall under the *demos* model.

As previously described, the division between civic and ethnic nationalism cannot be made cleanly.[350] This can be shown in various practical ways. Former First Minister Nicola Sturgeon, for example, defines Scots as 'people who live and work in Scotland'[351] in line with the interpretation of the Scottish Government. Essentially, civic nationalism in Scotland uses a modernist theory of national identity and treats the identity as constructed and artificial. Ethnosymbolist objections must be kept in mind, as there is a much older root behind the idea of Scottishness. The modernist theories cannot account for the older history of symbolism within Scottish identity, such as William Wallace and the Bruce.[352] In reality, Scottish people engage with such 'parochial' renditions in defining their identity without issue, thus exposing a tension in Scottish identity, whereby civic nationalism is fundamentally a project of the political elites.[353] The Scottish National Party themselves are committed to promoting the Gaelic and, to a lesser extent, the Scots languages. In short, civic nationalism needs the features of a more ethnic past to establish its fundamental boundaries. The Scottish constitutional self is contingent upon a national self, which does, despite civic nationalism, draw from a historical and ethnic source.

On the point of *ethnos* and *demos* in the Scottish constitution*,* there is not enough material to come to a conclusion. This is because there is no formal Scottish constitutional text. However, there appears to be a process of creating a Scottish *demos* outwith any Scottish ethnicity, rooted in a thin conception of consent and popular sovereignty. This may be successful, as constitutional identity is more of an elite-created identity than a national identity.

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[349] *Ibid*
[350] MacCormick, *Questioning Sovereignty* (n 16) 171
[351] See e.g.S Sturgeon, *Nicola Sturgeon's speech at the Law Society of Scotland* (*SNP.org,* 24 June 2019) <https://www.snp.org/nicola-sturgeons-speech-at-the-law-society-of-scotland/> accessed 20 June 2020
[352] Soule, Leith and Steven, 'Scottish devolution and national identity' (n 9) 6
[353] *ibid*

However, the downplaying of ethnicity has another disadvantage, as the civic concept prevents recognition of cultural pluralism in Scotland itself.[354] Even if the civic model can be sustained at the elite level, this is a tension within Scottish constitutional identity which may come to the fore in the future.

The writings of Craig are again helpful here.[355] As previously discusses, Scotland has been misunderstood by the discourses of modernism and civic nationalism, and pure civic nationalism is not possible. Scotland's divided heritage may have led to a reading of Scottishness as civic; indeed, this may have been the place of elite Scottishness. The Scottish nation is better understood, however, by centring diversity and dialogue. The civic Scottish ideal cannot properly account for historically marginalised Scottish groups such as Gaelic speakers or Shetlanders. Scotland's civic identity, in its minimal level of ethnolinguistic politics, also gets things culturally wrong. Gaelic has been officially adopted as a national language even in areas with no history of the language. This is true of areas with their own language traditions, such as Scots-speaking regions, Doric-speaking regions and Shaetlan-speaking regions. A better frame for Scotland would be one with pluralism at its heart. Instead of creating a thin, artificial national identity, centred solely on the claim that anyone in Scotland is a Scot, a thicker discursive one can be developed that more accurately portrays Scotland. The point is not to shift from *demos* to *ethnos.* Ethnicity is still downplayed and there is no ethnic group prioritised as the core of the nation. Instead, the *demos* is contextualised with the inclusive narrative of Scotland's plural heritage. That pluralism is centred, not a dominant ethnic group.

How, then, are the tensions within Scottish identity reflected through constitutional thnking? An interesting window into this, along with how reliant Scottish constitutional identity is upon its British constitutional other, is the draft constitution for an independent Scotland. This was published by the Scottish Government during the 2014 Scottish independence referendum.

[354] This includes a historic rejection of legal pluralism within Scotland itself. The regions of Orkney and Shetland traditionally operated under udal law. This was undermined through various court cases which imposed Scots law on those regions, relegating udal law to a very marginal modern role. See Bruce v Smith (1890) 17 R 1000
[355] See e.g. Craig, 'Scotland and hybridity' (n 7)

The accompanying Bill passed in the Scottish Parliament opened with the following statement: 'In Scotland, the people are sovereign'.[356] The narrative used is obvious, linking pre- and post-UK constitutional developments as the source of this sovereignty. The distinction between the 'Scottish constitutional tradition' and the right of self-determination is also made, thus expressly deriving the sovereignty of the Scots people from a supposed Scottish legal source. This appears to be an attempt to create law as tradition: in other words, history that has acquired pastness is being selectively used to create legal authority. Beyond these nationalistic elements, the role of the Scottish people becomes more confused.

The will of the people is to be enacted through their elected representatives, referendums, and by 'other means provided by law'.[357] There was no means of entrenchment envisioned for the new constitution, which would have therefore reduced the constitution of Scotland to a new parliamentary sovereignty.[358] However, the Bill also set out a commitment to a written constitution.[359] This demonstrates how incoherent narratives about Scottish constitutional norms become when pushed beyond independence. The idea of Scottish sovereignty has staked out a constitutional meaning within the UK, whereby Scotland is a constitutional body that must consent to its terms within Britain, but in an independent state, less is clear. Scottish sovereignty would remain a cultural and nationalist feature, but a precise normative meaning has not been established in the new state. Scottish constitutional identity is clear about what it is not, but what exactly it would *be* without its other, the unitary British constitution is less clear.

Scotland also needs to discuss Scottish diversity and how to balance these competing claims fairly within a potential constitutional order. The draft Scottish constitution did not mention this pluralism despite including many other value statements, such as a commitment to nuclear disarmament. Instead, the authority of the people was repeatedly asserted as that of a unitary body.[360]

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[356] The Scottish Independence Bill: A Consultation on an Interim Constitution for Scotland (n 189) s2
[357] *ibid* s3(3)
[358] Bulmer, 'The Scottish Constitutional Tradition: A Very British Radicalism?' (n 191) 41
[359] The Scottish Independence Bill: A Consultation on an Interim Constitution for Scotland (n 189) s33
[360] *ibid* See e.g. s 2, s 3 and s12

The thin Scottish consent identity reads Scots as a uniform group, with no account of minority cultures. The will of the people of Scotland does not reflect diversity, and would be better stated as the peoples of Scotland.

This links to the next point: the lack of 'identarian' legal features in Scottish constitutional identity. Constitutional identity, as set out in the earlier chapter, is the identity that arises by virtue of having a constitution. One might reasonably expect to see clauses, case law or legislation on issues such as language or heritage, as exist within the constitutional orders of other countries. Beyond legislation on the Gaelic language, these materials are absent in the Scottish case. Scottish constitutional identity is instead rooted in the structure of devolution and the Scottish view of the British constitution. This is because of the inherent pluralism in Scottish identity, the national sovereignty of Scotland and the popular sovereignty of Scotland. The Scots are not a nation because they were a group first; they are a group because they were a nation first. The centrality of this 'nation-ness' then feeds into the narrative around devolution; as Richard Finlay puts it:

> Scotland ought to have a parliament because it was a nation, not because it was a more effective administrative unit.[361]

In other words, Scotland's recognition as a nation within the UK's constitutional structure is an expression of Scottish identity in itself. Scottish identity and Scotland's place in the UK form a circular definition: Scottish identity is simultaneously created by and reflected through its constitutional position. This has only been reinforced through devolution. The passing of the Scotland Act was a vital stage in the emergence of Scottish constitutional identity from national identity, and it is discussed next.

[361] Finlay, *Scottish Nationalism: History, Ideology and the Question of Independence* (n 340) 3

Devolution as Constitutional Identity

Devolution is an important point of constitutional change in Scotland. Christine Bell regards the 1997 referendum and the Scotland Act 1998 as the creation of a Scottish constitutional identity, as the British constitution was distinguished and a new identity created.[362] Her analysis argues that Scots established a new identity, whereby they chose constitutional institutions that reflected their constitutional narratives. This is an attractive argument. For one thing, a constitutional order was rejected: the unitary interpretation of the British constitution centred on Westminster. The thesis has already discussed the Scottish submerged constituent power within the UK. It seems only possible to be a member of a discrete constituent power if there is also a collective identity, or, in other words, a constitutional identity. The 'what are we' and 'who are we'[363] of this identity are the same. The imaginary community[364] formed a contract[365] with one another through the Scotland Act. In Scotland's case, this contract is the affirmation of their pre-existing self-image as a constituent power within the British state.

Bell's argument has another advantage. This is because was no Scottish constitution prior to devolution.[366] There was a constitutional recognition of Scottish differentiation, but this was done through convention instead of law.[367] Therefore, tracing the origins of Scottish constitutional identity to the foundational text of the Scotland Act seems logical. The Scotland Act contains many of the elements of a constitution, but, as Alan Page points out, its legal basis is an Act of the British Parliament.[368] The precise nature of the Scotland Act is covered later in the thesis. The point for now is that, while the Scotland Act seems like a new departure, it is also ordinary law.

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[362] Bell, Constitutional transitions: the peculiarities of the British constitution and the politics of comparison' (n 20)
[363] H Lindahl, 'Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood' in M Loughlin and N Walker (eds.) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press, Oxford 2008), 15
[364] Jacobsohn, *Constitutional Identity* (n 72) 90- 91
[365] *ibid*
[366] Page, 'The Scottish Constitution' (n 3) 137
[367] *ibid* 138
[368] *ibid* 140

It was a development within the British constitution and also represented that continuity. This is reflective of how constitutions generally change; as Joseph Raz said about constitutional change:

> It is still the constitution adopted two hundred years ago, just as a person who lives in an eighteenth-century house lives in a house built two hundred years ago. His house has been repaired, added to, and changed many times since. But it is still the same house and so is the constitution[369]

Gary Jacobsohn cautions against this metaphor, which is intended to show how constitutional identity persists through changes in the constitution. This is because he believes that it presents an idea of change that is too simplistic: the house could be changed so radically as to lose its identity.[370] Instead, he views change and continuity as much more dynamically linked. Jacobsohn points out that 'Founding choices are themselves a blending of continuity and change'.[371] This fits well with the Scotland Act. It reinforced and distinguished elements of the British constitution to give a new settlement for a submerged constituent power.[372] Devolution expressed the British constitution as people in Scotland saw it.[373] It also reformed that constitution. Paradoxically, Scottish constitutional identity has emerged slowly, but also appeared at devolution, as the Scotland Act is a founding constitutional choice. Scottish constitutional identity also attaches to both the British constitution and a potential Scottish constitution.

[369] Jacobsohn, *Constitutional Identity* (n 72) 323
[370] *ibid* 325- 326
[371] Page, 'The Scottish Constitution' (n 3) 324
[372] S Tierney, 'Sovereignty and Crimea: How Referendum Democracy Complicates Constituent Power in Multinational Societies' (2015) 16(3) German Law Journal 523, 540
[373] Tierney, 'We the Peoples: Constituent Power and Constitutionalism in Plurinational States' (n 28) 243- 244

Multiple Constitutions

The dominant Diceyan view of the British constitution is only one particular interpretation of history and the law.[374] It has no innate right to be the correct or only constitutional narrative. However, Scottish constitutional narratives do not assume any legitimacy through their dominance, as the Diceyan narratives can, nor are they normative in the same way. Nonetheless, the British constitution relies on its competing narratives so it can span multiple constituent nations. The basis for Scotland's place in the state now known as the UK is legitimate, valid and barely contested, in contrast to Ireland, which was based on conquest.[375] This means that there are legal means out of the Union for Scotland, which in turn contours the debate in Scotland. However, these legal means do not amount to a legal process for leaving the Union, as the principle of parliamentary sovereignty impedes this. In essence, the UK constitution with regard to Scotland is an incoherent compromise.[376] Scotland voluntarily consented to the Union and can leave the British state at any time, providing the narrative of choice. However, the British state is governed through a parliamentary sovereignty with no regard for that choice. This demonstrates the paradoxes in Scotland's relationship with the British constitution that exist even before multiple constitutions are discussed.

The Scotland Act marked a constitutional turning point and is important in Sottish constitutional identity. If it is a constitution, then Scotland's constitutional identity would emerge due to it possessing two constitutions, one of which exists within the framework of the other. The identity that arises from possessing this constitutional arrangement can be characterised as the three closely linked elements: popular sovereignty, national sovereignty and a non-ethnically defined people. Each of these support Scotland's potential twin constitutions. National sovereignty can be harmonised with the British constitution by looking to its union-state nature, with Scotland preserved as a nation that voluntarily entered the Union. This is reinforced by the Scotland Act providing recognition to the Scottish nation.

[374] McCormick, *Questioning Sovereignty* (n 16) 59
[375] Finlay, *Scottish Nationalism: History, Ideology and the Question of Independence* (n 337) 92-93
[376] *ibid* 97

Popular sovereignty can be sustained by that voluntary entry into the Union and the use of referendums to settle major constitutional issues, such as devolution and Scottish independence, also upheld by the Scotland Act. Finally, the people are defined by being a part of this constituent power, as to be Scottish means to have this loose right to vote in Scotland's constitutional future. All of these ideas could be harmonised with the British constitution because of the indeterminate nature of the constitution. So far, the thesis has only considered devolution as an event and has not interrogated its legal content. The next chapter, therefore, asks if the Scotland Act can actually support Scottish constitutional identity if one considers it from a legal lens, framed around whether it is a constitution in its own right or not.

Part Three Conclusion

All manifestations of Scottish identity share the premise of Scottish nationhood. The questions asked about Scottish identity reflect this: we want to know what makes us *us,* not whether there is an us. Often, that sameness is sought through what we are not, particularly England or the English. How we differ is disputed and is chiefly where aspects of constitutional identity then come into play. In other words, traditionally, ethnicity was used to explain national identity, whereas in modern times, the civic ideal has become dominant. Essentially, reflexive nationalism forms the core of Scottish constitutional identity: the Scottish people have the right to choose Scotland's place in the world. This identity does not have a final destination but instead must uphold the narrative of Scottish choice. Scottish ideas of the British constitution as plural and fluid are also not a post-modern invention. Instead, they dovetail with Scottish national identity and can be bolstered by drawing on myths and narratives.

While the civic conception cannot be the sole understanding of Scottishness, it cannot be disregarded either.[377] For example, the franchise for Scotland's independence referendum was all residents of Scotland, including EU nationals.

[377] B Jackson, 'Two Scottish Tales: the Dream and the Grind' (2020) 91(2) The Political Quarterly 485, 486

Conversely, people born in Scotland but living elsewhere were excluded from the vote to avoid an ethnic framing to the referendum. This directly corresponds to the idea of Scottishness as anyone who lives and works in Scotland. The inclusivity of this approach to the referendum is commendable. It should be complemented by a more sophisticated underlying reading of Scottish identity as plural. This does not substitute the *demos* based identity in Scotland with *ethnos,* but it tweaks the *demos* construction. Scottishness would be participating in the national conversation instead of just living in Scotland. In terms of constitutional identity, this participation is set down in the three broad principles: national sovereignty, popular sovereignty, and a non-ethnic basis.

Finding a constitutional identity's point of origin is not straightforward. Bell's argument that this occurred with devolution is convincing and accepted in the thesis. The culture produced around devolution shows how a collective, constitutional idea of Scottishness was formed. This can be seen emerging through the statements of Donald Dewar, the first First Minister of Scotland:

> This is about more than our politics and our laws. This is about who we are, how we carry ourselves[378]

In other words, the realisation of Scotland's constitutional position through devolution was a fulfilment of both their Scottish identity and their British constitutional identity. To their minds, the British constitution was upheld and secured by promoting the voice of Scotland in devolution, as for them, the British constitution was built upon the consent of both England and Scotland given in 1707. The factors which led to that constitution being dominated by England were now counterbalanced by the ability of Scots to govern their own affairs and express their own politics. In Jacobsohn's terms, this was the moment when Scotland's national identity was constitutionalised, creating a new constitutional identity.

[378] On the opening of the Scottish Parliament, 01 July 1999

Chapter Conclusion

This thesis argues that there is a Scottish constitutional identity, but this is entwined with a national identity that contains constitutional elements. A greater coherence has been sought in Scottish national identity over the 20th and into the 21st century. Mirroring this, a more coherent identity has formed from having a constitution in Scotland. The likes of the Declaration of Arbroath are no less historically dubious than before. Still, the myth now links with a democratic identity in Scotland centred on the Scotland Act.

The identity that arises from having a constitution in Scotland can be broken down into three elements. The first is that Scotland is a nation. Second, Scotland has a choice over its place, exercised by the people in the nation. Finally, being a part of the people who make that choice is the crucial component of being Scottish, as the nation does not have an ethnic basis. The three elements are mutually supportive and circular. Another way of expressing this is through the 'latent constituent power' terminology, but that constituent power is reinforced by also being a key component of Scottish national identity more generally. The fact of believing oneself a part of that constituent power serves as an identity that marks out the members of that constituent power.

In a constitutional sense, the Acts of Union are central to any Scottish identity. They were the original claims for constitutional recognition, as they formally preserved Scottish nationhood. The associated theories of unionism and the union state, which are particular readings of the United Kingdom and its constitutions, are also entailed by Scotland's identity premised on its nationhood. Therefore, devolution itself seemed a dynamic and negotiated process centred around the constitutional needs of the Scottish constituent power.

A song written for the devolution referendum goes:

> *Oor mither tongue spoke different weys, that past tae present ties*. *Each seperate and yet entwined, that's where oor real strength lies. For should one strand unwind itself the others tae forsake*. *Than a' would be forever lost, fur a' the strands would break*.'[379]

The song centres diversity and difference as the nature of the Scottish nation, combining that dynamic with devolution portrayed as 'Scotland Yet'. Scottish identity is a fluid dialogue, amounting to Scotland Yet, where Scotland is the space in which the people in this dialogue negotiate and change their position in the world, 'whatever yet may be'. The thesis argues that Scottish constitutional identity is built around the thin premise of Scots as a body who must consent to their constitutional position. This is, of course, not historically accurate, nor is its associated narratives of Arbroath and the Claim of Right. Nonetheless, the imaginary community which exists between the people of Scotland is characterised by the collective right to choose and negotiate the constitutional place of Scotland as a distinct nation.

[379] Steele, Davy. Taken from his song 'Scotland Yet', which discussed the Scottish nation at the moment of devolution. Translation (my own): Our mother tongue spoken different ways, that passed to present ties. Each separate and yet entwined, that's were our real strength lies. For should one strand unwind itself the others would be forsaken. Then everything would be forever lost, because all of the strands would break.

Chapter Five: The Scottish Constitution

Introduction

This chapter is divided into three broad parts. The first discusses the background of Scotland's constitutional position. The second describes the Scotland Act and the legal nature of devolution. The third moves on to the nature of the Scottish constitutional position, structured around the question of whether Scotland has a constitution in its own right. The basis of the third part draws on the work of Alan Page, who has argued that the Scotland Act can be considered a small-c constitution.[380] Having a constitutional identity depends on having some sort of constitution. Scotland potentially has two constitutions, so this argument is considered in depth. The method used in this chapter will primarily be a study of legislation and case law, as this chapter analyses a range of primary and secondary sources. The approach is doctrinal in early parts before broadening to theoretical analysis. Towards the end of the chapter, constitutional theory is used to discuss the nature of constitutions and analyse the claim for a Scottish constitution. This chapter is focused on the position before 2016, as the next chapter covers the legal changes in Scotland's constitution since Brexit.

[380] Page, 'The Scottish Constitution' (n 3) 137

Part One: Background on Scotland's Constitutional Position

Introduction

This part serves as a foundation for the rest of the chapter. It covers Scotland within the British constitution prior to the Scotland Act in 1998, starting with the Acts of Union. The events and issues discussed here have already been covered elsewhere in the thesis, but not in depth, and not from a legal lens. However, as this is not new ground, the approach is to be relatively brief

Background

The UK is made up of England, Scotland, Wales and Northern Ireland. Wales was conquered and absorbed into England in the 13th century.[381] Scotland and England formed the new state of Great Britain following the 1707 Act of Union. Ireland joined through the Act of Union of 1801 and has a more complex history with the other nations in the region. The Republic of Ireland seceded from the United Kingdom in 1922. Following partition, the protestant-majority region of Northern Ireland remained in the UK. Wales is recognised as a nation in modern times, and has devolved institutions like Scotland and Northern Ireland. Scotland held a referendum on secession in 2014 and voted to stay within the United Kingdom.[382]

[381] The full annexation occurred in the 16th century: see the Laws in Wales Acts 1535 and 1542. The legal system of England was fully extended to Wales

[382] See e.g. 'Scottish referendum: Scotland votes 'No' to independence' (*BBC News,* 19 September 2014) <https://www.bbc.co.uk/news/uk-scotland-29270441> accessed 16 May 2019

The Acts of Union

The forerunner to the United Kingdom was created through the Acts of Union in 1707:

> In 1707 the English got the unitary sovereign power which they wanted and got it in the form based upon the existing English parliament, with an English majority within it. The Scots got their recognition as a separate sovereign State, both from the form of the Union of 1707 as an international treaty, and from the survival of Scots law and the Scottish church[383]

Scotland joined with England to form the United Kingdom of Great Britain,[384] with the political will for the Union largely coming from England.[385] The 'Acts' refer to two Acts in the Scottish and English parliaments to ratify the articles of the Treaty of Union.[386] Both were passed, political powers were vested in London and the Parliament of Scotland was abolished. Now, Scotland was to send Members of Parliament (MPs) to the new British parliament in London, which was essentially the old English parliament.[387] The exact transition between the English and British parliaments is unknown, as is the issue of continuity between the two. The Acts of Union are notable for how much they didn't say, as there are many silences in their content. In particular, there is a lack of clarity around issues of power and the constitution. Was Scotland incorporated, or was a new union state legally founded? This is amplified by the quirks of the Union.

As one can see in the quote above, the Act of Union left differences between Scotland and the rest of the United Kingdom. Scotland retained separate legal and education systems and its own independent church.[388]

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[383] C Russell, *James VI and I and his English Parliament* (Open University Press, Maidenhead 2011) 124.
[384] Act of Union 1707 Article 1.
[385] A I MacInnes, 'The Treaty of Union: Made in England' in T M Devine, (ed.) *Scotland and the Union 1707-2007* (Edinburgh University Press, Edinburgh 2008) 54 - 62
[386] J D Ford, 'The Legal Provisions in the Acts of Union" (2007) 66(1) Cambridge Law Journal 106, 106; see also I McLean, 'The Union of Westminster and Edinburgh Parliaments, 1707' in I McLean and A McMillan (eds.) *State of the Union* (Oxford University Press, Oxford 2005) 28
[387] Article 3
[388] Articles 1; See The Protestant Religion and Presbyterian Church Act 1707; Kidd and Petrie, 'The Independence Referendum in Historical and Political Context' (n 14) 32

The continued independence of the Scottish courts is set out in Article XIX.[389] The Union can therefore be described as *political* because the Scottish legal and religious nation was left intact.[390] This gives rise to the paradox whereby Scotland and England are politically united, but legally, to an extent, distinct.[391] Scotland was left with an institutional, residual state. As Michael P Clancy points out, there is also a clause which appears to restrict the sovereignty of the new British Parliament.[392] This evidence suggests that the Scottish vision of the UK as two nations forming a new state was upheld in the Acts of Union.

Other aspects of the British constitution confuse this picture of national recognition. For example, there was no provision for any sort of Union power structure, nor does Scotland have a say at the source of power within the new British constitution at Westminster. Scotland only sends a number of MPs in line with its population share (at present, 59 of 658 MPs). Therefore, the demographic dominance of England ensures that Scotland has no entrenched voice at the centre, as there is also no elected upper house to balance the overwhelming population of England with regard to the smaller UK nations.. This evidence suggests that the Union supports the English narrative of Scottish absorption.

The Scottish Union

There are two connected principles in the doctrine of the British constitution which affect the place of Scotland. First, the United Kingdom is a unitary state.[393] Second, there is no written UK constitution. Instead, the constitution has traditionally been rooted in the principle of parliamentary sovereignty.[394]

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[389] Ford (n 387) 118

[390] A O'Neill, 'Back to the Future?: Judges, Politicians and the Constitution in the New Scotland '(2013) 18(1) Judicial Review 45, 46

[391] *ibid* 51- 52; See Stuart v Bute; Stuart and Moore (1861) 4 Macq 1 at 49;

[392] Clancy (n 242) 75. The clause is XVII*: [W]ith this Difference betwixt the Laws concerning public Right, Polity, and Civil Government, and those which concern private Right; that the Laws which concern public Right, Polity, and Civil Government, may be made the same throughout the whole united Kingdom; but that no Alteration be made in Laws which concern private Right, except for evident Utility of the Subjects within Scotland.*

[393] See eg, R Schütze, 'British 'Federalism'?' in R Schütze and S Tierney, (eds.) *The United Kingdom and the Federal Idea*. (Bloomsbury, London 2018) 1

[394] See Dicey (n 135); M Loughlin, 'Constituent Power Subverted: From English Constitutional Argument to British Constitutional Practice' in M Loughlin and N Walker, (eds.) *Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press, Oxford 2008) 42- 47

Parliament can make or unmake any laws, and there is no higher legislation.[395] According to this view, the Union was constitutionally insignificant and the British Parliament is a continuation of the English Parliament.[396] This raises questions over whether the terms of the Union could be unilaterally altered by the British Parliament, making the entrenchment of Scotland's distinctiveness a point of constitutional debate in British constitutional doctrine. Under a Diceyan interpretation, the British Parliament could. However, as Aileen McHarg recently pointed out, parliamentary sovereignty must be regarded as a thin concept, '…with only limited implications for the practice of government and politics.'[397] This already shows the tensions in the British constitution. As a matter of English doctrine, the British parliament is assumed to be able to do anything. This is true to even in absurd scenarios: it could even Scotland as a nation. However, this would be practically impossible. Like much in the UK constitution, one must think of powers in terms of 'wouldn't' as well as 'couldn't', with a great deal of overlap between the two. The function of the constitution is also very different to its doctrine.

The view that England absorbed Scotland, which underlies Diceyan sovereignty, stands in conflict with the view that the UK is multinational in any meaningful sense. Different nations cannot be accommodated under a constitution that cannot entrench those nations The tension in the British constitution is also a factor in the politics of the Union, as already discussed. For the English, the Union was the absorption of Scotland into the English constitution, while the Scots saw the Union as the creation of something new.[398] This forms the distinct constitutional narrative in Scotland.[399] Scottish unionism centres on the Acts themselves,[400] an is built from the Scottish tradition of the union state. This is the view of the Act of Union as the coming together of two equal nations.[401] The union state is, therefore, in contradiction with an orthodox view of parliamentary sovereignty, for abolishing any of Scotland's uniqueness would abrogate the very foundation of the UK.

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[395] Ibid; A Tomkins, *Our Republican Constitution* (Hart, Oxford and Portland, Oregon 2005) 1
[396] Dicey famously stated that the Act of Union and the Dentist Act 1878 were of equal constitutional significance – (n 135) 445; Loughlin (n 395) 46
[397] McHarg, 'The Future of the United Kingdom's Territorial Constitution: Can the Union Survive?' (n 238) 142
[398] Ibid
[399] Mullen, 'Brexit and the Territorial Governance of the United Kingdom (n 14) 2-3
[400] Keating, *The Independence of Scotland: Self-government and the Shifting Politics of Union* (n 185) 18- 19; O'Neill, 'Back to the Future?: Judges, Politicians and the Constitution in the New Scotland (n 391) 49- 50
[401] Kidd and Petrie, 'The Independence Referendum in Historical and Political Context' (n 14) 38- 39

There has also been a need for differentiation in how Scotland is governed recognised since the Union. Prior to the 1990s, this was achieved through administrative devolution, namely, in the Scotland Office.[402] Founded in 1885, the Scotland Office represented the British state's willingness to recognise Scotland's distinctiveness, but only as a part of the central British state.[403] Scottish affairs did enjoy separate treatment but no political power was given to Scotland. This is another example of an ambiguity about the position of Scotland within a unitary system. A practical recognition of the multinational reality of the UK did not lead to formal constitutional recognition.

A key theme in this section is, therefore, the balance between the unitary-unionist split and the association with parliamentary sovereignty. This chapter will establish which of these positions is supported by legal doctrine as it emerges in legislation and case law. The next point of discussion, the infamous *MacCormick* case, has been covered already. It is revisited to briefly here to see if it has given rise to any legal principle or change.

MacCormick v Lord Advocate

The Act of Union and Scotland's place within the UK were central to the *MacCormick* case. Lord Cooper, as was previously discussed, referenced the Declaration of Arbroath to state that parliamentary sovereignty was an English, and not a Scottish, principle. This point has never been upheld in any subsequent case. In addition, as *obiter dicta*, there is no binding effect on other cases. While Lord Cooper's interpretation in *MacCormick* has also never been expressly repudiated, it is not possible to draw doctrinal impact from this case. It may have had some influence on changing the culture around the British constitution, especially through the judicial decisions of the late 20th and early 21st centuries that pushed back against parliamentary sovereignty. For example, in *Jackson v Attorney General,* Scottish Judge Lord Hope noted in his *obiter* that '…the English principle of the absolute legislative sovereignty of parliament…is being qualified'.[404]

[402] Walker, ''The Territorial Constitution and the Future of Scotland' (n 33) 252
[403] J Mitchell, *Governing Scotland: The Invention of Administrative Devolution* (Palgrave MacMillan, Hampshire 2003) 1
[404] *R (Jackson) v Attorney General* [2005] UKHL 56 paragraph 104

The case was one of several which suggested that the British constitution was decentralising away from parliamentary sovereignty. There was and is a disparate body of narrative, paradox and politics about Scotland's role within the Union prior to the Scotland Act, but it is difficult to assess what it amounted to.

Part Two: The Scotland Act 1998

Introduction

Devolution to Scotland was finally achieved in the 1990s. There had been earlier attempts at establishing devolution: before the First World War, a Scottish Home Rule Bill was making its way through the British Parliament. It was unsuccessful, as was the controversial 1978 referendum on a Scottish Assembly. The Blair Government came to power in 1997 on the commitment to hold a referendum on establishing a Scottish Assembly. The terms of devolution came from the Scottish Constitutional Convention, a cross-party group committed to 'Scotland's Claim of Right' and the creation of a Scottish Parliament. The 'yes' vote succeeded in the referendum by 74 % to 26%. The Scotland Act was passed and the new parliament was opened in Edinburgh on the first of July 1999. The first section reads, ' There will be a Scottish Parliament'.[405] This part will discuss the content of the Scotland Act in detail before moving on to case law.

The Act

The Scotland Act 1998 was the legislation which established the Scottish Parliament and is the source of power for that parliament.[406] Much of the Act is procedural. A Scottish Executive was also created.[407] It comprises a First Minister, his ministers, the Lord Advocate and the Solicitor General for Scotland.[408] Control of Scots law was thus also transferred to Scotland. The competences of the Parliament are set out in section 29. The matters on which the parliament may not legislate include Convention rights, EU law and the reserved powers, as discussed next.[409] The Parliament operates on a reserved powers model. Under this model, anything not explicitly reserved to the British Parliament automatically devolved to the Scottish Parliament.

[405] Scotland Act 1998 c. 46 s1(1)
[406] *Ibid*
[407] s44
[408] s44(1)
[409] s29(2)(e)

Reserved matters are listed in Schedule 4 and include defence, foreign affairs and the constitution, which encompasses the issues of the Union, Crown and British Parliament.[410] Any legislation that falls outwith the Parliament's competences is 'not law'.[411] In order to stay within competences, some safeguards were built into the devolution legislation. For example, all Bills introduced at Holyrood must be accompanied by a statement from the proposing MSPs that the Bill is within competences.[412] The Presiding Officer (the speaker in the Scottish Parliament) is also required to provide a non-binding opinion on the competence of any Bill brought forward in the Scottish Parliament.[413] Essentially, the powers wielded by the Scottish Parliament are extensive, as the reserved powers model is one of subsidiarity. There are also safeguards built into the Scotland Act to ensure that the Scottish Parliament does not legislate with regards to those powers retained at the centre by the British Parliament or outwith its competences in other respects. Should those safeguards fail, then the subsequent Scottish legislation is of no legal effect.

In addition, the Act explicitly does not limit the legislative abilities of the British Parliament with regard to Scotland.[414] Ultimately, the highest power remained the British Parliament, but the power to legislate had returned to Scotland,[415] complementing its institutional and legal differentiation from the UK. One can, therefore, conceive of devolution as being extremely wide in the range of powers transferred to Scotland but also shallow in how these powers are grounded. Westminster formally retains the ultimate legal power over everything devolved despite the high level of powers devolved. In addition to retaining power to legislate in London, the UK government has certain powers to police the actions of the Scottish Parliament. Section 35 outlines the process whereby the Secretary of State may block a Bill from receiving Royal Assent. The reason for doing so can be either that the Scottish bill affects the international obligations of defence or national security of the UK or that the Bill will affect reserved matters and do so in a negative way.[416] Either reason is underpinned by the fact that the Secretary of State must have 'reasonable grounds'.

[410] Schedule 4
[411] s29(1)
[412] s31(1)
[413] s31(2)
[414] s28(7)
[415] Clancy (n 242) 78- 79
[416] s35(1)(a); s35(1)(b)

The Scottish Government can challenge the issue, and it will go to the Supreme Court. Section 35 is therefore another safeguard to keep the legislation of the Scottish Parliament within competences, with concerns about national security added to this. This demonstrates that when read plainly, the legislation is balanced between its broad devolution of powers and its retention of Westminster sovereignty, including a supervisory role over the Scottish Parliament.

The restrictions on the Scottish Parliament can be separated into two groups. They are 'federal' and 'constitutional' in nature.[417] Federal restrictions divide competences with the British Parliament, for example, through the reserved matters. In contrast, constitutional restrictions protect certain constitutional values, such as the European Convention on Human Rights (ECHR).[418] The Scottish Government and Parliament cannot act contrary to the ECHR or the Human Rights Act,[419] in addition to EU law being embedded in the text. As mentioned above, the legislation contains multiple methods to ensure that Acts of the Scottish Parliament (hereafter ASPs) remain within their competences.[420] If these fail, oversight of Scottish Parliament competences falls to the Supreme Court, which uniquely considers devolution cases as matters of British constitutional law as opposed to Scots law,[421] acting as a constitutional court in the Scottish context.[422] This, in effect, creates a judicial state.[423] The 'constitutional' limits also demonstrate how some values are embedded in the Scotland Act. While there are no grand statements of morals or principles, the express protection of human rights and EU law amounts to a thin recognition of values. The Scotland Act also leaves Scottish Acts open to judicial review, as it establishes a constitutional framework for the courts to be turned to. This will be discussed next.

[417] C McCorkindale, A McHarg and P Scott 'The Courts, Devolution, and Constitutional Review' (2017) 36(2) University of Queensland Law Journal 289, 290- 291
[418] *Ibid*
[419] s29(1); s53(1) and s57(2)
[420] McCorkindale, McHarg ans Scott'The Courts, Devolution, and Constitutional Review' (n 418) 291
[421] *ibid* 294
[422] *Ibid* 297- 296
[423] A O'Neill, Human Rights and People and Society in Goodall, K, Little, G and Sutherland, E E *Law Making and the Scottish Parliament: The Early Years* (Edinburgh University Press, Edinburgh 2014) pp 39- 40

Case Law: Devolved Powers and Convention Rights

The majority of devolution case law is concerned with Convention rights.[424] One such was *Somerville v Scottish Ministers*. This case was about the ECHR and challenged segregation practices in Scottish prisons.[425] The case was notable because it turned on the wording of the Scotland Act, so Scottish ministers had to lobby the British Government to fix the problem.[426] This is a further demonstration of the subordinate nature of the Scottish Parliament and Government, confirming that, doctrinally, its place within the British constitution is restricted and narrow, and Westminster remains the master of the Scotland Act.

The mechanism to challenge an Act of the Scottish Parliament is broad and expansive.[427] Following *Axa*, it was confirmed that the judicial review of the Scottish Parliament is to be carried out in accordance with the Scotland Act.[428] However, in practice, the role of judicial review is constrained through the *Axa* ruling, in which the Supreme Court ruled that Acts of the Scottish Parliament are only subject to common law judicial review in extraordinary circumstances. Therefore, the Scottish Parliament sits somewhere in between the absolute sovereignty of Westminster and other public institutions, such as local authorities, but that does not mean that the judicial supervision of the courts is narrow. There are two categories of grounds under which the courts can review actions of the Scottish Parliament. The first is the limited role of common judicial review. The second is legislative judicial review under the Scotland Act, encompassing the restrictions it sets out on competences through reserved powers and the ECHR.

[424] McCorkindale, McHarg and Scott 'The Courts, Devolution, and Constitutional Review' (n 418) 296 -297
[425] Somerville & Others v Scottish Ministers [2007] UKHL 44
[426] E Sutherland, *Law Making and the Scottish Parliament* (Edinburgh University Press, Edinburgh 2014) 46- 47
[427] McCorkindale, McHarg and Scott, 'The Courts, Devolution, and Constitutional Review' (n 418) 291
[428] D J Carr, 'Not Law' (2012) 16(3) Edinburgh Law Review 410-, 410

Scotland and the Broader UK Constitution

The relationship between the Scottish institutions and the rest of the United Kingdom is also managed through political means. The governance of Scotland by two parliaments is achieved through the Sewel Convention.[429] The Convention attempts to smooth the situation where the British Parliament legislates in an area of devolved competence. Essentially, permission will be sought from the Scottish Parliament through a Legislative Consent Motion. This was set out by Lord Sewel's statement in the parliamentary debates on the Scotland Bill as it progressed at Westminster. He stated that the British Parliament would not 'normally legislate' in an area of devolved competence without seeking 'consent' from the Scottish Parliament.[430] As Aileen McHarg points out, the principle was intended to operate for legislation which 'contains provisions applying to Scotland and which are for devolved purposes' or that 'which alter the legislative competence of the Parliament or the executive competence of the Scottish Ministers'.[431] However, there has been a longstanding debate over what the word 'normally' entails. McHarg notes that while vague, it is not unusual for a *legal* principle to have broad and unclear wording.[432] She also notes that Lord Sewel referred to the older system of devolution in Northern Ireland and that the only time the British Parliament had previously overridden devolution was during extreme strife when the devolved administration broke down.[433] It can, therefore, be inferred that 'normally' is to be interpreted broadly, and the need for legislating without consent must be one of truly exceptional circumstances. However, as is typical of the British Constitution, there is no clarity on the matter.

[429] *Hansard*, HL Vol 592, col 791
[430] *ibid*
[431] A McHarg, 'Constitutional Change and Territorial Consent: the Miller case and the Sewel Convention' in M Elliott, J Williams and A Young (eds.) *The UK Constitution after Miller: Brexit and Beyond* (Bloomsbury, London 2018) 4-5
[432] *ibid* 18
[433] *ibid* 6

The 'West Lothian Question' also generated much debate. This refers to the anomaly left by devolution, whereby Scottish (or Welsh) MPs in the British Parliament may still vote on domestic issues in England which have been devolved to the other countries.[434] These points help demonstrate the nature of devolution: it is not symmetrical and creates a paradox which requires political solutions when the law runs out. The legal regime created through the Scotland Act still exists within the unwritten British constitution.

Devolution led to the argument that the UK had become somewhat federal.[435] The argument ran that, as a matter of practicality, the British Parliament could no longer run the UK as a unitary state from London. Political powers had returned to Scotland.[436] Ultimately, however, the Scotland Act was designed to not challenge the sovereign power of the British Parliament. As previously discussed, however, there is a long-standing tension between the UK's identity as both a unitary and a union state.[437] On a doctrinal basis, however, the sovereignty of parliament was retained as the lodestar of the British constitution despite the material challenges to it created through devolution. What is emerging is a tension between the reality and the doctrine of the British constitution, or the function of the British constitution and its doctrine. In the case of the West Lothian Question, the problem was left unresolved until 2014. Following the independence referendum, Prime Minister David Cameron attempted to address the West Lothian Question through English votes for English Laws (EVEL hereafter). This did not resolve the asymmetrical constitution. Instead, EVEL reduced the power of Scotland at the centre of the constitution even further, and this is briefly discussed later in this part. First, *Axa* is considered in more detail.

[434] M Elliott, 'Devolution, the West Lothian Question, and the nature of constitutional reform in the United Kingdom' (*UK Constitutional Law Blog,* 26 May 2013) <https://ukconstitutionallaw.org/2013/03/26/mark-elliott-devolution-the-west-lothian-question-and-the-nature-of-constitutional-reform-in-the-united-kingdom/> accessed 27 June 2019

[435] V Bogdanor, 'Constitutional Reform in Britain: The Quiet Revolution' (2005) 73(8) Annual Review of Political Science 81, 86

[436] O'Neill, 'Back to the Future?: Judges, Politicians and the Constitution in the New Scotland (n 391) 56

[437] C McCorkindale, 'Scotland and Brexit: The State of the Union and the Union State' (n 42) 362- 365

AXA v Lord Advocate

The case concerned compensation for asbestos poisoning under the Damages (Asbestos-related Conditions) (Scotland) Act 2009. The Act was challenged as outwith the competences of the Scottish Parliament on two grounds: first, the Act was incompatible with the Convention, and second, that it was 'irrational' at common law.[438] Therefore the judicial review was on the grounds of both the common law and the Scotland Act. Neither ground was successful. The way the Court reached their conclusion set the approach taken in judicial review of ASPS. Tickell summarises:

> The Scotland Act provides guidance on how courts are to approach adjudication under this section. 'Whether a provision of an Act of the Scottish Parliament relates to a reserved matter' is to be determined 'by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances'. This test must be read alongside the interpretative duty imposed on the court by section 101, which provides that any Act of the Scottish Parliament 'which could be read in such a way as to be outside competence' must be 'read as narrowly as is required for it to be within competence, if such a reading is possible'[439].

Therefore, the presumption is to read ASPs within competences when it comes to legislative judicial review. More fundamentally, ASPs are only subject to judicial review on tightly constrained grounds because of the special nature of the Scottish Parliament. The Court thus created a hierarchy, with the Scottish Parliament sitting between administrative bodies and the unlimited sovereignty of the British Parliament. While the special democratic founding of the Scottish Parliament was noted, it remained that the Parliament was created by the British Parliament as opposed to the 'Scottish people'.[440] *Axa* was part of a trend for judges to pronounce toward more judicial activism in the British constitution.[441]

[438] A McHarg, 'Axa General Insurance Ltd v Lord Advocate: Analysis' (2012) 16(2) Edinburgh Law Review 224, 224
[439] Tickell, (n 193) 326
[440] O'Neill, 'Back to the Future?: Judges, Politicians and the Constitution in the New Scotland (n 391) 56
[441] G Gee and A Young, 'Regaining Sovereignty? Brexit, the UK Parliament and the Common Law' (2016) 22(1) European Public Law 131, 137 -138

This trend can also be seen in the rise of theories such as common law constitutionalism and the effect of EU membership on the British constitution, which all amounted to a reinterpretation along more consent-based, legalised lines. This goes hand in hand with a view of devolution as more than another ordinary statute. Indeed, in cases such as *Thoburn*, the Scotland Act was elevated to the new position of 'constitutional statute':

> the Magna Carta, the Bill of Rights 1689, the Act of Union, the Reform Acts which distributed and enlarged the franchise, the Human Rights Act 1998, the Scotland Act 1998 and the Government of Wales Act 1998. The 1972 [European Communities] Act clearly belongs to this family"[442]

Laws LJ argued that these constitutional statutes were immune from implied repeal. The important point is that this idea sits uncomfortably with the doctrine of parliamentary sovereignty. The notion of constitutional statutes (or instruments) was later upheld in the *HS2* case, although the Scotland Act was not named in that case.[443] The Scotland Act was also cited as immune to implied repeal by a judge in a 2012 Supreme Court case.[444] One can, therefore, argue that uncertainty was arising doctrinally from the courts in the nature of the UK constitution and Scotland's place within it. Constitutional statutes can be argued to have modified the simple system of parliamentary sovereignty, as a constitutional structure has been built up. However, this does not mean that there is any great level of protection for the Scotland Act. The Scottish constitution, in the sense of a base document that established the remit of the Scottish institutions, was now weakly entrenched. Ambiguity remained the defining characteristic of what this precisely meant.

[442] *Thoburn v Sunderland CC* [2002] 4 All ER 156 paragraph 62
[443] *HS2 (*n 143)
[444] *BH v Lord Advocate* [2012] UKSC 24 at 30

Imperial Tobacco v Lord Advocate

Imperial Tobacco was another important case concerned with the validity of ASPs.[445] Lord Hope held here that the matter was one of statutory interpretation. The Supreme Court also dialled down its rhetoric from the landmark decision in *AXA.*[446] They stated that the Scotland Act was 'not a constitution'[447] and was instead it was an Act of Parliament. This sought to distinguish the tone of *Robinson.* In *Robinson*, a Northern Irish case, dicta from the House of Lords described the devolution statute there as 'in effect a constitution',[448] and it could be read alongside its historical context. So, there is a window for the courts to go further with devolution. Adam Tomkins is somewhat critical of the case and notes that the Supreme Court has not followed the *Robinson* approach.[449] The devolution paradox, therefore, also appears to be present in Northern Ireland, whereby conflicting legal and political positions have emerged around the British constitution. As McHarg, McCorkindale, and Paul Scott observed, the courts have been mostly reluctant to treat devolution as a constitution change to any greater extent than what their texts set out.[450] Therefore, the court has managed to avoid more profound issues in the British constitution and has generally not read devolution in its context, with the exception of *Axa.* Instead, it prefers to interpret the devolution statute generally as a 'constitutional statute', meaning that it has weak entrenchment in the form of being immune from implied repeal.

[445] Imperial Tobacco Ltd v Lord Advocate (Scotland) [2012] UKSC 61
[446] A Tomkins, 'What's Left of the Political Constitution?' (2013) 14(12) German Law Journal 2275, 2279
[447] *AXA General Insurance Limited and others (Appellants) v The Lord Advocate and others (Respondents) (Scotland) [2011] UKSC 46*paragraphs 71 and 181
[448] *Robinson v Secretary of State for Northern Ireland and Others* [2002] UKHL 32 paragraph 11
[449] Tomkins, 'What's Left of the Political Constitution?' (n 447); A Tomkins, 'Confusion and Retreat: The Supreme Court on Devolution' (*UK Constitutional Law Association,* 19 February 2015) <https://ukconstitutionallaw.org/2015/02/19/adam-tomkins-confusion-and-retreat-the-supreme-court-on-devolution/> accessed 26 May 2020
[450] McCorkindale,, McHarg, an Scott 'The Courts, Devolution, and Constitutional Review' (n 418) 302.

The Amended Scotland Act

The contradictions between legal texts and their contexts also exists in the Scotland Act. The Scotland Act was amended in 2012 following the victory of the Scottish National Party in the 2007 Scottish Parliament election.[451] The Act originated in the recommendations of the Calman Commission on Scottish Devolution. The language of the report is striking. For example, it argues that '…the United Kingdom has never been a unitary state'.[452] Parliamentary sovereignty is also undermined throughout.[453] The findings can be placed within a narrative of Scottish sovereignty, arguing that elements of this sovereignty were preserved through the Act of Union before finding a place again within the devolution settlement.[454] However, in a doctrinal sense, this was not translated into the Act. Largely cosmetic, it had two key effects. The Scotland Act 2012 changed the 'Scottish Executive' to the 'Scottish Government'.[455] The Scottish Parliament was also given greater financial powers.[456] The changes were, therefore, twofold: devolved powers were increased and expanded, and the symbolism of devolution was also enhanced. The symbolism leaned into the practical reality of the British constitution, but ultimately, the doctrine remained unchanged.

The Scotland Act 2012 increased the differentiation between Scotland and the UK through the devolution of some tax and spending powers. The Act, however, did not resolve any issues over the status of Scotland beyond a desire to head off Scottish independence. The basis for the Act also contained rhetoric which contradicted the traditional reading of the British constitution. This rhetoric was not upheld in the text of the Scotland Act.

[451] The Act came from the Calman Commision. H Holden, The Commission on Scottish Devolution – the Calman Commission (*Parliamentary Library – Explanatory note*, 04 June 2010) <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN04744> accessed 27 May 2021, 7
[452] 'Serving Scotland Better: Scotland and the United Kingdom in the 21st Century. Final Report' (*Commission on Scottish Devolution,* June 2009) paragraph 1.66
[453] *Holden* (n 452) 17- 18
[454] M Pittock, 'Scottish sovereignty and the union of 1707: Then and now' (2012) 14(1) *National Identities* 11, 11 - 12
[455] Scotland Act 2012 c. 11 s12(1)
[456] *ibid* part 3

The Scotland Act 2016

The Scotland Act 2016 was an Act of the British Parliament passed following the 2014 independence referendum. It was an amendment that did change the legal doctrine of devolution and British the constitution. It had two broad effects. The first was to increase the powers of the Scottish Parliament: tax and borrowing powers were increased, for example. The areas of distinction between Scotland and the rest of the UK were therefore increased, and the Scottish Parliament became ever more powerful.

More significantly, the Scotland Act 2016 also made constitutional changes in its opening two sections.[457] First, the Scottish Parliament was made permanent.[458]. Second, the Sewel Convention was placed on a statutory footing:[459]

> that the parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament' (Scotland Act, 1998, s 28 (8))

This suggests that the British parliament can no longer alter or abolish the Scotland Act at will, as section one set out that a referendum of the Scottish people was the only possible scenario for abolition. Referendums as a part of the process for constitutional change in Scotland were further entrenched, recognising another source of legitimacy beyond parliamentary sovereignty. Placing the Sewel Convention into the legislative text gives the Scottish Parliament power at the centre of the British state. These amendments led to claims that the UK was moving towards becoming a federal state with power vested in its constituent parts.[460]

[457] S Tierney, ''Drifting Towards Federalism? Appraising the Constitution in Light of the Scotland Act 2016 and Wales Act 2017' in R Schutze and S Tierney (eds.), *The United Kingdom and the Federal Idea* (Hart Publishing, Oxford 2018) 103- 105
[458] Scotland Act s1(1)
[459] s1(2)
[460] See e.g. Tierney, ''Drifting Towards Federalism? Appraising the Constitution in Light of the Scotland Act 2016 and Wales Act 2017' (n 458) 115 -116;

The legislative entrenchment in sections one and two of the Scotland Act challenges the traditional soft-law accommodation of Scotland's constitution within the British constitution. By placing entrenchments in legislation, there was a transfer to a hard law entrenchment. In order to make the Scottish Parliament permanent then one must assume that section one is itself unamendable, or at least heavily entrenched. The Act does not offer more insights on these issues, with the explanatory notes only adding confusion:

> This Act also includes provisions which set out the constitutional relationship of the Scottish Parliament and Scottish Government within the United Kingdom's constitutional arrangements. It does not amend this relationship.[461]

This suggests that the Scottish Parliament has always been permanent, and is silent on the effect of making the Sewel Convention hard law. It is hard to square the permanence of the Scottish Parliament with the sovereignty of the British Parliament, and especially difficult believe that this has been the case since 1999. The Scotland Act 2016 inserted a legal acknowledgment of a Scottish *demos* and popular sovereignty. This is because section one provided that the Scottish Parliament is permanent, with the exception of if authorised by the Scottish people in a referendum. While the previous Scotland Act was the result of a referendum, this fact is not mentioned in the legislative text. So, the legislative provision for a referendum is a new feature, especially as the British Parliament accepted that it was bound to enact the results of that referendum. The people of Scotland also, therefore, emerged and were recognised in British doctrinal law as a separate people within the supposedly unitary UK constitution. It also gives rise to the Scottish people as the ultimate masters of the Scotland Act.

While previous versions of the Scotland Act did not contain any provisions which directly challenged the doctrine of parliamentary sovereignty and the unitary British state, the 2016 amendment did. Ambiguities around interpretations coming from case law and convention were extended into legislation and pushed further by the permanence clause.

[461] Explanatory notes to the Scotland Act 2016, pages 5-6

Despite the claims that the British constitution was unchanged in the explanatory notes, this must amount to a change of doctrine in Scotland's constitutional status. The tension in the British constitution was no longer between doctrine and practice, or between doctrine and narrative; it was between contradictions within the doctrine itself as set out in legislation.

More Minor Legislation: The Referendum Act

The 2014 referendum on Scottish independence was facilitated through the Scotland Act 1998 (Modification of Schedule 5) Order 2013 using the sovereignty of the British Parliament. Under this, an independence referendum in 2014 would not be a reserved power.[462] A process was therefore established for Scottish independence referendums.[463] This followed the SNP achieving an absolute majority in the 2011 Scottish Parliament election. The Scottish parliament then published a Bill to hold a referendum on Scottish independence, which was challenged as outside competences by the British Government.[464] Tierney points out how sharply divided academic opinion was on the issue of the Scottish Parliament's ability to hold such a referendum, with it seeming likely that a challenge would make its way to the Supreme Court. Following the Edinburgh Agreement, Acts were passed to facilitate the referendum. A Section 30 Order under the Scotland Act was made, which transferred the power to hold a referendum to the Scottish Parliament.[465] This headed off the question of authority to hold an independence referendum. The legal consequences of a refusal by the British Parliament to hold an independence referendum had never been tested prior to 2022. While the question of whether the Scottish Parliament could hold its own referendum on independence was unresolved, the majority of powers around Scottish independence resided in the British Parliament, including the approach used in 2014.

[462] P Silk, 'Devolution and the UK Parliament' in G Drewry, and A Horne,(eds.) *Parliament and the Law* (Hart Publishing, Oxford 2018) 181 - 182
[463] S Tierney, 'Legal Issues Surrounding the Referendum on Independence for Scotland' (2013) 9(3) European Constitutional Law Review 359, 360
[464] *ibid* 361
[465] S Tierney, 'The Scottish Independence Referendum' in A McHarg, T Mullen, A Page and N Walker, *The Scottish Independence Referendum: Constitutional and Political Implications* (Oxford University Press., Oxford 2016) 60

More Minor Legislation: English Votes for English Laws

Prime Minister Cameron announced another change to the constitution following the Scottish independence referendum. It was EVEL, as mentioned previously. It was a response to the West Lothian Question, whereby MPs from minority nations with devolved competences were still able to vote on such issues in England. A change in standing orders at the British Parliament effectively gave MPs representing English constituencies a 'veto' over laws which only apply to England.[466] This created an uncertain situation. The British Parliament now served simultaneously as the overarching British Parliament and a quasi-English Parliament, with MPs divided into two different groups. Once again, the piecemeal nature of the British constitution was used to accommodate the UK's increasingly divergent constituent nations, creating imbalance and asymmetry.

Beyond these soft-law tensions, devolution provided Scotland with a constitutional structure through the Scotland Act. This is because the Act created new institutions which were legitimised and constrained by the provisions of that Act. In addition, a robust legal framework gave the courts a supervisory jurisdiction. The entrenchment of this settlement was seemingly impossible, however, because it sits within the broader British constitution, which operates under a model with no hard legal entrenchment. The means of entrenchment are convention and practices, or soft law, in particular, the Sewel Convention. The British Parliament is also the master of the Scotland Act, and the sovereignty of the devolved institutions is parasitic upon the sovereignty of Acts of the British Parliament. Devolution was not federalism, nor could federalism work in the UK due to the population imbalance between England and the other nations.[467] Devolution was, on the one hand, decentralisation, but it took place within a country still dominated by the centralised doctrine of parliamentary sovereignty.[468]

[466] L Smyth, 'English Votes for English Laws' in G Drewry and A Horne, (eds.) *Parliament and the Law* (Hart Publishing, Oxford 2018) 209- 211
[467] MacCormick *Questioning Sovereignty* (n 16) 193- 194
[468] V Bogdanor, *Devolution in The United Kingdom* (Oxford University, Oxford 2001) Press 1

Conclusion

The Scotland Act created an asymmetrical devolutionary settlement for Scotland. Its impact on the British constitution was both significant and unclear. The significance was due to several factors: new institutions were created with substantial powers. The impact was ambiguous for the doctrine of the British constitution. On the one hand, parliamentary sovereignty was expressly upheld in the text of the Scotland Act. On the other, devolution occurred during a period of more general decentralisation and the weakening of the traditional British constitution. In 2016, this weakening was underlined by the new provisions in the Scotland Act that suggested that parliamentary sovereignty was, at least, qualified. The chapter now shifts focus from what this entails for the British constitution, and to the question of a potential Scottish constitution.

Part Three: The Scottish Constitution

Introduction

This part deals with the nature of the Scotland Act, framed around the question of whether it can be considered a constitution in its own right. To do this, the theory of sub-state constitutions are discussed first. Later, the discussion turns to the implications of the Scottish constitution for Scottish constitutional identity. This links with analysis from earlier parts of the thesis.

What is a sub-state constitution?

The nation, the state and the constitution typically coincide. Various terms are used to discuss the nature of constitutions below the nation-state level. A recent volume used the following description of 'subnational constitutions':

> … basic documents for given subnational entities which lay down entrenched fundamental rules on one or more of the categories of subnational identity, representative structures and organization of powers, fundamental rights and policy principles, and require the approval of the people or representatives of the subnational entity.[469]

Subnational constitutions also fundamentally differ from nation- state constitutions in that they are ultimately limited in their powers by the broader state.[470] The authors explain that their definition includes the phrase 'one of' because of the variety in subnational constitutionalism. The authors do concede that constitutions are, in theory, adopted and amended by a sovereign people.[471]

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[469] P Popelier, G Delledonne, and N Aroney 'Subnational Constitutionalism Defining subnational constitutions and self-constituent capacity' in P Popelier, G Delledonne, and N Aroney (eds.) *Routledge Handbook of Subnational Constitutions and Constitutionalism* (Routledge, London 2021) 9
[470] *ibid* 4
[471] *ibid* 7

To get around this element, as many subconstitutions are authorised and created by central authorities, they argue that the foundation of any constitution by a sovereign people is usually a myth. This is accurate, but it does point to a tension within sub-constitutions, as they are even further from the ideal of the constituent power than national constitutions are. The authors also note that the degree of entrenchment of a subnational constitution varies from system to system.[472] The next section, which discusses the Scottish constitution, will return to these points.

Sub-national constitutions are allocated a space in which to operate by their broader national constitution. G. Alan Tarr argues that this constitutional space depends on the nature of the wider constitution, with the subnational constitution filling in gaps that exist in the larger constitution.[473] Tarr also states that federal systems typically offer more space than devolutionary ones,[474] as they are founded as plural states as opposed to those that devolve powers to territorial units at a later date, with the subnational unit already possessing an identity and governing structures at the time of federation.[475] Scotland does not fit well into this divide between federal states and devolutionary ones. The UK is not a federation, and its quasi-federalism system is devolutionary in nature. However, at the Acts of Union, the UK began as a plural space, with Scotland possessing and retaining an identity and legal system, with only its political system giving way as it entered the UK. Nonetheless, the frame of subnational constitutional space is a useful one in capturing the relationship between the subnational and national constitutions.

At the substate level, the stakes are effectively lower because of the safety net of the broader constitution, meaning that one should not be surprised to see lower levels of the separation of powers, weaker rights protections and a lower standard for amendment.[476] In practice, subnational constitutions vary widely. In the American example, state constitutions better resemble a complete example of a constitution in guaranteeing rights and separating powers when compared to the 'minimal' national constitution.[477]

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[472] *ibid* 7-8
[473] A G Tarr "Explaining Sub-National Constitutional Space." (2011) 115(4) Penn State Law Review 1133, 1133
[474] *ibid* 1135
[475] *ibid*
[476] T Ginsburg and E A Posner, 'Subconstitutionalism' (2020) 62(6) Stanford Law Review 1583, 1596
[477] G Delledonne and G Martinico, 'Legal conflicts and subnational constitutionalism' (2011) 42(4) Rutgers Law Journal 881, 886

Identity concerns have been vital in the developing relationship between state and substate in other systems, such as Spain.[478] This frames a great deal of the literature on subnational constitutions. With these features in mind, the Scottish constitution will now be discussed.

The Scottish Constitution

First, the term substate constitution will be used instead of subnational constitution. This is more than semantics, as Scottish nationhood is not contested in the UK and there is no one British nation. Scotland lies below the state level, but not the national level.

Second, the fact that identity concerns have not been litigated to develop the relationship between the state constitution and the sub-state constitution, nor are they contained in the substate constitution, does not reflect a lack of Scottish constitutional identity. Instead, it reflects the fact that self-determination and popular choice are the central features of Scottish identity, as previously discussed, for various reasons. These include the internal cultural diversity of Scotland, its historical narrative, and the UK's own decentralised identity compared to a country like Spain. The fact that the right to hold an independence referendum has been recently litigated is evidence of the development of Scottish constitutional identity as self-determination. The thick, identity-driven rhetoric used to argue for self-determination via an ability to hold an independence referendum reflects this.

Third, the Scotland Act established institutions and created a regime of supervision over those institutions. It is the source of the Scottish Parliament's powers and the location of legal legitimacy. For these reasons, it appears to be a sub-state constitution, but further discussion is necessary.

Two writers have fully discussed Scotland's level of constitutional separateness: Aileen McHarg describes Scottish constitutional 'distinctiveness'. At the same time, Alan Page argues that describing a post-devolution Scottish constitution is possible.[479]

[478] *ibid* 895-900
[479] Page, 'The Scottish Constitution' (n 3) 137- 138

McHarg's argument centres on the increasing divergence in Scottish constitutional practice since devolution, in addition to the theory of the union state.[480]

According to Page, before devolution there was constitutional latitude for Scotland through convention as opposed to separate constitutional law. This was complemented by the survival of the Scottish legal system, giving rise to the possibility of a 'Scots law' interpretation of the British constitution. Page here draws in unionism and notes that this idea reached its peak in *MacCormick v Lord Advocate.*[481] Using a definition of 'constitution' supplied by Cheryl Saunders, Page argues that the Scotland Act amounts to a constitution, albeit one over which Westminster retains control.[482] Saunder's definition is a relatively thin one centred on founding, legitimising and constraining institutions through constitutionalism. It includes the need for some popular legitimacy. The Scotland Act enjoys supremacy over the laws of the Scottish Parliament, so it amounts to a constitution in the written tradition. Thus, Page separates the devolution of the 1990s from elements of Scots law and unionist narratives which preceded it in his purely doctrinal take on Scotland's constitutional settlement. Broadly, Page limits 'Scotland's constitution' to the Scotland Act. This thesis accepts the argument that the Scotland Act amounts to a Scottish constitution, which is something that Scotland did not possess prior to devolution.

Gaps in the Scottish Constitution

Before 2016, the Scottish constitution had a number of gaps. Some of these were practical: whether the Scottish Parliament could hold a referendum on Scottish independence without authorisation from the British Parliament was unknown. The Sewel Convention remained relatively untested. Similarly, some provisions in the Scotland Act which restricted the Scottish Parliament's powers, such as Section 35, had never been used. These examples, when taken in the context of the decentralisation of the British constitution away from parliamentary sovereignty across the late 20th and early 21st centuries, led to uncertainty over the exact powers and relationship between the institutions in Edinburgh and London.

[480] McHarg, 'The Future of the United Kingdom's Territorial Constitution: Can the Union Survive?' (n 238)
[481] Page, 'The Scottish Constitution' (n 3) 139- 140
[482] *ibid* 143

Other gaps in the Scottish Act were raised by seeing it as a constitution. Comparing Scotland's constitution again to another contested constitution, that of the EU, is interesting. On the face of it, some gaps in the case for a Scottish constitution are similar to those in the case for an EU constitution. There is no single text entitled the constitution in either case. Both lack the capacity of a nation-state and break the exclusive link between the nation-state and the constitution. Neither text is properly linked to a *demos,* but both are linked to *demoi* that have a constitution in another formation. The similarities then end. The EU constitution covers multiple smaller *demoi*, whereas Scotland does have a *demos* that climbs up into a *demoi* in the UK. In other words, the extent of a European people is contested in a way that there being a Scottish people is not contested. There are certainly state constitutions below the potential EU constitution, whereas the potential Scottish constitution exists below the British constitution.

Both the EU and Scotland have a constitutional settlement which has a distinct 'master'. In the EU's case it is the member states; for Scotland, it is the British Parliament. These masters are ultimately empowered to amend each constitution. There is blurring in each case, and neither is an entirely external master. In the EU example, the member states and the Union are deeply linked through supranationalism. In Scotland's case, amendment is blurred by two factors. First, Scotland is a subset of the electorate to the British Parliament, giving some voice in theory over amendment. Second, the creation and amendment of the Scotland Act had, as of 2016, tracked with popular opinion and events in Scotland. This links to a point that Page downplays in his argument for the Scotland Act as a constitution: it is the Scotland Act in context that amounts to a constitution. This is because constitutions are more than just legal instrument and are symbolic statements of a people. The Scotland Act, due to its popular foundation and congruence with pre-existing narratives in Scotland, meets the threshold of being a constitution in the legal framework it creates and the solidarity it can engender.

The temporal aspects of the Scottish constitution present problems. In other words, how long has there been a Scottish constituent power or pouvoir constituent? In a sense, the use of a referendum to establish the Scotland Act bridges this element. Prior to the Scotland Act there was no Scottish constitution. Following a campaign by Scottish civil society, a referendum was used to express the will of the Scottish people, leading to the Scotland Act and its associated institutions. This means that the Scottish constituent power existed as some sub-constitutional force prior to the Scotland Act, but was submerged. This points to the fact that the Scotland Act is reliant on Scottish elements and narratives within the broader British constitution. Although the 1998 text eschewed Scottish identity, it was built from Scottish identity. There are elements of continuity and change in Scotland's constitutional position pre- and post-Scotland Act, pointing to a much messier picture of legal text overlapping with non-legal elements.

Much more problematic is the true nature of the Scotland Act's founding. To an extent, it has always had two faces: one as a statement of a native constituent power authorising a new settlement and another as a simple Act of the British Parliament. This distinction has not always been as straightforward as one between politics and law. As highlighted above, *Axa* reinforced the special nature of the Scotland Act due to its popular foundation and gave this a legal meaning through the protection against common law judicial review. In the Scotland Act 2016, the link between the Scottish people and the Scotland Act was made even more explicit. However, this weakened role for the people in the founding of Scotland Act mirrors the general weakness in most substate constitutions, which are adopted by the broader state and not by a sovereign people.

Amendment similarly leads to the contentious issue with treating the Scotland Act as a constitution. The Scotland Act can be amended by the British Parliament as the Scotland Act is higher law in the sense that the Scottish Parliament cannot amend it.[483] This differs from nation-state constitutions, which at least tend to pay lip service to the people in their amendment processes or are amended by certain majorities in a parliament that sits at a corresponding level to that constitution.

[483] Page, 'The Scottish Constitution' (n 3) 140

The British Parliament sits at a higher level with representatives from all four nations of the UK. Once again, the uneasy balance between law and politics confuses the situation. In practice, prior to Brexit, the Scotland Act was not amended without some link to politics in Scotland. The Scotland Act 2012 was in response to the SNP majority in the Scottish Parliament in 2011 and the Scotland Act 2016 came on the back of commitments made during the 2014 independence referendum. The British Parliament, therefore, acted as a conduit for the will of the Scottish people. Finally, the Sewel Convention also functioned well before Brexit, further maintaining the impression of Scottish consent to constitutional change. Like the founding of the Scottish Parliament, constitutional amendment has two faces: a legal retention of British Parliamentary sovereignty and a political change towards recognising a Scottish popular sovereignty of some sort.

The weakness in Page's argument lies in the limited definition of constitution. A constitution is defined as a set of rules that limit and legitimise rule. Arguably, however, this is no different from law in general. The features that mark constitutions as distinct are their higher nature, their founding and their broader social role. However, the Scotland Act does meet the threshold of being a constitution because it draws on its political connections to an idea of a Scottish people. This brings the discussion to Scottish constitutional identity.

The Scotland Act and Scottish Constitutional Identity

This thesis describes Scottish constitutional identity as containing three linked elements: national sovereignty, popular sovereignty and a people defined in non-ethnic terms. Each of these elements are very loosely defined. We have already seen how the event of devolution was key in developing this identity. Can the same be said of the Scottish constitution itself, the Scotland Act?

The two faces of the Scotland Act, the legal and the political, generally contradict and support Scottish constitutional identity, respectively. In its text, the Scotland Act does not expressly support Scottish constitutional identity with two exceptions. In fact, the preservation of British Parliamentary sovereignty in the Scotland Act contradicts Scotland's sovereignty narratives. These exceptions are the notable amendments from 2016 that placed the Sewel Convention on a statutory footing and made the Scottish Parliament permanent, save for a referendum of the Scottish people. The law of the Scotland Act, in these exceptions, supports Scottish constitutional identity in that it reinforces the narrative of Scottish popular sovereignty. Therefore, the law of Scotland's constitution here joins the politics of Scotland's constitution in feeding into Scottish constitutional identity.

The general silence of the Scotland Act on 'identity' issues does not contradict the reading of Scottish constitutional identity. This is because the existence of the Scottish Parliament in itself is a statement of Scottish constitutional identity. However, constitutional identity is mostly read into the Scotland Act from places outwith the law, notable for its authorisation in a referendum. Case law does not directly address issues of identity in Scotland, but as above, this is not evidence of a lack of constitutional identity in itself. What is problematic is the preservation of parliamentary sovereignty.

Parliamentary sovereignty at the UK constitutional level does not necessarily contradict Scottish constitutional identity. In its purest form, parliamentary sovereignty does. As the British Parliament can unmake or make any law, it could, therefore, interfere with Scotland's sovereignty, for example, by making Scotland a region of England or abolishing the Scottish Parliament without the consent of people in Scotland. These hypothetical examples would be contrary to existing legislation in 2016. For the first, the Acts of Union and the second, the Scotland Act following the 2016 amendments. Both of these statutes would fall within the definition of a constitutional statute. Again, on the purest reading of parliamentary sovereignty, Parliament could set aside such a statute if it ultimately wished to repeal it. Practically, this seemed unlikely, as parliamentary sovereignty had been weakened by, among other things, forty years of EU membership, the advent of human rights legislation and devolution. Ultimately, the precise meaning and implications of parliamentary sovereignty across the whole British constitution had become ambiguous prior to 2016.

Conclusion

The Scotland Act meets the threshold of being a constitution. In particular, it follows the pattern of being a sub-state constitution. The Scottish constitution mirrors the gaps in sub-state constitutions generally: they lack links to a constituent power even more obviously than nation-state constitutions, as they are founded by the central government as opposed to the people. In Scotland, this was overcome by leaning on elements of Scottish constitutional identity. This thesis has already discussed the importance of devolution as a political and cultural event in Scotland's narrative of sovereignty. In function, the Scottish constitution both undermined and supported Scottish constitutional identity, primarily through the preservation of parliamentary sovereignty in the text of the Scotland Act. Parliamentary sovereignty is an English constitutional narrative. However, the text was not absolute following the 2016 amendments, which reinforced Scottish constitutional identity by supporting the popular sovereignty narrative. Case law such as *Axa* promoted an elevated status for the Scottish Parliament and pushed against pure ideas of parliamentary sovereignty. The function of the constitution also pushed against parliamentary sovereignty through the use of the Sewel Convention. The substate Scottish constitution and, in particular, its British constitutional frame, were both confused and difficult to pin down in terms of their exact nature in 2016. However, plenty of evidence could be found to support Scottish constitutional identity within the contested constitutional picture.

Chapter Conclusion

Scotland possesses a high degree of autonomy within the UK. This thesis accepts Alan Page's analysis, which recognises that the Scotland Act amounted to a constitution in itself. By legitimising and restraining the governing institutions in Scotland, the Scotland Act produces a constitutionalism of its own within the broader British constitution. However, that legal constitutionalism is ultimately under the authority of the British Parliament in London. Scotland can be described as having two linked constitutions: the British and the Scottish.

Scotland has always enjoyed areas of distinction from the wider UK in general terms, including the Church of Scotland, Scots law, education and health. Accompanying this, there has been a long-recognised need for a level of constitutional accommodation. This was previously provided by the Scotland Office, with the Secretary of State for Scotland acting as a cabinet minister in the British Government. In 1998, that constitutional accommodation was strengthened, alongside the widening of Scotland's general distinctions within the British state. This was not reflected in the doctrine of the British constitution until the reforms of the Scotland Act 2016 in the wake of the Scottish independence referendum. However, the practical and material changes to the function of the UK constitution stood in tension with the static doctrine of the British constitution, casting doubt over whether the doctrine of parliamentary sovereignty accurately described the pre-Brexit constitution. The ambiguity included the status of the Scotland Act. The precise nature of and relationship between Scotland's two constitutions was not apparent prior to Brexit.

Chapter Six: The Legal Position of Scotland within the British Constitution Since Brexit

Introduction

The purpose of this chapter is to map the legal changes in the UK Constitution since Brexit, focusing on the constitutional position of Scotland. As established in the previous chapter, one can meaningfully discuss a Scottish constitution based on the Scotland Act. The chapter is divided into parts on case law and legislation and the focus is still on a narrower legal definition of a constitution. However, the final part will broaden this analysis to the main focus of the thesis in Scottish constitutional identity.

In the years prior to Brexit, the UK Constitution had been in the process of transforming. This can be seen across different feature of the constitution. For example, the increasing use of constitutional referendums, the advent of human rights legislation, a federalising trend and a more confident judiciary all signalled a different kind of constitution. EU membership was a major driver behind this progress. More generally, it was accompanied by a sense that the UK had moved from its tradition of political constitutionalism to some sort of legal constitutionalism. There was even an argument that the foundational principle of the constitution, parliamentary sovereignty, had been displaced or at least curtailed. Brexit has not slowed this rate of change, but it has changed the direction of travel.

Turning to Scotland, the argument for a Scottish constitution was potentially at its highest in 2016 following the changes to the Scotland Act, as discussed in the previous chapter. The precise implications of these changes were not known in 2016. However, in principle, these changes entrenched the Scotland Act and strengthened the link between Scotland's voters and changes to the devolved settlement. As Brexit came so soon after this decentralisation, the question is what effect Brexit has had on the Scottish constitution.

Methods

This chapter is a doctrinal analysis of the case law and legislation that has constitutional implications for Scotland and has arisen since the Brexit vote. The following simplified timeline sets out the events that this chapter will discuss:

2016: UK voters endorse Brexit
2017: *Miller* Case
2018: Continuity Bill Reference
2019: *Miller* II/*Cherry*
2019: Internal Market Act
2020: The UK leaves the European Union
2022: Independence Referendum Reference

The format of the chapter is to divide these events into parts on legislation and case law. Each part is in then in chronological order.

Part One: Brexit Case Law

Introduction

This part will analyse the case law that was a part of Brexit. These cases were caused by the process of leaving the EU. Starting with *Miller,* this case arose because of the UK seeking to trigger Article 50 TEU. The more minor *Wightman* case concerned another argument over Article 50. The Continuity Bill Reference in 2018 represented the first dispute over who would receive powers and functions returning from the EU. Finally, the prorogation of the British Parliament at a crucial juncture in the Brexit process motivated *Miller II/Cherry.* All of these cases had implications for the UK constitution generally, as well as for Scotland. These implications are analysed in the final section of this part.

R (on the application of Miller and another) v Secretary of State for Exiting the European Union

R (on the application of Miller and another) v Secretary of State for Exiting the European Union, commonly known as *Miller,* was concerned with triggering Article 50 of the Treaty of the European Union to signal the UK's intention to leave the EU.[484] The UK Government sought to trigger Article 50 using the Royal Prerogative, which can be done for most foreign affairs. This use of executive powers would bypass Parliament and avoid the possibility of a political debate or defeat in the legislature. Anti-Brexit activists, led by Gina Miller among others,[485] therefore brought a legal challenge which questioned triggering Article 50 without an Act of the UK Parliament.

[484] Consolidated version of the Treaty on European Union [2012] OJ C326/13 Article 50
[485] *Miller* (n 199)

There was a second significant side to the *Miller* case. The Scottish and Welsh governments joined the case on the grounds that the Sewel Convention, as set out in Section 2 of the Scotland Act 2016, created a legal necessity for their consent to be taken into account. The Scottish Government therefore intervened as they argued that the permission of the Scottish Parliament was necessary to trigger Article 50.[486] This is because EU law is embedded in the devolution statutes, so an amendment would be needed. The argument was, therefore, that the Sewel Convention had been activated, and this was now a legal requirement following the Scotland Act.

The Court found that an Act of the British Parliament was needed to trigger Article 50. This is because EU membership amounted to far more than a simple international treaty. Thus, it fell outside the purview of the royal prerogative. EU law amounted to an independent source of law within the British legal system and conferred rights on individuals, so parliament had to exercise its sovereignty on the matter.[487] On the second issue, the court ruled that Section 2 of the Scotland Act and the equivalent Welsh Act did not create any legal effect. Instead, it was merely a 'legislative statement of a non-legal political convention',[488] the interpretation or enforcement of which was not a role for the Court. The Court did spend time discussing the importance of political conventions within the British constitution, but noted that they were not a matter for the justiciary to rule on. Very little time was spent discussing the implications of placing the Sewel Convention into legislation in the Scotland Act 2016. Instead, the Court stated that they would have expected 'different words' to be used by Parliament if it sought to create a justiciable legal rule,[489] citing 'it is recognised' and 'will not normally' as evidence for their view.[490]

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[486] Scottish Government will intervene in Article 50 legal case <https://www.gov.scot/news/scottish-government-will-intervene-in-article-50-legal-case/> accessed 14 June 2019
[487] *Miller* (n 199) paragraphs 67, 80, 86, 101
[488] *ibid* paragraph 149; see also criticism of ruling by Aileen McHarg: 'The Supreme Court considered that section 2 of the Scotland Act 2016 was not intended to convert Sewel into a justiciable legal rule, but rather to "entrench it as a convention" (para 149). But this is a perplexing notion in the absence of any method of enforcing compliance with it'. She also notes that the courts have previously interpreted political conventions, making the refusal to do so here even more strange; see A McHarg, 'Constitutional adjudication in a mixed constitution' (*Judicial Power Project,* 25 Jan 2017) <http://judicialpowerproject.org.uk/aileen-mcharg-constitutional-adjudication-in-a-mixed-constitution/> accessed 18 January 2019
[489] *Miller* (n 199) paragraph 148
[490] *ibid*

The Court does not expand on why this wording leads them to believe that there is no justiciable rule or what words would have been used had a justiciable rule been created.

The Supreme Court used traditionalist narratives of parliamentary sovereignty. In doing so, they circumvented a situation in which the UK Government would have been in breach of statute[491] for ignoring the Sewel Convention. On analysis, the *Miller* case rendered Section Two effectively cosmetic, as its statement in the Scotland Act made no material change to the existing settlement – it is of no legal effect. This also raises the possibility that Section One, setting out the permanence of the Scottish Parliament, is of no legal value either. The Court relies on this section to support its analysis of Section Two.[492] They argue that the goal is to demonstrate that "the Scottish Parliament and the Scottish government a permanent part of the United Kingdom's constitutional arrangements, signifies the commitment of the British Parliament and government to those devolved institutions', but do not clarify why this supports their interpretation of Section One. One could also argue that, in legislating for the permanence of the Scottish institutions, more than a political convention was sought to be created when the referendum requirement was inserted. Therefore, the doctrinal changes made in the Scotland Act 2016 have effectively been extinguished by the Supreme Court, as one of the key provisions has been interpreted as doctrinally unimportant and the traditional model of the British constitution upheld.

The robust treatment of Section Two is particularly surprising when one considers that the Sewel Convention's wording could have been interpreted to give the same practical effect. The word 'normally' was not defined, meaning that, hypothetically, the Convention could have been applied and the consent of the Scottish Parliament could have still been immaterial, as Brexit represented an extraordinary situation.

Miller was controversial in Scotland, where it was seen as an imposition of English doctrine on the constitution with no regard for the material changes made through devolution.[493] While the courts have generally viewed devolution cases through the text of the Scotland

[491] S Douglas-Scott, 'Brexit, Article 50 and the Contested British Constitution' (2016) 79(6) MLR 1019, 1039
[492] *Miller* (n 199) 149
[493] See e.g. Welikala (n43)

Act, in *Miller,* the Court abandoned this approach to come to an even narrower definition of the Scotland Act, because they undercut it through a traditional account of the British constitution. The Court was willing to look further than the text of the Scotland Act, but only to reassert the principle of parliamentary sovereignty. Dicey was cited approvingly, stating that the British constitution has no 'single coherent code of fundamental law' and is 'pragmatic' rather than 'principled'.[494] Previous *dicta* from the Supreme Court and its predecessor pointed away from Dicey's account. For example, *HS2* endorsed the concept of constitutional instruments or certain laws which were fundamental to the British constitutional order. On Scotland and devolution, *Axa* suggested that the Scottish Parliament enjoyed a status elevated above that of other lower administrative bodies due to its democratic foundation in a referendum of the Scottish people. *Miller* signalled a change of direction on the constitution by the Supreme Court.

Wightman v Secretary of State for Exiting the European Union

The case of *Wightman v Secretary of State for Exiting the European Union* also concerned the mechanism for triggering Article 50 TEU, specifically asking whether a state that triggered the Article could unilaterally 'take it back'.[495] The Court of Session requested a preliminary ruling. The case was heard before the European Court of Justice, which ruled that a country could unilaterally revoke Article 50.

One plank of the case concerned the proper role of the courts, as they are not meant to issue legal guidance. This was rejected by the Court for several reasons: the role of the Court is to provide legal answers, the public law nature of the issue is broader than simple judicial review, and parliamentary sovereignty is not infringed by the petition.[496] The situation was also not a hypothetical one.[497]

[494] *Miller* (n 199) paragraph 40
[495] *Wightman and others v Secretary of State for Exiting the European Union* [2018] CSIH 62
[496] *ibid* paragraph 21- 29
[497] *ibid* paragraph 31

The case was politically significant in that it originated in a Scottish court and was premised upon the Scots law conception of judicial review. It highlights the energy behind legal challenges to Brexit in Scotland. Beyond this, there is little material related to the topic of this thesis as it did not cover the constitutional relationship between the UK and Scotland any further.

The Continuity Bill Reference

The Continuity Bill Reference (hereafter the Continuity Bill) has a great deal of constitutional relevance to the thesis. In the next chapter the broader materials around the case will be analysed through a discursive framework. The case arose because of the British Parliament's Withdrawal Bill, which repatriated powers (known as retained EU law) returning from the EU to the British Parliament as opposed to the devolved institutions.[498] This led to accusations of a 'power grab' by Scottish and Welsh leaders.[499] In response to the defeat of its amendments in the UK parliament, the SNP introduced its own legislation on the matter in the Scottish Parliament. Consent under the Sewel Convention for the UK Bill was also refused by the Scottish Parliament. This was disregarded by the British Parliament for the first time.[500]

The Scottish Bill[501] covered much of the same ground as the UK Withdrawal Bill. However, there were some key differences: the central offending provision of the UK Bill was section 12, which allowed UK ministers to unilaterally narrow the ability of the devolved institutions to retain EU standards in devolved areas[502].

[498] In the subsequent Act, sections 8 and 9 set out the main powers returning, while section 12 makes these protected legislation European Union (Withdrawal) Act 2018 c.16
[499] See e.g. 'Brexit bill is a naked power grab, Carwyn Jones claims' (*BBC News*, 13 July 2017) <https://www.bbc.co.uk/news/uk-wales-politics-40582756> accessed 05 January 2021
[500] N McEwen, 'Legislative Consent after Brexit: Briefing Paper for the Scottish Parliament Constitution, Europe, External Affairs and Culture Committee' (19 May 2022) <https://www.parliament.scot/-/media/files/committees/constitution-europe-external-affairs-and-culture-committee/briefing-from-prof-nicola-mcewen.pdf.> accessed 10 January 2023 2
[501] SP Bill 28 UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill [as introduced] Session 5 (2018)
[502] S Douglas- Scott, 'Brexit legislation in the Supreme Court: A Tale of Two Withdrawal Acts?' *Centre on Constitutional Change,* 17 December 2018)

In response to this, section 17 of the Scottish Bill would ensure that the consent of Scottish ministers would be needed for UK ministers to act in this way. The UK government referred the Scottish Bill to the Supreme Court under section 33 of the Scotland Act, arguing that the Scottish Bill was outside competence. This prevented the Scottish Bill, which had passed in the Scottish Parliament, from becoming law as Royal Assent was delayed until the legal case had concluded.

The Supreme Court case, therefore, was about the role of devolution and the balance of power in the constitution. The UK Government argued that the entire Scottish Bill was outside the competences of the Scottish Parliament, because the UK Bill had been passed into law and so could not be contradicted by the Scottish Bill. In addition, the UK Bill had now amended the Scotland Act, meaning that the Scottish Parliament was not competent to amend the Scotland Act. The Scottish Government argued that this was not the case: rather, the Bill was within competences simply because anything not reserved in the Scotland Act was devolved, whether it was an EU returning power or not, and that this was the case at the time of the Scottish Bill's passing.

The Supreme Court ruled that only section 17 of the Scottish Bill was outside the competence of the Scottish Parliament.[503] This is because it would modify both the UK Withdrawal Act and the Scotland Act. However, the rest of the Bill was competent. As pointed out by Sionaidh Douglas-Scott, the Court's ruling is very conservative.[504] Because the UK government effectively had the power to hold the Scottish Bill in legal limbo and pass its own legislation in the meantime, this effectively means that the UK Government has a mechanism to override any legislation it does not agree with. This challenges the subsidiarity embodied in the devolution settlement, whereby the powers of the Scottish Parliament were to be as wide-ranging as possible.

<https://www.centreonconstitutionalchange.ac.uk/opinions/brexit-legislation-supreme-court-tale-two-withdrawal-acts> accessed 24 May 2019

[503] The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill - A Reference by the Attorney General and the Advocate General for Scotland (Scotland) [2018] UKSC 64

[504] Douglas- Scott, 'Brexit legislation in the Supreme Court: A Tale of Two Withdrawal Acts?' (n 503)

In terms of doctrine, post-Brexit changes seem to have cleared up ambiguities around the nature of the British Constitution: the British Parliament remains virtually unlimited in its power and can do as it likes. What has collapsed is the soft law and politics necessary to maintain the devolution settlement and the Scottish constitution within the British Constitution. Not only has the nature of the Sewel Convention been rowed back by the Supreme Court in *Miller*, but even as a political convention, it has no effect. As Kenneth Campbell QC predicted in 2016 on the issues which would be raised by Brexit and devolution:

> Failure to address these points, however, might conceivably result in a Sewel crisis should legislative consent be sought from a devolved legislature – most likely the Scottish Parliament – and refused[505]

Campbell was entirely correct in predicting the nature of the subsequent constitutional disputes raised by Brexit. However, there has been no constitutional crisis. The British Parliament has reclaimed powers, with the Supreme Court interpreting the constitution as one of continuous parliamentary sovereignty. *Miller* and *The Continuity Bill Reference* are a pair of cases in which the Supreme Court arrived at conservative rulings regarding Scotland's constitutional position.

Others have argued that the Supreme Court's ruling was less conservative in character in that it found the majority of the Continuity Bill was within competences. McHarg and McCorkindale point out that the ruling was within a continuous jurisprudence on devolution that the court has built up.[506] They also noted that the court robustly defended the reserved powers model, stating that this was an essential part of the court's consistent interpretation of the Scotland Act.[507]

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[505] K Campbell, 'Sand in the Gearbox: Devolution and Brexit' (*UK Constitutional Law Blog,* 5 September 2016) <https://ukconstitutionallaw.org/2016/09/05/kenneth-campbell-qc-sand-in-the-gearbox-devolution-and-brexit/> accessed 8 September 2019

[506] McCorkindale and McHarg, 'The Supreme Court and Devolution: The Scottish Continuity Bill Reference' (n 40) 191

[507] *Ibid*

Essentially, McCorkindale and McHarg argue that arguments made by the UK Government which were broader in nature failed. At the same time, those that relied narrowly on the wording of the Scotland Act succeeded.[508] There is one exception to this: McHarg and McCorkindale argue that the Court did consider the broader issue of parliamentary sovereignty in dealing with section 17 of the Bill. This was contrary to section 27(1) of the Scotland Act because it forms some impediment to parliamentary sovereignty through requiring express repeal, something which has previously been accepted with 'constitutional statutes'.[509] This could have been extended to this Act of the Scottish Parliament but was not in line with the conservative interpretation of the 2016 Scotland Act first set out in *Miller*.[510]

R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland

This joint case, known as *Cherry/Miller 2* in this thesis, was about the prorogation of the British Parliament in 2019. The facts were that the British Government sought to prorogue the British Parliament over the period in which the Article 50 period would lapse, thus essentially forcing Brexit by removing Parliament's ability to take any action to delay or prevent the UK's EU exit. The ability to suspend Parliament is held by the Queen, who only exercises that power on the advice of the Prime Minister. Challenges were brought to the prorogation in the jurisdictions of Scotland[511] and England and Wales.[512] The challenge in England and Wales was not successful. However, the challenge in Scotland was, where the Court of Session ruled that the Prime Minister had given unlawful advice to the Queen with regards to the prorogation.[513] Choosing to hear the appeals together, the Supreme Court subsequently upheld the finding of the Court of Session.[514]

[508] *Ibid* 193
[509] *Ibid* 195
[510] *Ibid*
[511] *Cherry* (n 205)
[512] R (Miller) v Prime Minister [2019] EWHC 2381
[513] *Cherry* (n 205) paragraph 124- 125
[514] *Miller II/Cherry* (n 203)

The judgement was premised on the concept that no actor in the constitution is above the law,[515] holding that:

> a decision to prorogue Parliament (or to advise the monarch to prorogue Parliament) will be unlawful if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive[516]

Martin Loughlin argues that, regarding the justiciability of the Court's decision, a novel ground has been created, whereby the Court judges prorogation not by judicial standards but by 'constitutional principles'.[517]These principles are the collage of practices and conventions that make up the function of the British Constitution, now held to be normative legal principles[518]. Essentially, the Court has expanded its role to that of guardian of the constitution within a newly fleshed out framework.

The submissions of the Counsel General for Wales, representing the devolved Welsh Government, highlight the devolution angle to the case. The Counsel General argues that dialogue with the Westminster Parliament was curtailed by the prorogation, Bills which had been consented to by the Welsh Assembly had fallen away and that scrutiny of government ministers had been greatly restricted.[519] This amounted to the conclusion that the Westminster Parliament should be sitting for the purposes of communication with the Welsh Assembly and to adequately consider issues affecting Wales.[520]

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[515] See e.g., M Loughlin, 'The Case of Prorogation: The UK Constitutional Council's ruling on appeal from the judgment of the Supreme Court' (*Policy Exchange,* 2019) <https://policyexchange.org.uk/wp-content/uploads/2019/10/The-Case-of-Prorogation.pdf> 5-6
[516] *Miller/Cherry* (n 520) paragraph 50
[517] Loughlin 'The Case of Prorogation: The UK Constitutional Council's ruling on appeal from the judgment of the Supreme Court' (n 516) 13
[518] *ibid* 15
[519] Written Submissions of the Counsel General for Wales UKSC 2019/0192 paragraphs 18-20
[520] *ibid* paragraph 20

The Lord Advocate's submissions, on behalf of the Scottish Government, do not specifically mention devolution. Instead, they are concerned with the general issues: the justiciability of and reasons for prorogation. It is not just the unreasonableness of the decision; there is also the importance of the issue at stake, such as the established constitutional principle in this case.[521] The only mentions of Scotland come from general statements about the diverse implications of EU withdrawal for Scotland, which is cited as the reason for the Scottish Government intervening in the case.[522]

In terms of direct links to Scottish constitutionalism, the relevance here is more political in nature: there was some controversy that a Scottish court could pass a binding ruling on the UK executive in terms of Scots law.[523] While less significant in a doctrinal way than the earlier *Miller* case, the arguments used in the case again turned on constitutional narratives. At the Court of Session, the prorogation was held to be unlawful on the grounds that the sovereignty of Parliament was being usurped. It is also worth noting that the court was willing to look to the purpose and intentions of those seeking prorogation in making its ruling, finding that there was no 'rational' reason for the prorogation.[524]

In the Supreme Court judgement, the judges solidified their reasoning from *Miller*. The judgment turned on four questions, roughly paraphrased as 1. Is the matter justiciable? 2. Under what standard would advice to prorogue Parliament be lawful; 2. Has that standard been met in this case; 4. If not, what remedy is appropriate?[525] On the first, the court rejected arguments that it cannot enter the political arena of the relationship between the Prime Minister and Parliament, tacitly adopting the role of policing ministerial accountability before Parliament and, more generally, a policing role within the balance of powers.[526] This is complemented by an understanding of the Court as the upholder of the law and the characterisation of prerogative powers as a legal issue in their existence and extent.[527]

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[521] Case for the Lord Advocate UKSC 2019/0192 & 2019/0193 paragraph 14
[522] *ibid* paragraph 3
[523] See e.g. P Gourtsoyannis 'Outrage after impartiality of Scottish judges questioned by No10 source' *The Scotsman,* 11 September 2019) <https://www.scotsman.com/news/scottish-news/outrage-after-impartiality-scottish-judges-questioned-no10-source-1407983> accessed 8 May 2020
[524] *Cherry* (n 205) paragraph 124
[525] *Miller/Cherry* (n 203) paragraph 27
[526] *ibid* paragraph 33; 34; 39
[527] *ibid* paragraph 37

The extent of prerogative powers is limited by the common law. This is an ill-defined concept, evidenced by the fact that the court can only offer non-exhaustive examples.[528] Effectively, the overarching principle of parliamentary sovereignty means that there cannot be an unlimited power to prorogue Parliament.[529] Following on, the Court's role is to ensure that a prerogative does not frustrate the role of Parliament.[530] As such, the advice on prorogation was not lawful, and Parliament was not prorogued. Following the judgement, Parliament was immediately recalled.

Analysis

The constitutional cases that have arisen since Brexit have been driven by practical issues emerging as the UK left the EU. The issues which ran through these cases concerned power, more specifically, which institutions had powers over parts of the Brexit process. The Supreme Court has had a prominent role in resolving these disputes. The Supreme Court's jurisprudence has been, in many ways, highly creative. This has been a necessity: the Court has found itself in uncharted constitutional waters. This has included its own place in resolving politically charged disputes.

In other ways, the Court has been conservative in its jurisprudence, with the key theme being parliamentary sovereignty in both *Miller* cases. Similarly, the interpretation of devolution has been consistent with the general position before Brexit when looking at the Continuity Bill reference, with the reserved powers model defended by the Court. While this aspect of the constitution is consistent, the new prominence for parliamentary sovereignty is in contrast to pre-Brexit case law, which is much less conservative on the issue. In effect, the reserved powers model and the principle of parliamentary sovereignty serve to demarcate the limits of devolved powers as broad but shallow.

[528] *ibid* paragraph 40
[529] *ibid* paragraph 44
[530] *ibid* paragraph 50

This because they are rooted in the gift of the Westminster Parliament, as affirmed in the general narrative of the *Miller* cases and expressly upheld in the Continuity Bill Reference. Therefore, the apparent continuity in the interpretation of devolution is undercut by the prominence of parliamentary sovereignty.

Conclusion

Brexit led to several cases of constitutional significance, beginning with *Miller.* The key characteristic of these cases has been the reaffirmation of parliamentary sovereignty. This has not entirely turned back the clock: the Supreme Court has staked itself out as the guardian of the constitution and has, at times, been highly innovative in its jurisprudence. The black letter law of devolution has also largely been upheld.

In other ways, the reaffirmation of parliamentary sovereignty was arguably most aligned with the will of anti-Brexit Scotland when that affirmation was against the approach of the UK Government in going about Brexit. With regards to Scotland in general, however, the court has been decidedly conservative and traditional in its jurisprudence.

Part Two: Post-Brexit Case Law

Beyond the cases triggered by the Brexit process, there has been another case with relevance to the Scottish constitution since 2016. The referendum reference from late 2022 is analysed in this section. The ruling follows the conservative trend established by the Supreme Court since Brexit.

Reference by the Lord Advocate of devolution issues under paragraph 34 of Schedule 6 to the Scotland Act

The power to hold a Scottish independence referendum has long generated academic debate.[531] The issue had not been resolved before 2022: a political agreement was reached between the Scottish and British governments in order to facilitate the 2014 referendum through an Act of the British Parliament.[532] This presumes that a Section 30 order and Act of the British Parliament are necessary for such a referendum.[533]

Prior to a definitive answer, a speculative case pointed to the likely conclusion that the courts would reach on the question.[534] A campaigner for Scottish independence sought a declaration that the Scottish Parliament could hold an independence referendum, and a Bill pertaining to this would not be outside of competences. The case made by the applicant centred around themes of popular sovereignty and the decreased relevance of parliamentary sovereignty.

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[531] See eg C Mac Amhliagh, '… yes, but is it legal? The Scottish Independence Referendum and the Scotland Act 1998' (*UK Constitutional Law Blog,* 12 January 2012) <https://ukconstitutionallaw.org/2012/01/12/cormac-mac-amhlaigh-yes-but-is-it-legal-the-scottish-independence-referendum-and-the-scotland-act-1998/> accessed 12 December 2018

[532] 'Scottish independence: Cameron and Salmond strike referendum deal' (*BBC News,* 15 October 2012) <https://www.bbc.co.uk/news/uk-scotland-scotland-politics-19942638> accessed 17 May 2020

[533] N Aroney, 'Reserved matters, legislative purpose and the referendum on Scottish independence' (2014) Public Law 422, 442

[534] *Keatings v Advocate General for Scotland* [2021] CSIH 25

These questions were not directly answered, as the Court ultimately found the applicant's case hypothetical and the applicant himself to have no standing. However, the Court gave some clues as to how they would have answered these questions: the decline of parliamentary sovereignty had been 'greatly overexaggerated', and historical narratives about Scottish constitutionalism were little relevant to the question at hand.[535] Instead, it is a matter of statutory interpretation of provisions of the Scotland Act. Section 29 and Schedule 5 would be the only prism for the case, as that narrower angle is the legal one.

In late 2022, another significant Supreme Court Ruling was handed down, finally resolving the issue of who had the power to hold an independence referendum.[536] The case was triggered by political events. In 2021, the SNP formed the Scottish Government following their success in the Scottish General Election in May of that year. Their manifesto included a commitment to legislate for a second Scottish independence referendum. A Bill to that end was introduced in the Scottish Parliament in late 2022. The Lord Advocate, who was unable to make a ruling with regard to the competence of the Bill, made a referral to the Supreme Court under section 34 of the Scotland Act. The issue before the Court was whether the Scottish Parliament had the power to legislate for a referendum on Scottish independence. The question was if an independence referendum would relate to reserved matters, in particular, the Union between Scotland and England and the Parliament of the United Kingdom.[537]

[535] *ibid* paragraph 63- 66
[536] *Reference by the Lord Advocate of devolution issues under paragraph 34 of Schedule 6 to the Scotland Act* [2022] UKSC 31
[537] The Lord Advocate's Written Case 4

In her submissions, the Lord Advocate argued that the referendum could legally take place. She begins her written case by setting out the jurisdiction of the Court to hear the reference. The reference procedure had never been used under section 34 of the Scotland Act before.[538] The Lord Advocate can refer 'devolution issues' to the Court if in the public interest, and the Court's duty is to provide legal guidance on issues of law arising from the reference.[539] Devolution issues can cover any issues arising about reserved matters.[540] The jurisdiction of the reference was contested by the UK Government, who mainly argued this point on procedural grounds.[541] They also made linguistic arguments which were rejected by the Court.[542] Other arguments against hearing the reference question include that, simply, if the Lord Advocate cannot be satisfied that a Bill is within competences, then it should not be introduced. This was also rejected by the Court.[543] Ultimately, the Court was satisfied that this is a devolution issue. The Advocate General also argued that the Court should exercise its discretion to not hear the reference, even if it does relate to a devolution issue. He argues this point from several angles, most notably that the issue is still hypothetical as no Bill has been introduced. The Court also rejected this argument, noting the exceptional nature of the present case.[544] A ruling was therefore warranted and the Court entrenched itself as a constitutional adjudicator.

On the main question, the Supreme Court unanimously ruled that holding a referendum on independence was beyond the competences of the Scottish Parliament. This is despite the fact that the result of any referendum would still need to be enacted by the British Parliament, as there is no such thing as a legally binding referendum within the British Constitution. The critical issue was whether the referendum would 'relate to' reserved matters in a more than 'loose or consequential way', picking up a similar point to the *Continuity Reference*.[545] The Court rules that this does not have to be a 'a legal or direct effect' on a reserved matter.[546]

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[538] *ibid* 5
[539] *ibid*, i*bid* 8
[540] Scotland Act Schedule 6
[541] *Lord Advocates' Reference* (n 537) paragraphs 17-24
[542] *ibid* paragraphs 37; 42
[543] *ibid* paragraphs 43-44
[544] *ibid* paragraph 53, 54
[545] *ibid* paragraph 57
[546] *ibid* paragraph 72

The Court rejected the argument that the 'effect' of legislation is to be read narrowly.[547] Building on this, the potential political outcomes of the Bill are considered: the court acknowledges that there would be no 'immediate legal consequences' of a referendum on Scottish independence. Still, it concludes that the political implications are sufficient to ensure that the Bill relates to reserved matters in more than a 'loose or consequential' way.[548] In other words, the political pressure created by a referendum on Scottish independence alone is enough to make it beyond competences.
Therefore, a Bill passed by Holyrood which sought to hold a referendum on Scottish independence would not be law.

Analysis

The process of Brexit and beyond has led to unprecedented disputes between various branches of the UK state. Some of these branches have been parties in the case law. In terms of the parties in some of these cases, the UK Government has had a mixed fortune. It lost in the *Miller* cases. The Scottish Government has had even less success. An interesting exception to the defeats of the Scottish Government on Scotland is the *Continuity Bill Reference*. The interpretation of devolution used by the court is also in line with previous devolution jurisprudence. However, there is the caveat to that interpretation made by the Court with regards to the provisions held to be beyond competences. Can the narrow reading of the Continuity Bill be contrasted with the court's treatment of the *Referendum Reference*? The Court, in that case, rejected the narrower readings of the Lord Advocate in determining the effect of the Referendum Bill.[549] The Court conflated the political pressure a referendum would create with being 'more than a loose or inconsequential connection' with reserved issues.[550] In a sense, this is in line with the *Continuity Bill Reference*, where the only consideration of wider constitutional implications was for the purposes of upholding parliamentary sovereignty.

[547] *ibid* paragraph 74
[548] *ibid* paragraphs 81- 82
[549] *ibid* paragraph 77-81
[550] *ibid* paragraph 82

The Court will be novel and adventurous, but only in order to find a traditional interpretation of the territorial constitution. Ultimately, the devolved institutions are weakened by a strong interpretation of parliamentary sovereignty.

Although not a party, the British Parliament has been the overwhelming victor in the Brexit cases and beyond. The *Referendum Reference* falls into the pattern of jurisprudence established by the Brexit cases in which the UK Supreme Court reads devolution legislation narrowly but the principle of parliamentary sovereignty broadly.

Conclusion

In sum, a general reassertion of parliamentary sovereignty has defined the jurisprudence of the Supreme Court since Brexit. This has served to undercut the consistent interpretation of devolution, both in the reasoning of the Court and in the ways that the British Parliament have chosen to wield their sovereign powers in the devolution settlement. The issue of whether the Scottish Parliament can hold referendums on Scottish independence has been decisively resolved and it cannot, as that power lies with the British Parliament.

Part Three: Post-Brexit Constitutional Legislation

Introduction

This section will consider the legislation necessary for Brexit or claimed to be necessary for Brexit. Two Acts have been excluded from this section because they did not have constitutional ramifications and have since been repealed. These are Acts that served to extend the transition period provided for by Article 50 TEU while the UK continued to be caught up in a political dispute over whether and how it should exit the EU. The lens for this section is the effect that these statutes have had upon Scotland.

European Union (Notification of Withdrawal) Act 2017

The European Union (Notification of Withdrawal) Act 2017 concerned triggering Article 50 TEU, as mentioned in the section on the first *Miller* case. The brief Act empowered the Prime Minister to give notice under Article 50.[551] In passing this Act, Parliament used its necessary power, as identified in *Miller,* to hand control over the Brexit process to the executive. The Scottish angle to this Act is limited to being politically opposed by a majority of Scotland's politicians.

European Union (Withdrawal) Act 2018

This Act, as mentioned above in the section on the *Continuity Bill Reference*, dealt with a range of practical issues emerging from the UK's exit from the EU. This Act set out the repeal of the European Communities Act on exit day from the EU.[552] The Act also made provision for returning EU law. The goal, essentially, was to ensure that EU law remained applicable in the UK on exit day but in the form of domestic legislation.[553]

[551] The European Union (Notification of Withdrawal) Act 2017 c.9 s1(1)
[552] European Union (Withdrawal) Act 2018 c. 16 s1
[553] M Elliott, and S Tierney, 'Political Pragmatism and Constitutional Principle: The European Union (Withdrawal) Act 2018' (2019) Public law 37, 41

This was done by transferring EU law into domestic law.[554] The Act amended the Scotland Act, substituting the previous restriction on EU law for retained EU law.[555] Section 12 proved to be the most controversial regarding Scotland. This is because, as initially drafted, effective discretion was given to the British Government over devolving legislative competence, which runs contrary to the reserved powers model.[556] The prospect of refused consent from Scotland and Wales prompted a redraft. The final version does include a restriction upon devolving power, but now the 'onus' is on London to regulate what it wishes to protect from modification.[557] The Act marked the first time that a British Act was passed despite it being refused consent by the Scottish Parliament.[558] The Sewel Convention, previously reduced to just a political convention by the *Miller* case, did not even function as a political convention here.

European Union (Withdrawal Agreement) Act 2020

The European Union (Withdrawal Agreement) Act 2020[559] made provisions for the ratification of the Withdrawal Agreement[560] reached between the UK and the EU in 2019. The Act provided continuity by preserving EU law in the UK following exit day. The Scottish Parliament[561] and the Welsh Assembly refused consent to the Act, which, in keeping with the previous Act discussed, did not have any effect.

[554] S Douglas-Scott, 'The Future of the United Kingdom after Brexit' in F Fabbrini (ed.), *The Law & Politics of Brexit: Volume II: The Withdrawal Agreement* (Oxford University Press, Oxford, 2020) 237
[555] European Union (Withdrawal) Act 2018 (n 554) s12(2)
[556] Elliott and Tierney (n555) 55-59
[557] *ibid*
[558] G Cowie and D Torrance (2020) 'Devolution: The Sewel Convention' (*UK House of Commons Research Briefing,* 13 May 2020) <https://commonslibrary.parliament.uk/research-briefings/cbp-8883/> accessed 6 September 2021
[559] The European Union (Withdrawal Agreement) Act 2020 c.1
[560] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community
[561] 'Letter of 14 January 2020 from Clerk/Chief Executive of the Scottish Parliament on legislative consent' (14 January 2020) <https://publications.parliament.uk/pa/bills/cbill/58-01/0001/LCM_20200114.pdf> accessed 30 May 2021

The Internal Market Act

The Internal Market Act served to transfer EU law into British law and maintain the UK internal market through free and unrestricted trade. The Act attracted significant controversy at the Bill stage for a number of reasons. First, it had implications for Scotland's constitutional place in the UK. This is for similar reasons as the Continuity Bill: in other words, many of the returning powers from the EU should, under the devolution settlement, be exercised at the devolved administrations. These competences were instead to be retained at Westminster by the British Government, who set this out in the Internal Market Bill. The logic for retaining the powers at the UK level was to ensure the smooth functioning of the UK internal market. The Act also introduced two controversial functions for the UK Government in Part 6 and Part 7. Part 6 allows direct funding of projects across the UK with no regard to devolution, while Part 7 reserves resolving disputes over subsidy control subsidy to the UK Government. Both are centralising measures.

Another reason for the controversy was that the common frameworks adopted by the British Parliament were fundamentally different in nature to those which had created a single market while the UK was an EU member state. This was due to two 'market access principles': mutual recognition and non-discrimination. However, the methods of upholding these principles served to undermine devolution. The risk, as seen by the devolved governments, is that a 'race to the bottom' will be the result and a 'constraint on devolution' had been created,[562] as the UK provisions went well beyond what was required by EU law. In practice, the Internal Market Bill removed areas of powers from the Scottish Parliament to legislate with regard to Scotland.

[562] D Torrance, 'Internal Market Bill: Reactions from Scottish and Welsh Governments' (*Insight: House of Commons Library,* 1 October 2020) <https://commonslibrary.parliament.uk/internal-market-bill-reactions-from-scottish-and-welsh-governments/> accessed 5 May 2021

The Act introduced the new concept of the internal market into UK law, as UK internal cross-border trade between the UK nations now required regulation. The market access principle is crucial to the Act, underpinned by mutual recognition and non-discrimination.[563]
In practice, these create a situation whereby certain measures adopted by devolved institutions, for example a ban on alcohol advertising, may be rendered ineffective due to anomalies that would be created, such as such a ban only applying to alcohol produced in the devolved country and not produced in England.[564] Regarding its constitutional implications, the Act is problematic because it is unbalanced and tilted towards the centre. It is 'effectively Cassis de Dijon on steroids',[565] allowing little room for manoeuvre. Compounding this, the UK state and constitution are much more centralised than any EU equivalent, leading to an Act which locks in English hegemony.[566] Essentially, the EU internal market exists in a space where member states can have a voice and role. By contrast, the UK is dominated by England, with parliamentary sovereignty ensuring that there can be no protection of the smaller countries in the UK.

The Act was also contentious because, as originally drafted, it amounted to a breach of international law. It altered the Northern Ireland protocol as agreed in the UK-EU Withdrawal Agreement of October 2019 through its Part 5, although this was eventually removed before the Bill passed. None of the controversy over the Scottish aspect of the Bill resulted in an amendment to the legislation, and the Bill passed into law despite it being refused legislative consent by the Scottish Parliament. Once again, the Sewel Convention was breached by Westminster, as Holyrood refused legislative consent but this was disregarded for the third time.

[563] McEwen, McHarg, Hunt, and Dougan, 'Sleeping with an Elephant: Devolution and the United Kingdom Internal Market Act 2020' (n 41), 668
[564] *Ibid* 670-671
[565] *ibid* 681
[566] *ibid* 682- 685

Analysis

A loser in the Brexit process here is once again the devolved Scottish institutions. The implications of the legislation for the Scottish constitution can be seen in two ways. First, the manner in which legislation has been passed has not reflected well on the devolution settlement. Prior to 2016, the Scottish Parliament had only voted to deny legislative consent on one occasion.[567] The possibility of consent being withheld had also influenced the UK Government to offer concessions in the passage of the Scotland Act 2016.[568] In addition to the Acts listed above, the European Union (Future Relationship) Act was passed despite being refused legislative consent by the Scottish Parliament. This pattern suggests that the Sewel Convention is breaking down, even as just a political convention.

The reserved powers model has been challenged by the power struggle brought on by the Withdrawal Act 2018. The assumption that everything not expressly reserved is devolved was breached, linking to the second way legislation has impacted on the Scottish constitution: through its content. The Internal Market Act introduced new principles that cut across devolution. The consistency in devolution upheld in the Supreme Court can be contrasted with the changes to devolution made through British legislation. As previously mentioned, the reserved powers model is upheld in the Court, but it is not upheld in UK legislation. Compounding this, the Supreme Court reinforced the principle of parliamentary sovereignty, which aids the British Parliament in undermining the devolution settlement. Describing the interpretation of devolution as consistent in the courts only describes one small part of the bigger picture.

[567] 'Explainer: Sewel Convention' (*Institute for Government,* 16 January 2018) <https://www.instituteforgovernment.org.uk/explainer/sewel-convention> accessed 20 May 2019
[568] *Ibid*

As Aileen McHarg points out, since Brexit, the courts have ultimately proven to be conservative since Brexit, finding novel ways to reassert the sovereignty of Parliament and giving little regard to the territorial aspect of the constitution.[569] This has continued to hold true. Parliamentary sovereignty has returned as a normative principle. Coming with that reassertion, powers have been returned to London through legislation such as the Withdrawal Act and the Internal Market Act. Completing this picture, even the traditional political mechanisms at the centre of the constitution, such as the Sewel Convention, are no longer effective. Therefore, the British constitution may be even more centralised towards London today than the case law suggests when one considers it in context with legislative changes.

Conclusion

In Scotland's doctrinal place as of 2021, the law is that Parliament is sovereign and the Scottish Parliament is limited in its power, role and scope. The master of the Scottish constitution is the British Parliament in London. However, while the dynamic of re-centralisation towards London is clear, there is still a degree of instability in the balance of authority at the centre of the British constitution. The new principle of 'the will of the British people' does not sit well with a return to parliamentary sovereignty, before one considers the political forces destabilising the constitution. The unsettled British constitution has undoubtedly not been settled since 2016.

[569] A McHarg, "The Supreme Court's prorogation judgment: guardian of the constitution or architect of the constitution?" (2020) 24 Edin. L.R. 88, 95

Part Four: The Post-Brexit Scottish Constitution

Introduction

This part takes a broader view of the changes since Brexit. The analysis from the previous chapter is returned to. First, this is done on the issue of Scotland having a constitution and second, on implications for Scottish constitutional identity.

Changes to the Scottish Constitution

What has changed about the Scottish Constitution since June 2016? First, EU law has been removed from the Scotland Act. Certainties have also replaced some ambiguities. The Scotland Act does not have a special status because of its nature; it is just an Act of the British Parliament. The Scottish Parliament cannot call referendums on independence. The UK government is flexing its muscles on devolution, showing that the preservation of parliamentary sovereignty in the Scotland Act is more than symbolic. The Sewel Convention does not enjoy the force of law, as was speculated following the changes to the Scotland Act in 2016. In fact, it does not necessarily enjoy the force of a political convention. This is because it has been breached numerous times.

For the Scottish constitution, then, Page was largely correct in his doctrinal take. The Scotland Act is a constitution so far as a constitution establishes, grants powers to and limits the powers of institutions. In this way, the Scotland Act is a more certain constitutional settlement than in 2016, with the gaps filled in. It is also a narrower constitution with less space afforded to the substate level by the centre.

Two related aspects of the Scotland Act as a constitution have been undermined. First, the nature of the broader UK constitution and the reassertion of parliamentary sovereignty reduce the status of the Scotland Act as a settlement. The traditional interpretation of parliamentary sovereignty means that the Act cannot be permanent or well entrenched. Parliamentary sovereignty is an English bull in the UK's constitutional china shop, and the Scotland Act is a fragile piece of china.

Second, amendment power has been exposed as a point of tension. The Scotland Act is a constitution only so far as a constitution can have another Parliament as its master. Prior to Brexit, changes to the Scotland Act were congruent with Scottish politics, such as the Scotland Act 2012 following the formation of the SNP majority government in Edinburgh. Since Brexit, changes to the Scotland Act do not have this impression of being driven by voters in Scotland. On the contrary, voters in England and Wales endorsed Brexit. Therefore, the heavy-handed actions of the UK's constitutional centre towards Scotland and the changes in the Scotland Act appear contradictory to Scottish voters. The difficulty the Scotland Act has in being a constitution, along with the weakness that subnational constitutions have more generally, is their poor link to a constituent power and constituted power. In Scotland, this could be eased by the apparent relationship between Scotland's voters and the founding of and changes to devolution. Now, the opposite seems apparent: changes have been made against the wishes of Scotland's voters. The impression of Scots as a constituted power is not possible to sustain.

Scottish Constitutional Identity in 2023

The identity that arises in Scotland as a result of having a constitution is less clear than it was in 2016. Earlier in the thesis, Scottish constitutional identity was described as three tightly linked elements: some sort of national sovereignty, some sort of popular sovereignty and non-ethnic boundaries to that identity. These elements run into each other, as the narrative of Scotland's national sovereignty in choosing to enter the Union with England has bled into the loose narrative of popular sovereignty derived from the Declaration of Arbroath. These factors, in turn, form the non-ethnic basis for marking out holders of Scottish identity, as it implies some long tradition of a submerged Scottish constituent power, with membership of that constituent power marking out holders of Scottish identity.

The weakening of the perceived link between the founding of and changes to the Scotland Act and voters in Scotland undermines the narrative of popular sovereignty. The link between the people and the constitution is now more tenuous than ever.
As previously discussed, the authorship of the Scottish constitution is caught between the faces of British parliamentary sovereignty on the one hand and referendums and constitutional narratives in Scotland on the other. This balance has shifted in several ways. First, parliamentary sovereignty has been re-enforced. Second, the role of referendums has changed in certain ways. First, it is now clear that the Scottish Parliament does not have the ability to call referendums on Scottish independence. Next, Brexit was a referendum of the broader British people with no carve-out for Scotland. Scotland had no veto over Brexit, and its parliament was not consulted. These final two points also challenge narratives over Scotland's national sovereignty.

Another way of expressing the change is that the tension in Scottish constitutional identity and the British constitution can now be described as tensions between narrative and politics on the one hand and the law and the constitution on the other. Sections One and Two of the 2016 Scotland Act had introduced Scottish narratives into law, as discussed in the previous chapter. The sections have been hobbled following Brexit, in particular by the jurisprudence of the Supreme Court. The behaviour of the pre-Brexit British constitution could also be interpreted sympathetically to Scottish ideas of sovereignty: the reality of parliamentary sovereignty could be downplayed because of the Sewel Convention, along with constitutionally prudent behaviour by the centre of the British constitution. This restrained behaviour is now gone.

As previously discussed, constitutional identity is the identity that arises as a result of having a constitution. A constitution is, therefore, a necessary part: it is the tangible thing within constitutional identity. Prior to Brexit, Scotland had a small-c constitution in the form of the Scotland Act, which was strongly linked to Scottish identity. Since Brexit, it is no longer possible to describe a distinct Scottish constitution within the broader British Constitution. In terms of Scottish constitutional identity, therefore, the only constitution that Scotland has is the British Constitution. The corresponding identity that arises is in tension with that constitution.

This points to the issue of whether a constitutional identity can be made up of a constitution and collective beliefs that contradict that constitution. Prior devolution this was also the case, and Scotland only had the British Constitution.

Aspects of Scottish constitutional identity developed during this period, in particular the movement for devolution, which suggests that a constitution and its collective beliefs can be somewhat contradictory. However, the unique flexibility and ambiguity of the British constitution is probably what allowed a constitution and contradictory collective beliefs to co-exist. This thesis has already discussed the unionist and union-state views of the UK, which predominated in Scotland. Those views were central to the push for devolution. it was seen as the fulfilment of the British Constitution, despite the fact that aspects of the British Constitution, particularly parliamentary sovereignty, are incompatible. The movement for devolution was not intended to end one constitution and begin another. It was instead seen as a correction of the British constitution. This suggests that now, in the absence of a Scottish constitution, it is crucial that people in Scotland do not perceive the British constitution to be incompatible with their collective beliefs in Scottish sovereignty.

Conclusion

In sum, Page's account of the Scotland Act as a sub-state constitution is less sustainable because it rests upon defining a constitution in yet narrower terms, even further from the supporting popular nature of its foundations and the Scottish narratives it bought into. The identity of the post-Brexit British constitution is the sovereignty of the British Parliament, both in its legal and discursive reassertion. Parliamentary sovereignty is an English principle. Scotland's constitutional identity is less clear. The link between ideas of Scottish sovereignty and devolution has been undermined, pointing to dissonance in the constitutional identity that emerges in Scotland.

Chapter Conclusion

The Scottish constitution has changed substantially since Brexit. This is a thesis about how constitutions change, are developed and recede. Before Brexit, this thesis argues that a Scottish constitution existed which could be interpreted consistently with Scottish constitutional identity, made up of the Scotland Act and a congruent constitutional context. As shown in this chapter, Brexit was a turning point. The Scotland Act as a constitutional settlement has been fundamentally weakened and no longer rises to the threshold of being a constitution, sub-state or not Crucially, the constitutional changes have not come because of the choices of the Scottish people, with clear implications for a constitutional identity that centres the narrative of popular consent in Scotland. This opens up dissonance between the constitutional law of Scotland and the constitutional identity of Scotland. Without a Scottish constitution, the British constitution is therefore left as Scotland's only constitution, but it is not a hospitable ground for Scottish narratives since its centralisation and turn towards parliamentary sovereignty.

The next chapter discusses how different constitutional actors have talked about these changes, revealing how they construct and present their constitutional identities. This is crucial in analysing how the constitution is perceived in Scotland. Legally, the centralised British constitution is not compatible with Scottish collective identity. Prior to the Scotland Act, there appears to have been a perception grounded in the unionist vision of the UK in Scotland that allowed the British constitution and Scottish identity to co-exist. The question is if the post-Brexit British constitution can now sustain Scottish identity.

Chapter Seven: Scottish Constitutional Identity and the Continuity Bill

Introduction

A number of texts from the Continuity Bill affair have been read and analysed in the broad framework of the question, 'How is Scottish constitutional identity constructed and denied in recent constitutional law discourse?', which serves to explore the broader questions: 'What is the nature of Scotland's constitutional identity?' and 'how has Scotland's constitutional identity changed since Brexit?'. Some comments can be made. First, there are apparent attempts to construct broad Scottish and British identities through debate on the continuity bill. Second, a quasi-legal argument is being built by the Scottish National Party around the constitutional force of the Scottish people. The most important conclusion, however, is that promising insights appear to be available through continuing analysis of case studies drawn from contemporary constitutional law. In addition, tensions are clearly present between narratives of the British constitution, narratives of Scotland's place within that constitution and between narratives and the changing doctrine of the UK constitution since Brexit.

The structure of this chapter differs from that of the others in the thesis. This is because this chapter requires a more detailed methodology and further background before analysis can be done later in the chapter.

Part One: Background

Motivations and Terms

The axis of constitutional friction and identity in Scotland is key, making constitutional identity the natural framework. The point of tension which produces this identity is broadly located in the UK's unitary-union state. Closely related to this, the British constitution is caught between its legal tendency of Diceyan sovereignty and its political tendency of devolution and modernisation[570]. The political tendency has, in my view, shifted since Brexit. This forms the broad dichotomy to be used in this chapter, with parliamentary sovereignty and a unitary UK state on one hand and a plurinational union state on the other. The first position is premised upon the Act of Union, with Scotland being nothing more than the incorporation of Scotland into the English constitution. This did not affect the core of parliamentary sovereignty, which is essentially the British constitution in the absence of a written constitution[571]. This interpretation implicitly requires the combination of nation and state; popular sovereignty is collapsed into parliamentary sovereignty, tacitly requiring a single British *demos*. Thus, Scotland's constitutional status within the UK is only ever temporary, as theoretically, the English-dominated British Parliament could amend the Acts of Union at will.

The account above can be contrasted with the union state model, as has been previously considered. the favoured story in this is of a contractual Union in Scotland. The myth of the Declaration of Arbroath, Scots popular sovereignty and the importance placed on the idea of the Union are essential factors within the Scottish imagination. As already discussed, Neil MacCormick argued that Scots have a 'cultural imagining of sovereignty' embedded in their national identity. The question for this chapter is how far this cultural understanding is being used in constitutional disputes, and what exactly it stands for in those disputes.

[570] J E K Murkens, 'Preservative or Transformative? Theorizing the U.K. Constitution Using Comparative Method' (2020) 68(2) The American Journal of Comparative Law 412, In particular 432- 433

[571] See e.g. Loughlin, 'Constituent Power Subverted: From English Constitutional Argument to British Constitutional Practice' (n 395) 42- 47

In other words, how has Scottish constitutional identity been constructed and denied in recent UK constitutional discourse? How do these two views of the constitution interact? And finally, what is law, and what is just politics? These form the framework for this chapter, which focuses on the Continuity Bill affair of 2018.

As highlighted in earlier chapters, one could meaningfully talk of a Scottish constitution in the Scotland Act prior to 2016. Since Brexit, that constitution has receded in a doctrinal sense as the broader British constitution has centralised. In addition to the legal Scottish constitution, earlier this thesis established that Scottish identity is complex and, at times, closely linked to Scotland's law and constitutional position. This chapter, therefore, has two lines of enquiry. First, how does identity relate to the Scottish constitution? Second, how has that identity changed as the legal constitution has changed?

The 'Continuity Bill affair' will be read broadly to include the original UK parliamentary debates on the Withdrawal Act, the Scottish legislative consent motion debates, the Scottish Parliamentary debates on the continuity Bill, the Supreme Court submissions and the Supreme Court judgement on the matter. Finally, this chapter is exploratory and not an encompassing study.

The Continuity Bill

The roots of the Continuity Bill affair lie in the British Government's approach to Brexit. Following the UK's exit from the European Union, EU law in the UK required replacement through domestic legislation to remain in force. Therefore, the UK Government brought forward the Withdrawal Bill, which sought to repeal the European Communities Act 1972 and to provide legal continuity across the UK in areas that were previously under EU competence. The dispute arose because, under the devolution settlement and the reserved powers model, many of the returning powers should be under the competence of the devolved parliament in Edinburgh (and the other devolved parliaments). As covered in earlier chapters, this is because of the reserved powers model. The UK Withdrawal Bill did not properly account for this, and amendments put forward that would have addressed the issue were defeated.

The Scottish Parliament, therefore, refused legislative consent for the UK Bill, and the Scottish Government introduced its own continuity legislation in order to preserve the devolved powers model in these areas of competence.[572] While the Presiding Officer was of the opinion that this Bill was outside the competences of the Scottish Parliament, the Bill was passed by the Scottish Parliament and argued to be within competence by the Scottish law officers. The Scottish Bill was challenged by the British Government as *ultra vires* under the Scotland Act and the matter was referred to the courts.[573]. In the subsequent Supreme Court case, the majority of the Bill was held to be within the competence of the Scottish Parliament at the time the b

Bill was passed.[574] In the meantime, however, the British Parliament had successfully passed its Withdrawal Bill, making the question of competences of the Scottish Bill effectively moot due to the principle of the sovereignty of the British Parliament. In simple terms, Westminster placed the matter beyond the ambit of the judiciary by legislating on the matter. The Scottish Government did not reintroduce an amended Bill in the Scottish Parliament following the Supreme Court decision. This was also further proof that the Sewel Convention is toothless and its legislative form, section 2 of the Scotland Act 2016, is meaningless. The affair was ultimately concerned with the role of devolution and the location of power in the British constitution. With this background in mind, the next matter is a method for answering these questions: how can one study discourse and link it to the law?

[572] UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill (n 502)
[573] Under s33(1) and in accordance with s33(2) of the Scotland Act
[574] *Continuity Bill Reference* (n 504)

Discourse in Constitutional Law: Other Literature

In legal scholarship, terms like 'legal discourse' and 'constitutional discourse' are often mentioned.[575] What precisely is meant by 'legal discourse', and how exactly is it analysed? Typically, trends or norms in legal reasoning are traced through history, case law and legal scholarship.[576] Methods include studying the discourse of balancing and how this has diffused throughout the legal world, paying attention to the local context and focusing on the historical method.[577] Therefore, discourse is the object here itself – although a sociological or socio-legal approach is not used. Instead, the concept of balancing itself is assessed across different examples. Another example is the historical approach taken by Boerger and Rasmussen in their study of European constitutional discourse.[578] They look to a combination of politicians and theorists but do not use a systematic discursive framework. 'Constitutional discourse' is another frequent phrase used in constitutional scholarship. Broadly, it can refer to works in constitutional theory.[579] In other words, discourse here means a more traditional approach of surveying literature and making theoretical inquiries. Similarly, Jo Murkens uses the term 'public law discourse' in his study of the UK constitution, his method being a survey of academic literature and public law textbooks.[580]

This narrow form of discourse, limited to the work of constitutional scholars, is not suitable for the topic here. A broader method is necessary to capture the range of actors participating in the discourse and the political and identarian aspects of the issues at hand. Legal methodology alone is not enough.

[575] See e.g. J Bomhoff, *Balancing Constitutional Rights: The Origins and Meanings of Postwar Legal Discourse* (Cambridge University Press, Cambridge 2013)
[576] *ibid*
[577] *ibid* 29- 30
[578] See e.g. A Boerger and M Rasmussen, 'Transforming European Law: The Establishment of the Constitutional Discourse from 1950 – 1993' (2014) 10(2) European Constitutional Law Review 199
[579] See e.g. A Somek, 'The Owl of Minerva: Constitutional Discourse Before its Conclusion' (2008) 71(3) Modern Law Review 473
[580] J E K Murkens, 'The Quest for Constitutionalism in UK Public Law Discourse' (2009) 29(3) Oxford Journal of Legal Studies 427, 430- 438

A Non-Doctrinal Method and a Research Question

Using a non-doctrinal approach to law is justified because law is not legitimate on its own; instead, law derives legitimacy from the wider world, a point proven by legal realism.[581] There is no innate power to law beyond actors upholding it. The major continuation of legal realism, critical legal studies, approaches law as a power structure; thus, language and process, as opposed to principle, are fundamental.[582] As Kahn put it:

> The rule of law, I argued, is not just a set of rules to be applied to an otherwise independent social order. Rather, law is, in part, constitutive of the self understanding of individuals and communities[583]

Such an approach is particularly suitable for the British constitution. For one thing, it is uncodified, meaning that convention and practice are particularly important. As discussed above, self-understanding and identity lie behind the multiple understandings of the constitution. In general, the link between constitutional law and other factors is already a strong one: on the one hand, a constitution orders society and provides a constraining mechanism on politics. On the other hand, a constitution is the symbolic statement of the people, their identity and aspirations. To attempt a purely doctrinal account of British constitutional law, therefore, risks being limited to an incomplete reading: simply, the constitution is contested, and to ignore the wider constitutional context will produce a narrow picture, particularly when that contested constitution falls across the lines of the UK nations. The thesis has covered the contested British constitution in more depth elsewhere. Using a sociological method, as here, has the potential to overcome the risk of being too narrow.

[581] P W Kahn, Freedom, Autonomy and the Cultural Study of Law (2001) 13 Yale Journal of Law and the Humanities 141
[582] *ibid* 150
[583] *ibid* 141

As Wincott and Davies show,[584] different constitutional understandings are present across the media of the UK nations. Analysing the discourse of politicians at different levels of the UK's territorial constitution can offer similar insights on divergent understandings of the Britsh constitution within those in power. Is there something similar to be observed across the different territories and forums within the British constitution? In order to proceed, however, the concept of identity needs to be broken down.

Critical Discourse Analysis

The purpose of this chapter is to analyse texts to describe the process of constitutional identity formation. Textual analysis is, therefore, the methodology, specifically, critical discourse analysis (hereafter CDA). Developed by Norman Fairclough, CDA is concerned with how texts relate to power structures in broader society.[585] Context is key, because discourse analysis concerns why a particular speech has emerged in a certain time or place. It is a critical approach through this, as both the content, circumstances and goal of the speech are analysed. In other words, where does the power lie in each setting, and how does the discourse used approach this? This dynamic aspect is well suited to the topic of identity:

> Identity, which is a further important concept in CDS, refers to the way individuals and groups see themselves in relation to others. Identity is a fluid construct, as it is subject to change over time and space. Furthermore, identity may be multiple; we may refer to an individual or group's identities. Identity is manifested through one's social practice, an important part of which, as already mentioned, is discursive practice. Identity may also be projected onto others through discourse.[586]

[584] G Davies and D Wincott, 'Brexit, the press and the territorial constitution' *UK Constitutional Law Blog,* 10 June 2020) <https://ukconstitutionallaw.org/2020/06/10/gregory-davies-and-dan-wincott-brexit-the-press-and-the-territorial-constitution/> accessed 5 May 2021
[585] A Perakyla, 'Analysing Talk and Text' in NK Denzin and Y S Lincoln, (eds.) *The Sage Handbook of Qualitative Research* third edition (Sage Publishing, London 2005) 871
[586] J Flowerdew and J E Richardson, *The Routledge Handbook of Critical Discourse Studies* (Taylor and Francis, Abingdon 2017) 4

Returning to the concept of identity is also useful in demonstrating the utility of a CDA approach to law. All identity is, by nature, defined by its boundaries: identity formation is thus concerned with making distinctions, and so speech can be analysed for this process of distinguishing and constructing an identity. Jacobsohn's approach locates constitutional identity in the tensions within the constitution. Using Israel as an example, he demonstrates how the disharmony between its two poles of ethnically based state vs liberally divided state drives Israeli constitutional identity as these issues appear in the courts.[587]

The tension in our case is between the UK constitution as a Diceyan construct, centred on the eternal and supreme power of the British Parliament, and the model of the UK constitution, which posits that multinationality and consent are central. As there is an association between the first and Englishness and the second as Scottish, one can meaningfully talk of the emergence of Scottish constitutional identity within the broader UK constitution. In Jacobsohn's terms, this tension was previously in the background:

> Disharmony is endemic to the constitutional condition but more apparent in some places than in others. One way to think of the difference is in background and foreground terms. Thus we might imagine one polity in which a tension or inconsistency in the constitutional order may lie largely dormant, occasionally emerging to establish the contours within which a difficult issue gets addressed, only to recede from prominence after it passes from scrutiny; and another where the contradiction lives as a lurking omnipresence that dominates the discourse of ordinary politics, intermittently threatening to undermine the societal equilibrium that makes such politics possible, but just as likely serving to forestall the advent of an enduring constitutional settlement.[588]

The contradiction within the British constitution was previously in the background: the constructive ambiguity of the evolving yet unchanged British constitution was noticed by academics. Following the twin events of the Scottish independence referendum and especially the centralising Brexit process, the contradictions of the British constitution can be seen by all.

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[587] Jacobsohn *Constitutional Identity* (n 72) 272
[588] *ibid* 271- 272

Part Two: Methodology

An Identity Focused Approach

The approach to CDA used by Ruth Wodak et al. to describe Austrian national identity will be the broad framework. Identity, as mentioned above, here borrows from the tradition of the postmodern imaginary community. In other words, collective identity exists within the imagination of the individual, as one cannot physically know all the members of the collective identity.[589] As Wodak et al. points out, national identity is also real in the sense that it has institutions and tangible real-world features and consequences.[590] These act as markers for the production of the collective national identity. Constitutional identity is similar. While there are obviously tangible elements of a constitution, such as the text and its normative force, the narrative used to justify and animate the constitution is imaginary. In other words, constitutional identity is, to a large part, a narrative. In reaching a similar point in their discussion, Wodak et al. take three points of a narratively constructed national identity: the past, the present and the future.[591] Below this, they make several ordering distinctions: 'origin, continuity/tradition, transformation, timelessness and anticipation'.[592] Essentially, these features are suggestive of identity construction, and lead to the discursive strategies used by speakers. This will now be broadly set out for use in a case study of the Continuity Bill affair.

[589] R de Cillia, K Liebhart, M Reisigl and R Wodak, *The Discursive Construction of National Identity* (Edinburgh University Press, Edinburgh 2009) 21- 22
[590] *Ibid* 23
[591] *ibid* 26
[592] *Ibid*

Strategies and Markers of Scottish Constitutional Identity

Strategies refer to the techniques used by speakers in their discourse. Strategy may be more or less important, given the context. However, as this analysis focuses on political debates and case law, strategy clearly has a significant role to play. Wodak et al. divide the forms of strategy into construction, maintenance, transformation, and dismantling.[593] Adjusted from Wodak et al., strategies to be observed include references to time, the use of collective words and references to 'the people'. These are clear strategies aimed at identity construction. In addition to this, the markers of Scottish constitutional identity lie in the tension between the unitary-union faces of the British constitution. Thus, the content of discourse also forms identity construction, maintenance and destruction.

The transcripts from the second reading of the Withdrawal Bill, the third reading of the Continuity Bill, the final debate on the continuity Bill, the continuity bill itself and its explanatory notes and various other documents, the judgement of the Supreme Court and statements made by both the Attorney General and Lord Advocate on the matter have all been analysed. The themes emerging have been grouped in the following way:

1. Slogans
2. Use of time
3. 'us', 'we' and 'our'
4. Separating Scotland and the UK
5. Language at the Supreme Court
6. The people(s)
7. The constitution, sovereignty and the nature of devolution
8. Continuity and change

Groups one to three focus on discursive strategies and six to seven on the content markers of Scottish constitutional identity. Who is the 'in' group, and who is the 'out' group? How is time being used to create a narrative? Slogans are also an easy way to analyse what a speaker is trying to say and to whom. The other groupings contain elements of both approaches, as there is also a large amount of overlap between each category.

[593] *ibid* 33

Point four is a strategy which demonstrates how the speaker defines their national framework: do they perceive Scotland within the UK, as separate from the UK or do they only see the UK? And why is a speaker either collapsing Scotland into the UK or, conversely, seeking to separate the two frameworks? Point five is another strategy of identity construction, but it also leans into the constitutional background set out above. The idea of a Scottish people is key to Scotland's constitutional narrative. What is a speaker trying to argue for in talking about the 'Scottish people'? Here, the aim is to explore how speakers use this idea of a Scottish people with reference to the Continuity Bill Affair. Conversely, who are the British people, and what is their relevance to the legal dispute at hand? Point six is also vital, as this dispute was mainly about devolution issues. Therefore, a lot of the focus is on the technical interpretation of the Scotland Act. However, devolution itself has different cultural and historical significance across Scotland and the UK. In addition, the technical focus of the discussion obscures the fact that this is, ultimately, a power struggle between the Scottish and British governments and parliaments in an ambiguous legal context. That power struggle, in my belief, is centred in differing constitutional identities within the same unsettled constitutional framework. Finally, point seven focuses on both the perception of the British constitution.

In simple terms, is Brexit seen as a change to the constitutional order? Or does it just form continuity with an uninterrupted line of parliamentary sovereignty? Once each theme is discussed, some comments are made about conclusions so far.

Part Three: Discourse Analysis

Slogans

There are two political slogans that are prominently featured across the debates. First, the Conservative slogan 'our precious union' requires breaking down, as it appears frequently across all political debates. 'Our' suggests that the Union is something we all collectively possess in the UK. The word 'precious' also indicates something valuable yet fragile. The repetition of this slogan amounts to a repeated assertion of something which binds the UK while highlighting that those bonds are under threat. Interestingly, 'our precious union' is prominent in the Holyrood debates but absent from Westminster debates in the texts analysed so far. It's notable that the precious, shared thing for British people is not our 'country', our 'constitution' or even 'United Kingdom' – rather, it's the Union which is centred. By using this slogan, there is an obvious political motivation in heading off the challenge of the SNP in their pursuit of Scottish independence. However, the slogan also tacitly acknowledges that there is no singular British nation. This leans into Scottish identity in highlighting how the UK is multinational, denying the sometime assertion of a single British nation. In addition, centring the Union is critical in Scottish constitutional thought. An interesting point is who chooses to use this slogan: English Conservatives use it much less than their Scottish counterparts. In the British Parliamentary debates, 'Our Precious Union' does not appear at all at the second reading.[594] . In contrast, Conservative MSP Adam Tomkins, shadow constitution secretary in the Scottish Parliament, mentions 'our precious union' within the first paragraph of his opening speech in the debate at Stage Three.[595] This is indicative of who the slogan is aimed at: the Scots; and also highlights how the Union is of greater importance to the Scottish constitutional imaginary than that of the broader UK.

[594] HC debate 7 September 2017, vol. 628, col. 342- 422; HC debate 11 September 2017, vol. 628, col. 455- 604
[595] SP OR 21 March 2018, col. 157

'Power grab' is the second slogan and is frequently used by the SNP.[596] This implies that the British Government and Parliament are improperly taking powers which belong to, or by rights should belong to, the Scottish Parliament. Therefore, Scotland is losing something, and Scotland's institutions are weakened through the actions of the British Government. This slogan appears at both the Westminster and Holyrood debates. Unsurprisingly, it's only used by the SNP. Obviously, Scotland is not directly losing powers, as they were previously under the competence of the EU. However, this slogan underlines that.

While it is not accurate to talk of the court using slogans, the phrase 'Scotland Act' is used one hundred and seventeen times in the judgement of the Supreme Court. The lens of devolution is the only one which the court considers. Of course, a judge does not employ slogans in the same way that a politician does. However, it shows how the court chose to read the case as narrowly as possible. This is true of the disregard of the UK Government's arguments for a broader reading of the case beyond the Scotland Act and is also true of the court's narrow interpretation of the Scotland Act. As mentioned above, the case involved the Sewel Convention. The court simply reasserted their finding in *Miller,* refusing to comment on what they regard as a purely political convention. As pointed out above, the conclusion of *Miller* was controversial. The court does not mention this, simply repeating their 'explanation' of the nature of the Scotland Act from *Miller.* The language used masks the contentious nature of the issues at hand, and again, the court interprets devolution law as narrowly as possible with regard to Brexit. In my view, these two slogans and the court's framing demonstrate the approach taken by some actors across the conflict. Another discursive strategy, the use of time, will be covered next.

[596] See e.g. 'Hands off Scotland's powers' (*SNP.org,* 2018) <https://www.snp.org/campaigns/powergrab/> accessed 15 December 2018; In the British Parliamentary debates, 'Power Grab' appears twice from a devolved nation perspective in HC debate 7th September 2017, vol. 628; in HC debate 11th September, vol. 628 the phrase 'power grab' appears 47 times.

Time: The Past and the Future

A regular strategy used by many actors in the debates is to employ a narrative of time. Both sides situate themselves within different stories. Michael Russell MSP of the SNP, who moved the Bill, makes an explicit statement:

> In effect, that bill sought to turn back the clock to 1973, and to allow the UK Government—and it alone—to redesign devolution as if the UK had never been in the European Union or the common market or the European Community. I will leave aside the difficulty of travelling in time.[597]

This casts the UK Government's actions as incompatible with the devolution settlement, in addition to being ahistorical in its approach to the UK's EU membership. Russell undermines the idea that Brexit can be cast in line with a continuity of British parliamentary sovereignty. Stephen Gethins MP of the SNP does similar at Westminster with a focus on devolution, noting that it is the 20th anniversary of devolution alongside his argument that the British Government is centralising powers.[598] This seems to rely on an argument that the current constitution is rooted in devolution. In addition, the strategy is once again to note that the actions of the current British Government are not in line with previous constitutional developments. Paul Masterton, a Scottish Conservative MP, directly challenges this view, arguing that devolution is fixed and permanent and will only be strengthened by extra powers coming through Brexit.[599] His argument builds from his own personal experience of the origins of devolution and offers little material to support his point. Apart from this, conservative speakers are generally more future-oriented, highlighting the supposed benefits of a post-Brexit future. This is exemplified by Adam Tomkins MSP, the Conservative shadow minister for the constitution at the Scottish Parliament and leader of the opposition to the Scottish Continuity Bill.

[597] SP OR 21 (n 605) col. 155
[598] At col. 471; see also Tommy Sheppard MP at col. 569; Joanna Cherry MP at col. 577-578
[599] *ibid* col. 548 -549

He focuses on a union-based future and argues that the present actions of the British Parliament are legitimate:

> 'The United Kingdom common frameworks that we will need in policy areas such as agricultural support, public procurement and environmental protection will, if they are designed properly, lead to a new post-Brexit era of shared government in the United Kingdom, with the United Kingdom Government and the devolved Administrations working together in the common interests of all of the nations of the UK. That is exactly as it should be.'[600]

His argument can be contrasted with his Westminster colleagues, who see the post-Brexit future in terms of freedom to make 'British law', with no mention of cooperation with the Scottish Government. The SNP argument focuses on the destruction of Scottish identity through the actions of Westminster, while the Conservative argument is about the construction or reinforcement of a new British identity. At Holyrood, this new future is modified to make it more focused upon consensual governance and the UK's multinationality. Therefore, there is a gap between the Conservative visions of the future presented at London and Edinburgh. At London, it is a unitary future, while Scottish Conservatives make their case for the future in terms of collaboration between the nations of the UK.

'Us', 'We' and 'Our'

The words 'we' and 'our' feature prominently across the debate transcripts. These are basic strategies of identity formation. Adam Tomkins MSP frequently refers to the slogan 'our precious union', as previously mentioned, and also to 'our union'.[601] These words are constructive of a pan-British identity. In addition, 'our union' implies something owned by all British people, as mentioned above. However, the careful use of collective and possessive words is not present in the London debates.

[600] SP OR 21 (n 605) col. 32
[601] SP OR 21 (n 605) col. 33

In the British Parliament, English MPs from both the government and the opposition use the words 'us', 'we' and 'our' in a singular way.[602] They do not seem to account for the possible differences between the UK nations. The one exception to this is Edward Leigh MP, who uses the phrase 'our Scottish friends'[603] - othering Scotland and presumably only talking to England. MPs refer to 'our' nation, exit, laws, lives, withdrawal, etc.[604], always with reference to the UK as a whole as if there is a unitary British nation. Perhaps unsurprisingly, the SNP do not link 'our', or any possessive words, with the British nation. Interestingly, Scottish Conservative MPs also generally avoid using references to the British people, nation, and possessive words.[605] This is perhaps just politics, but at the very least it betrays that the view of a unitary British people is not an attractive one to Scottish voters. In terms of identity, there is an assertion of pan-Britishness on the one hand and, on the other, the distinction of Scotland from the SNP. Scottish Conservatives lie somewhere between these two poles, carefully maintaining a middle ground between these two identities in their discourse.

Separating Scotland and the UK: Nation and Nations

Language around the place of Scotland within the UK shifts across the debates. For example, at Holyrood SNP MSP Ivan McKee makes a clear distinction between Scotland and the UK, while Labour Labour MSP Neil Findlay uses the phrases 'Scotland and the rest of the UK' and 'our neighbour on this island'. He also makes the following statement:

> That would go against the spirit of devolution and the interests of our people and our democracy[606]

[602] See e.g. Zac Goldsmith MP at col. 468; Vicky Ford MP at col. 477; Conor Burns MP at col. 487; Wera Hobhouse MP at col. 502
[603] At col. 466
[604] See e.g. Pat McFadden MP at col. 474
[605] See e.g. the speech from Ross Thomson MP at col. 515- 516; Luke Graham MP does make one refence to the British people but avoids using possessive words or mentioning the country or nation at col. 530 – 531; Stephen Kerr MP refers to the British people a number of times at col. 558- 559
[606] SP OR 21 (n 605) col. 36

Here, it is unclear if Findlay means the Scottish people and Scottish democracy or the British. This ambiguity is not present at Westminster: in the House of Commons, MPs from English constituencies universally refer to 'the country' or 'the nation' regarding the whole UK.[607] SNP MPs again prefer formulations such as 'Scotland and the UK'.[608]

Scottish Conservative MPs are careful to highlight that it was a UK vote, and Scotland remains a part of the UK[609]. As mentioned above, this seems to be an attempt to bridge the British-Scottish divide by constructing a larger argument, still centred on a basic idea of Scottish consent through Scotland's choice to remain in the UK in the 2014 referendum.

Language at the Supreme Court

In the Supreme Court judgement, the matter is only viewed through the prism of the British constitution, despite the submissions which argued for Scottish constitutional principles. As a framing, this is to be expected – in devolution cases, the court uniquely sits as a British one as opposed to an English, Scottish or Northern Irish court. What is slightly more noteworthy is the fact that the court exclusively interprets the matter through the Scotland Act.[610] Commenting that the Scotland Act 'must be interpreted in the same way as any other statute',[611] the court ascribes the meaning of upholding the important role of the Scotland Act as a 'constitutional settlement' to their giving of a 'consistent and predictable' interpretation to the Act.[612] Thus, the court is at pains to present its ruling as one of continuity.

[607] See e.g Maria Miller at col. 457; David Lammy MP at col. 483; Chris Bryant MP at col. 489; Robert Syms MP at col. 495
[608] Hannah Bardell MP at col. 535
[609] Stephen Kerr MP at col. 371; Luke Graham MP at col. 372
[610] *Continuity Bill Reference* (n 504) paragraph 11
[611] *ibid* 12
[612] *Ibid*

The court highlights three relevant restrictions set out in section 29 of the Scotland Act which would place the Scottish Bill beyond competences: the restriction on legislating incompatibly EU law,[613] the restriction on legislating in a way which relates to reserved matters,[614] or if the legislation would breach the restrictions set out in Schedule 4.[615] Schedule 4 prohibits the Scottish Parliament from modifying certain protected rules of law. The court then deals with the first argument of the UK law officers: that the whole Bill is outwith the competences of the Scottish Parliament because it relates to international relations. The court rejects this.

The UK Law Officers' case on these points is not assisted by reference to the constitutional framework underlying the devolution settlement or the principles of legal certainty and legality. The constitutional framework underlying the devolution settlement is neither more nor less than what is contained in the Scotland Act construed on principles which are now well settled.[616]

The court, therefore, rejects any constitutional framework beyond the Scotland Act from both sides. In addition, this is a bold statement from the court: the Sewel Convention is, of course, a part of Scotland's constitutional framework. Although it is set out in the Scotland Act, according to the court's jurisprudence, the Sewel Convention is not enforceable. This surely forms one of the principles which are 'now well settled', but that stability can be cast into doubt by pointing out that the operation of the convention has failed. The meaning of the Sewel Convention has surely changed: it now looks like window dressing against the reassertion of parliamentary sovereignty. It also highlights how the broader British constitution has changed around Scotland's constitutional framework. By limiting the constitutional framework of the Scotland Act to the Scotland Act itself, the court excludes the actual function of that constitutional framework. While the court may regard the principles around devolution to be settled, this settlement is premised upon the court's interpretation of section 2 of the Scotland Act 2016 as beyond their remit.

[613] s29(2)(d)
[614] s29(2)(b) and (3)
[615] s29(2)(c)
[616] *Continuity Bill Reference* (n 504) paragraph 35

This does not mean that the operation of that principle is, in any way, settled, only the court's interpretation in excluding itself. The court also highlights section one of the Scotland Act 2016 (63A), pointing out that this intends to 'entrench the role of the Scottish Parliament and Scottish Government in the UK constitution'.[617] However, as previously highlighted, the implication from the Supreme Court in *Miller* is that this would be interpreted as non-legally binding in some way, as the idea of permanent entrenchment is incompatible with the parliamentary sovereignty reaffirmed by the Supreme Court. In the *Continuity Bill Reference* the court does not expand upon the meaning or interpretation of this section, unlike section 2.

The court does consider the 2016 amendments made to the Scotland Act. However, they 'explain' the finding in *Miller* that the Sewel Convention, as set out in section 2two 'cannot be enforced by the courts'[618]. However, 'it nonetheless plays an important role in facilitating harmonious relationships between the UK Parliament and the devolved legislatures'.[619] This is a gloss, which will be returned to later. As Aileen McHarg and Christopher McCorkindale make clear, the court did rely heavily on the premise of parliamentary sovereignty as more than symbolism: the denial for any sort of role for the Sewel Convention, and the active interpretation of s28(7) of the Scotland Act makes this point plainly.[620] The court is hiding the fact that the constitution has changed due to Brexit and that their interpretation of normative parliamentary sovereignty has not been typical in the past decades. In addition, the change to the doctrine of the British constitution made through the Scotland Act 2016 has been interpreted away by the Supreme Court, who still hold the key legislative text of that Act as merely an affirmation of non-legal principles.

[617] *ibid* 17
[618] *ibid* 18-19
[619] *ibid* 19
[620] C MacCorkindale and A McHarg, 'Continuity and Confusion: Towards Clarity? – The Supreme Court and the Scottish Continuity Bill' *UK Constitutional Law Blog,* 20 December 2018) <https://ukconstitutionallaw.org/2018/12/20/chris-mccorkindale-and-aileen-mcharg-continuity-and-confusion-towards-clarity-the-supreme-court-and-the-scottish-continuity-bill/> accessed 10 January 2019

The only part of the Bill found to be outwith legislative competence is section 1y, which would have modified section 28(7).[621] This section was the controversial so-called 'veto' for Scottish ministers over their UK counterparts, whereby Scottish ministers could amend retained areas of European Union law. The Scottish Bill was also found not to fall outside of its competence with regard to its compatibility with EU law, as the wording of the Scottish Bill made clear that it would not come into effect before the UK left the EU. EU law would, therefore, terminate at this point.[622]

The court noted that their role was to assess whether the Scottish Bill would be within competences if given Royal Assent after their decision.[623] Therefore, they observe:

> In the rare circumstance in which there is supervening legislation by the UK Parliament which amends the Scotland Act and thereby changes the legislative competence of the Scottish Parliament after the Scottish Parliament has passed a Bill, this court's decision may be different from what it would have been if the Scotland Act had not been so amended. The amendment of the Scotland Act by the UK Withdrawal Act is such a circumstance.[624]

Simply put, the British Parliament overrode the matter by passing its own legislation. The UK government's attack on the Scottish Bill was both broad and multifaceted. A key plank of their case was that the entire Scottish Bill was outwith competences, because the UK Bill was intended to create a unified legal solution across the UK.[625] The court points out that there is no prohibition on the Scottish Parliament legislating in the same areas as the UK, so long as the Scottish actions fall within the competences of the Scotland Act. This is a standard, predictable interpretation of devolution. However, the court does not go any further, effectively rubber-stamping the approach of the British Parliament in overriding the legal issue through its legislative supremacy. It is unclear what is intended by the use of 'rare'. Does the court mean that this situation does not typically occur or that it will not? Tense suggests the latter, but the court has no way of controlling this.

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[621] *Continuity Bill Reference* (n 504) paragraphs 52, 54
[622] *ibid* paragraph 84
[623] *ibid* paragraphs 97, 125 (iv)
[624] *Ibid*
[625] *ibid* paragraph 98

It appears to be a projection of continuity and stability when there is no way to guarantee that the situation will not occur again.

The court's approach and language are highly technical. As pointed out by Mark Elliott, the judgement actually contained a paradox: obviously, the case was a strong endorsement of the principle of the sovereignty of the British Parliament.[626] However, the judgment also hints that the court has separated the concepts of parliamentary sovereignty and the legislative power of parliament. This is because the court rejects the argument that section 17 of the Continuity Bill would affect parliamentary sovereignty while accepting the premise that it would affect the ability of Parliament to legislate in Scotland, thus separating the two concepts. However, these more profound constitutional points are all tacit: the court avoids the topic of the permanence of the Scottish Parliament. It masks both the constitutional nature and significance of its rulings through technical language and the language of continuity.

The People(s)

Returning to the political sphere, the concept of the people is central to all of the debates. Peter Grant MP stakes out the SNP position with regards to the Withdrawal Bill:

> A lot has been said about the UK Government's red lines in the Brexit negotiations, and I will give the Minister one red line from the sovereign people of Scotland: our sovereignty is not for sale today and will not be for sale at any future time—not to anyone and not at any price. The Bill seeks to take sovereignty from us, probably more than any Bill presented to this Parliament since we were dragged into it more than 300 years ago. That is why I urge every MP who claims to act on behalf of the people of Scotland, who believes in the sovereignty of the people and who believes in the sovereignty of democratic institutions to vote with us and against the Bill on Monday night[627]

[626] M Elliott, The Supreme Court's judgment in the Scottish Continuity Bill case' (*Public Law for Everyone,* 41 December 2018) <https://publiclawforeveryone.com/2018/12/14/the-supreme-courts-judgment-in-the-scottish-continuity-bill-case/> accessed 24 May 2019

[627] col. 376

The sovereignty of the Scottish people, of course, is both a political argument, but also one rooted in Scottish identity. Grant is expressly locating the sovereignty of the people of Scotland in devolution. The Government's position is that it represents the will of the British people in enacting the results of the 2016 referendum through the Withdrawal Bill. This quote from David Davis MP is a good example:

> As the Prime Minister said in January, the historic decision taken by the British people in June last year was not a rejection of the common values and history we share with the EU but a reflection of the desire of British people to control our own laws and ensure that they reflect the country and the people we want to be[628]

There is no acknowledgement of the fact that the different nationalities in the UK may see themselves as contradictory peoples. Also, once again, the basic point can be observed that the UK is made up of four countries in one state, as opposed to their being one British country. MPs from English constituencies repeat this strategy, and the British people feature prominently at Westminster among those both in favour of and against the Bill,[629] including from Labour MPs.[630] The 'settled will' of the Scottish people is also cited as a defence of the devolution settlement by the SNP.[631]

The Nature of Devolution and the Constitution

During the debate stages of the Scottish Continuity Bill, the Lord Advocate, who sits in the cabinet as the law officer in the Scottish Government, took the unusual measure of making a statement to the Scottish Parliament on the topic of the competence of the Scottish Bill shortly after it was introduced. This has never occurred before.[632]

[628] col.356
[629] See e.g. Bernard Jenkin MP at col. 459; Craig MacKinlay MP at col. 485; Robert Syms MP at col. 495
[630] Caroline Flint MP at col. 468; Margaret Beckett MP at col. 477 and 479; David Lammy MP at col. 482
[631] Joanna Cherry MP at col. 578
[632] SP OR 28 February 2018, col. 19- 31

He set out how, essentially, he and the Presiding Officer (speaker) of the Parliament had reached different conclusions about the competences of the bill: he was required to approve the mandatory statement of competence issued by the responsible government minister, and the Presiding Officer had to provide an assessment of the competence of the bill, as set out in the Scotland Act. Therefore, it was not a clear-cut issue, as two neutral actors came to different conclusions about the legality of the bill. The Lord Advocate makes clear that he respects the view of the Presiding Officer but makes his extraordinary statement because this is the first time a Bill has been introduced with a negative statement of competence from the Presiding Officer. While the Presiding Officer's statement is not legally binding, it is persuasive upon the debate and decision to be taken by the MSPs. The Lord Advocate frames this as a duty he 'owes' to the Scottish Parliament (presumably a moral duty, as there is no legal one), and stresses the limitation of his capacity as one of solely assessing competence. He also uses phrases such as 'members will understand' to highlight his own objective role: he is fending off potential attacks on any political element to his opinion. He expressly states that his opinion is not political:

> I will gladly leave political questions about the Bill – questions which are frankly irrelevant to the issue of legislative competence - to others.[633]

He also frames the debate by pointing out the wide scope of the reserved powers model in the Scotland Act:

> I remind Members that, so far as the Scotland Act is concerned, this Parliament's general legislative competence is constrained by section 29 of that Act. Unless one of those statutory constraints applies, this Bill would, if enacted, be within the legislative competence of the Parliament.[634]

His argument is centred around his disagreement with the position of the Presiding Officer. He is also at pains to highlight the 'urgent practical necessity' of the Scottish bill. He makes several references to the fact that EU compliance requirement will cease once the UK has left the EU – he is at pains to say that offending provisions of the Bill will only take effect after the UK has left the EU.

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[633] *ibid* col. 20
[634] *ibid*

Therefore, the Scottish Bill is, in his argument, no more than is necessary for the highly unusual situation in which the Scottish Parliament finds itself in. He highlights how the Bill has been 'carefully drafted' to avoid conflict with EU law:

> The Bill has been carefully drafted so that it is not incompatible with EU law. Nothing can be done under it which would put the United Kingdom in breach of its obligations under EU law. This is not a case where the Parliament is being asked to exercise a competence before that competence has been transferred to it. Rather this Parliament has competence at this time to deal, in the way that this Bill provides, with the consequences for our domestic law, of leaving the European Union[635]

This nature of devolution and the Scottish Bill appears to be different for pro-Brexit and anti-Brexit speakers in the debate. In the Scottish Parliament, the nature of devolution seems to exist between two poles: its democratic foundation and role as the political forum for the Scottish people on the one hand, and the legal limitations placed on the parliament in the devolution settlement the other. As Tomkins puts it:

> The Scottish Government likes to talk about respecting the devolution settlement, but wilfully enacting law in this Parliament that is beyond the limits of our legislative competence does not respect the devolution settlement. That is not respecting the rule of law; it is not respecting the British constitution; and it is not respecting the devolution settlement.[636]

This reflects a conservative strategy of incorrectly implying that the Presiding Officer's opinion as binding. The Lord Advocate's statement can be directly contrasted with parliamentary statements from the Attorney General at Westminster, the UK Government's chief law officer, in response to an urgent question from Joanna Cherry MP.

[635] *ibid* col. 22
[636] SP OR 21 (n 605) col. 158

Again, there are clear attempts to present the matter as one of solely law and not politics:

> The continuity Bills raise serious questions about legislative competence that need to be explored. That is apparent from the view of the Scottish Presiding Officer at introduction that the Scottish Bill was not within the legal scope of the Parliament, and the recognition of the Presiding Officer of the Welsh Assembly that the assessment of competence in relation to the Welsh Bill was not a "straightforward" decision[637]

This masks the active role the British Government played in referring the matter to the Supreme Court: this was not the action of the Presiding Officers, but a decision undertaken by the Government. Secondly, the use of words like 'clarity' and 'explored' also elide the fact that the British Government want more than a theoretical discussion about the nature of devolution. Rather, they actively support the position that the Scottish Bill was outwith competences, something clear from their full-frontal attack on the continuity bill. The next points made by the Attorney General highlight this.[638] Joanna Cherry QC MP of the SNP responds, repeating the frame of the issue as one of democracy against law: she asks why the British Government have decided to thwart the Scottish legislation in the courts after they failed to thwart it in the Scottish Parliament.[639] Thus, she suggests that the government only resort to law because they cannot achieve their goals through more 'democratic' channels. This, in my view, is a solely political point, reflecting how the Scottish Government know that they are in the weaker position in terms of constitutional law, but the stronger one with regards to politics. In addition, there is a strategy to cast the law as unreflective of the contemporary needs of Scotland and, tacitly, cast British constitutional law as somehow foreign to Scotland. Another theme present throughout is the unprecedented nature of events – the Attorney General frames this through the opinion of the presiding officer[640].

[637] HC debate 18 April 2018 vol. 639 col. 339
[638] *ibid*
[639] *ibid* col. 340
[640] *ibid*

The Attorney General also repeatedly makes the implication that their actions are designed to uphold the devolution settlement, by highlighting that they are only using the mechanism of devolution in their actions.

However, as the statement on legislative competence from the Presiding Officer makes clear, his view on legislative competence is intended to guide MSPs in their debate during the progress of the Bill at Holyrood. This mischaracterisation of the role of the Presiding Officer's position is a part of the casting of the Scottish Government as unlawful and devolution as characterised by broad legal limitations.

Murdo Fraser, a Scottish Conservative MSP, makes the same point in the Scottish Parliament:

> Throughout the process, we have heard from the Scottish National Party Government that the devolution settlement must be respected, and we heard that again from the cabinet secretary at the start of the debate. However, that self-same SNP Government has ignored the opinion of the Presiding Officer of the Parliament that the bill is beyond the Parliament's powers.[641]

The dispute between a legally limited view of devolution and an expansive 'spirit' view was also carried through to the debate at Westminster. Patrick Grady MP and David Davis, the minister responsible for guiding the legislation through parliament, clash on this point:

> What the right hon. Gentleman is therefore describing is not devolution but reserving powers to this Parliament. It is a fundamental breach of the principles of the original Scotland Act[642]

[641] SP OR 21 (n 605) col. 166
[642] col. 355

The ‘principles’ of devolution presumably refer to the cultural phenomenon of devolution in Scotland, or perhaps the wide-ranging nature of the reserved powers model. Grady is correct, however, in that reserving powers under the Scotland Act to the minimal extent possible was the intended design of the devolution settlement Davis responds:

> We can ensure that our common approaches are better suited to the UK and our devolution settlements. The Bill therefore provides a mechanism to release policy areas where no frameworks are needed[643]

This vision of London regaining powers and ‘releasing’ them where desirable is notably traditionalist. It weights the balance in favour of London when, of course, the reserved powers model weighted the balance in favour of devolving wherever possible. Simply, the subsidiarity of devolution has been reversed in favour of the presumption that common approaches undertaken at Westminster will be better. This is clearly at odds with the nature of devolution, whereby everything not expressly reserved is automatically devolved. Cheryl Gillan MP also gives a clear presentation of this unitary – Diceyan view at Westminster:

> On devolved matters, our membership of the EU predates devolution to Wales, Scotland or Northern Ireland. It was the UK Government who gave away these powers to the EU, and it is UK Government who will reclaim them[644]

This is backed up by other Conservative MPs,[645] who do not appear to regard devolution as something which has changed the nature of the UK constitution. Rather, the very fact that Westminster gave away those powers means that Westminster should get them back, no matter that the British constitution has substantially altered in the past 48 years.

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[643] col. 366

[644] col. 462

[645] See also Edward Leigh, MP: ‘…if they have a genuine desire to ensure that powers from the EU do not come to the Westminster Parliament but go to the Scottish Parliament, we should be generous towards them’ at col. 466; Ian Duncan Smith MP at col. 378- 379 makes similar remarks about devolving ‘down’ the returning powers.

This static interpretation of total continuity betrays an underlying belief that the traditional understanding of parliamentary sovereignty has existed all along, and not been altered by the developments of the late 20th century. Simply, English conservative MPs do not regard there to be any constitutional force behind the devolution settlement. The argument is also made that there are 'devolution benefits' to be derived from Brexit,[646] with Scottish Conservative MPs arguing that there are no powers taken back from Holyrood.[647] Instead, as a result of EU withdrawal, the Scottish Parliament will actually be empowered through the limited powers given back to the devolved institutions under the UK bill. This is a shallow argument which ignores the context of amendments to the Scotland Act without a legislative consent motion, along with the contradiction of the reserved powers model and the general centralising turn towards London in the constitution. Simply, it is a surface level statement that Holyrood will gain some new powers through returning competences from the EU. It ignores that, under devolution's subsidiarity principle, much more should have been returned to Holyrood.

In response to this, devolution is portrayed as a broad expression of Scottish identity by the SNP. The SNP at Westminster also misrepresent the nature of devolution in their own way, by arguing that it formed a 're-establishing' of the old Scottish Parliament.[648] This is a myth. Legally, there is no continuity between the old parliament of pre-union Scotland and the modern parliament at Holyrood – the point is just political theatre. The SNP MPs strengthen their argument to represent the Scottish people by asserting that sovereignty rests with the Scottish people, and that parliamentary sovereignty does not apply across the entire UK.[649] This argument is based upon the mythology of the Declaration of Arbroath and the famous *MaCormick vs Lord Advocate* - it's a constitutional argument directly derived from Scotland's cultural imagining of sovereignty. However, it is not strictly a legal argument, and here it serves as a political point – but a political point which highlights how at odds the post-Brexit constitution is with virtually all Scottish constitutional thinking.

[646] Derek Thomas MP at col. 506.
[647] Stephen Kerr MP at col. 511
[648] Stephen Gethins at col. 469; Hannah Bardell MP at col. 534 -535
[649] Peter Grant MP at col. 370-371

The nature of the Union features in the Scottish Parliamentary debate but not the British Parliament debate. At Holyrood, there is a twin attempt to cast the Acts of Union as an economic matter but also a cultural one:

> 'Free trade was the reason why the union was established 311 years ago in 1707 and it is the reason why Scotland has prospered in the three centuries since. However, it is not just about trade. Our union is a social and cultural union, too. Again, my amendment recognises that and seeks to protect all of it.[650]

On this account, trade is the fundamental logic of union and is supplemented by social and cultural factors. Therefore, the centralising effects of Brexit are, in his mind, entirely unionist. This is clearly a fanciful interpretation of the Union of 1707. However, it's interesting that Scottish Conservatives see the need to situate their arguments within unionism, in comparison to other Conservative politicians.

Continuity and Change

Continuity and change are also prominent features of the debate. At Westminster, proponents of the Withdrawal Bill argue that their approach is one of continuity - it is about 'evolving as we move forward as a sovereign nation'.[651] In this formulation, Scottish objections are cast against the natural development of the British nation. This quote from Adam Tomkins MSP highlights how Scottish Conservatives portray the concept of change:

> 'It is imperative that Brexit—that is to say, the United Kingdom's withdrawal from the European Union—does not inadvertently undermine the integrity of the United Kingdom as a union of four constituent nations. Indeed, Brexit should deepen and strengthen our precious union'[652]

[650] SP OR 21 (n 605) col. 33
[651] Henry Smith at 460; See also Cheryl Gillan MP: 'this Bill is merely an enabling piece of legislation—a process whereby we can achieve what the country asked us to do' at 461
[652] SP OR 21 (n 605) col. 32

The word 'inadvertently' suggests that the Union may be at risk of being accidently undermined. Once again, it can be pointed out that Scottish speakers always refer to the UK as multinational – there are no references to the 'British people' at Holyrood. For the SNP, Green, Lib Dem and Labour MSPs, the cause of the dispute is instead Brexit, or the actions of the UK government is enacting Brexit. Thus, the need for the Bill can be justified in maintaining the devolution settlement. These speakers thus see themselves as fighting for continuity in the face of the disruption of Brexit. As Ivan Mckee of the SNP puts it:

> We do not want to be having this debate. We did not want Scotland and the UK to face the economic and social uncertainty and costs that Brexit will bring. We did not want to have to spend considerable time and resources in this place debating the UK's and Scotland's withdrawal from the EU, which is a distraction from our work in moving Scotland forward[653]

The point of crisis has arisen from Brexit. He continues:

> It is our duty and our responsibility as members of the Scottish Parliament to protect that settlement. I expect that, shortly, we will pass the bill by a significant majority. We will show that the Scottish Parliament, representing the Scottish people who elected us, is standing up for Scotland and making sure that their voice is heard. I urge members to vote for the bill[654]

Cast in this way, the Continuity Bill is a means to provide continuity within the Scottish constitutional settlement - a settlement which is threatened by Brexit and the UK's withdrawal bill. The UK is threatening devolution and the Scottish Parliament must stand up for itself. This conflicts with the idea of Brexit as a part of the British people seeking progress within a framework of a continuous constitution.

[653] *ibid* col. 164
[654] *ibid* col. 166

Framing

The Scottish Bill is framed in very similar terms to the UK bill, as made clear in the explanatory notes.[655] The Scottish Bill is necessary to ensure the smooth transfer of powers upon the UK's exit from the EU. However, the explanatory notes do also make explicit references to and distinctions from the UKWB.[656] The policy memorandum on the Scottish Bill once again frames their actions as defensive against the UK legislation:

> The introduction of the Bill does not mean that the Scottish Government has resolved to reject the EUWB and rely instead on this Bill. If the necessary changes are made to the EUWB, then this Bill can be withdrawn and a legislative consent motion lodged by the Scottish Ministers. But until those changes are made, this Bill will be progressed through the Scottish Parliament so that on any scenario there is a legislative framework in place for protecting Scotland's system of laws from the shock and disruption of UK withdrawal from the EU.[657]

The legislation itself simply refers to its only purpose as 'An Act of the Scottish Parliament to make provision for Scotland in connection with the withdrawal of the United Kingdom from the EU'.[658]

Comments

Comments can be made about the discourse at the Scottish Parliament and British Parliament. First, the use of collective words such as 'us' and 'our' differs between SNP MPs and those from different parties at Westminster. In addition, there are contrasting uses at Westminster and Holyrood. At Holyrood, Conservative party voices tacitly switch between referring to Scotland using these collective words and the wider UK.

[655] UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill Explanatory Notes
[656] E.g. at 59; or the controversial section 17 on consent as spelled out at paragraphs 93- 97
[657] UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill Policy Memorandum paragraph 6
[658] SP Bill 28 UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill (n 502)

Other features such as the distinctions made between Scotland and the wider UK point towards a rather obvious first conclusion: SNP politicians are keen to construct a Scottish identity while British Conservatives prefer a unitary British identity. Scottish Conservatives are careful to link both to some extent, relying on the premise that Scotland's 2014 referendum result was a vote to stay with the UK come what may. Labour politicians, Liberal Democrats and politicians from other parties also differ in how they approach the debate between London and Edinburgh, with Scottish politicians once again more careful to avoid references to any pan-British nation.

Interestingly, at Holyrood references to the British people are scarce- in fact, they are non-existant. This is to be expected to an extent, given that the remit of the Scottish Parliament is limited to Scotland. However, its notable that an idea of the British people does not factor into Scottish unionist speech, perhaps reflecting the plurinational tradition present in Scottish thought, or at the very least a recognition of a British single people would not play well politically in Scotland. Given that the debate on the original Bill at Westminster is premised on the will of the British people, it is surprising to see that justification disappear in Scotland, not even relied upon by pro-Brexit Scots. In addition, the normative force ascribed to each 'people' differs. The British people are a new constitutional force, in the UK constitution: the precise interaction of this with parliamentary sovereignty is too broad to address here. It can only be observed that the British people, in voting narrowly for Brexit, have also given their weight to the government's Brexit strategy, in the form of the original UK Withdrawal Bill.

The SNP's arguments around the Scottish people are rooted in in a number of related positions. First, they take inspiration from the widely believed tradition of Scottish popular sovereignty. This is a narrative from legal nationalism, which reached its high point in the *MacCormick* case and doubted the historical application of parliamentary sovereignty to Scotland. This can be linked to the political unionist approach which turns on consent and the Union as central features of the British constitution. Combined with the devolved institutions, these narratives place the Scottish Parliament and government within a grander story about the Scottish people and the British constitution.

The devolution of repatriated powers therefore cuts directly to Scottish perceptions about their role as a constitutional people. The SNP buttress their position by also mischaracterising devolution as a re-establishment of the old Scottish parliament, and by references to independence referendums as the will of the Scottish people. These appear to be expressions of Scottish constitutional identity.

The focus on the Union and of devolution also differ across political positions and parliamentary locations. At Holyrood there is a general attempt to cast the logic of the Union as economic, while also ascribing a great deal of moral importance through phrases such as 'our precious union'. The British Parliament hardly considers the Union at all. Instead, issues of power are viewed through a limited and paternalistic lens of devolution, whereby the British Parliament may choose to bestow powers on the devolved administrations as it wishes. This contradicts with the wider sense of devolution argued for by the SNP. This turns on both the use of union state traditions mentioned above, but also the spirit of the reserved powers model used in the Scotland Act. This argument plays out at Holyrood, with Conservative MSPs portraying the main characteristic of devolution as its legal limitations.

The Supreme Court, as is to be expected, completely avoids the political aspects of the Continuity Bill Reference. However, this narrow approach is perhaps overly so. Denying legal effect to the constitutional reforms of the Scotland Act 2016 is not a neutral, value-free interpretation. The Court appears desperate to avoid the role of constitutional court with regards to the territorial arrangements of the British constitution. In this attempt to retreat from the centre of the constitution, the court is betraying its new constitutional vision of the UK as unitary, political and centered on parliamentary sovereignty as an active principle. In doing so, the court is contradicting much of the past decades of judicial activism and transformation in the UK. Finally, the court actually has been innovative in other constitutional aspects of the Brexit process, as covered in previous chapters, and seems to curtail its own role with regards to devolution in particular.

Turning to the doctrinal law around the Continuity Bill affair, neither the British nor the Scottish constitutional narrative entirely fits within the constitutional framework. Since *Miller,* the judiciary has become more conservative in interpreting the nature of the constitution, relying much more on the principle of parliamentary sovereignty. This would fit better with the paternalistic, traditional account of devolution and the constitution given at Westminster. However, the broader reading of the devolution settlement favoured by Scottish actors is upheld by the Supreme Court. The judges rightly note that devolution is weighted to mean that the Scottish Parliament is competent except when it is expressly not in the Scotland Act. This confirms that the legal limitations of devolution are not really the fundamental characteristic of the settlement, as they are intended to be only what is necessary. This can be contrasted with the interpretation of sections one and two of the Scotland Act 2016. By stepping back from the actual function of the constitution, the court has imposed limitations upon its own role. It covers this by simply glossing over the point in their judgement. Thus, while the Court reads devolution broadly, they do not uphold any aspect of the consent principle or the idea of Scottish popular sovereignty. Therefore, Scotland has no role at the centre of the constitution. It's worth also highlighting that the British people are not a normative legal concept. Instead, doctrinally, parliamentary sovereignty has been reasserted within the British constitution. While Scottish actors were more accurate with regards to the nature of devolution, ultimately, the devolution settlement seems to be merely be an act of the British parliament.

Conclusion

In terms of the identity that arises from having the constitution, dissonance appears to be the essential characteristic. The most substantial dissonance is between nations: English and Scottish actors construct their constitutional identities on entirely different foundations. English politicians regard devolution as not a significant event in terms of law, the British constitution or as a political and cultural event. Instead, it is just an Act of the British Parliament. Scottish actors, whether nationalist or unionist, instead both pay heed to devolution. English actors refer to a British people, whereas all Scottish actors show some concession towards Scottish popular sovereignty and the idea that Scotland must have some role in consenting to its constitutional position.

The presentation of the changes to the Scottish constitution is interesting. The nationalist side is correct in identifying changes to the devolution settlement, and the presentation of continuity by UK politicians and the Supreme Court is an incomplete picture. The court has upheld the reserved powers model but ultimately undercut devolution by endorsing a highly traditional account of parliamentary sovereignty. Emphasising the legally limited side of devolution is also a change of direction when compared to the situation pre-Brexit.

Ultimately, there is now dissonance between Scottish constitutional identity in its need for some sort of Scottish consent, and the constitutional reality of the post-Brexit United Kingdom. The nationalist response to this is to call for Scottish independence. The unionist response is to construct arguments to show that Scotland consented when it voted to remain in the UK following the 2014 referendum. As the constitution becomes more centralised and more English in identity, it will be interesting to see if these arguments can still be made. Scottish constitutional identity, or what makes the British constitution stick in Scotland, is no longer supported by the law or the practice of the British constitution as it becomes more certainly traditional and centred on parliamentary sovereignty.

Chapter Conclusion

To answer the question, 'How are Scottish constitutional traditions and identity used in contemporary constitutional discourse?' I have analysed the discursive strategies of actors from different levels of the British Constitution. First, there are discursive attempts to construct British and Scottish identity across both the British and Scottish Parliaments. This is clear from the use of language in debates, such as collective words like 'us' and 'our' These identities ultimately also lie at the heart of the UK's contested constitution, caught between its unitary and multinational faces. Focusing on Scottish identity, a push is being made to give this a normative constitutional force – yet the line between national and constitutional identity remains unclear. In addition, a strong 'British' (tacitly English) identity is being created and mobilised as justification for the constitutional changes necessary for the UK's exit from the European Union. It is not only justification, however: the logic of this turn to the unitary British people has produced a narrative hostile to recognising differences across the British Union. This narrative, in turn, is used as the ideology to legitimise the more significant process of centralisation in the UK constitution.

It is noteworthy that pro-Brexit Scots cannot rely on this ideology in making their arguments. Instead, the Union is centred, which excludes the idea of a single British nation by highlighting the UK's nature as a multinational state. This includes looking to history in order to cast the centralising actions of the British Government as unionist. As previously discussed in the thesis, constitutional identity is made up of the identity that arises as a result of having a constitution, making the constitution itself a necessary part. Scotland's constitution is the British constitution. The British constitution is not really compatible with Scottish identity, but that could be masked by the ambiguity and flexibility of the unwritten constitution before Brexit. The arguments made by pro-Brexit Scots seek to show that the British constitution is still compatible with Scottish identity and eliminate the tension in Scottish constitutional identity being now made up of a constitution and collective Scottish beliefs that are not compatible. It will be interesting to see if these strained interpretations can hold in the future as the British constitution becomes yet more centralised and yet more dependent on English constitutional narrative. The factors that made the British constitution stick in Scotland are difficult to sustain after Brexit.

Concluding Remarks

In 1999, a Scottish Parliament will sit in Edinburgh for the first time in almost 300 years. It is not the reincarnation of the nation state which, in 1707, entered a partnership which became the United Kingdom; it is unashamedly a settlement within the United Kingdom—unashamedly, because the majority of Scots are determined to maintain the bonds of friendship, trust and common interest built over time. It has been and always will be the views of the people of Scotland that will alone decide their future[659]

This thesis set out to bring two strands together: Scottish identity and Scotland's constitutional position. There is a substantial amount of scholarship in Scotland that is nearly constitutional: work on Scots legal nationalism and identity, for example, or on the cultural associations of devolution. What has not been attempted is integrating Scottish identity with Scotland's constitutional position from the point of view of constitutional law. Constitutional theory, specifically constitutional identity, has been the lens used in this thesis to attempt to place Scotland's constitution in its whole context.

Constitutional identity is not national identity, but it has an association with national identity. Both are based in the imaginary of their holders. Constitutions remain tied to the nation, and the nation remains the greater source of allegiance and popular legitimacy. The boundary between national and constitutional identity may, in practice, be fluid, particularly in the case of a national identity with somewhat constitutional characteristics, such as in Scotland.

The goal of this thesis was to answer the following question: what is the nature of Scottish constitutional identity? The quote given at the start of this chapter is instructive. It is from Donald Dewar, the 'father of devolution', who was responsible for delivering the Scotland Act while a Labour British Government minister and also the founding First Minister of the Scottish parliament.

[659] At 34, HC Deb 12 January 1998 vol 304 cc 19-117

Weaving a narrative through history, he centred choice and change among the people as the nature of Scotland. This collective imaginary of choice and consent is the defining characteristic of Scottish constitutional identity. More specifically, Scottish constitutional identity is made up of three interdependent parts. The first is Scottish national identity, the second is popular sovereignty and the final is a non-ethnic basis for Scottish identity.

In setting out a definition of constitutional identity, it was highlighted that it also contains a 'thing', or a tangible object in addition to its collective imaginary. This 'thing' is the constitution itself. In our case, two potential constitutions can serve as this 'thing'. Prior to Brexit, the broader British constitution was ambiguous and unsettled. Parliamentary sovereignty appeared weakened, and the reality of it as an active constitutional principle was doubtful. In this context, there was a Scottish Constitution. The Scotland Act slotted comfortably into broader Scottish narratives of the British state and Scotland's role within it. Founded through the actions of the people in Scotland, the Scotland Act served as the foundation of the Scottish Parliament and Government. It also limited the powers of the Scottish institutions, therefore creating constitutionalism and representing an expression of the will of the people of Scotland. Up until June 2016, Scottish constitutional identity was reflected in the characteristics of the Scotland Act.

Brexit started a wholesale centralisation towards the British Parliament and away from the devolved Scottish institutions. Some of this was done through legislation: this thesis has discussed how statutes have cut across the devolution settlement. Otherwise, the British Parliament has simply exercised its overwhelming power under parliamentary sovereignty. Underlining this has been a Supreme Court intent on being conservative in its interpretation of the relationship between Edinburgh and London, reinforcing the already vast imbalance created by parliamentary sovereignty.

In this context, arguing that there is a Scottish Constitution is no longer possible. The Scotland Act remains in place, but it no longer rises to the threshold of a constitution. Along with being legally weakened through case law and legislation, the Scotland Act's links with broader Scottish identity, as expressed in the popular sovereignty narrative, have been fractured. Crucially, that change was driven by the choice of voters outwith Scotland: the views of the people in the rest of the United Kingdom have decided to restrict Scotland's constitutional settlement. Today, Scotland's constitutional identity comprises the collective imaginary of Scottish popular consent and the remaining constitution: an incompatible, largely Diceyan, British constitution.

The thesis had some limitations. First, the continuing legal change in the area was both an advantage and a disadvantage. The project could draw on an increasing amount of material, but sketching a moving picture is challenging. While the UK has left the EU, the effects are ongoing. For example, Brexit signalled changes in how devolution operates with the ramifications still unfolding.

Second, combining the analysis of law with the analysis of non-legal materials was challenging. Constitutional identity is not just a matter of law, as already discussed, particularly in the unwritten British system. For this reason, other disciplines have been used to complement the law, and sources, namely parliamentary debates, have been relied on. This leaves the project open to the accusation that it is not a legal one. The justification for the methodology has been given in more detail in previous chapters. Ultimately, a balance has been sought between the strictly legal and the non-legal parts of the project.

The thesis also points to directions for future research. One is further refinement of the approach. Constitutional identity is new to the British constitution and the methodology reflects that. The absence of a codified constitution or an official constitutional court also made the combination of legal analysis with contextual materials necessary. The use of discourse analysis in a thesis on constitutional law also appears to be novel. There will be other ways to capture constitutional identity and other balances that can be struck between law and context, but the discursive approach is a promising one.

A particularly interesting line of research is the tone of the Supreme Court. As discussed in chapter six, the language of the Court implies continuity. This masks underlying changes in the law and the evolution of the constitution. The paradox of constitutional change being presented as continuity was raised by Christine Bell at an earlier point in the thesis. She argues that this is the identity of the British Constitution: constant transformation alongside a static narrative in parliamentary sovereignty, as parliamentary sovereignty cannot tolerate any constitutional amendment. Applying the change/continuity paradox to other Brexit cases from the Supreme Court, even if just focused on a specific issue such as devolution or the role of the judiciary, would be a worthwhile revisit to her arguments.

For now, some things are clear. Each constitutional identity is unique and, in the Scottish case, interwoven with national identity. Those identities played an important role in the passing of the Scotland Act. The constitutional character of the Scotland Act has been reduced since 2016 as the UK left the EU and reorientated towards a robust parliamentary sovereignty. Prior to devolution, the British constitution appeared to be in tension with Scottish identity but it was compatible. That compatibility in the post-Brexit United Kingdom remains to be seen.

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