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**SOVEREIGNTY AND CONTEMPORARY SCOTTISH  
CONSTITUTIONAL DEBATE**

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## ABSTRACT

This thesis critically analyses the juristic concept of sovereignty in contemporary Scottish constitutional debate. ‘Parliamentary Sovereignty’ - the shibboleth of the British public lawyer - has by now weathered many attacks but remains stubbornly in place as the foundation of the United Kingdom’s constitution. The problems this has thrown up for the accommodation of Scotland in the famously vague yet remarkably resilient structures of the British constitution are well-documented, and they have provided useful ammunition for a resurgent political nationalism. A Scottish tradition of popular sovereignty has increasingly been invoked in recent decades as a counter to the dominance of Westminster’s absolute legislative authority. This ostensibly one-sided fight takes place in a field of inquiry most often avoided by British public lawyers: the interface between law and politics. The distinction between legal and political sovereignty is observed dogmatically in orthodox jurisprudence, and it has even coloured more radical attempts to re-imagine what sovereignty might mean in an era when many contend that sub-state and supra-state influences are reshaping the modern polity. It will be argued that a failure to properly theorise the juncture of law and politics in traditional Anglocentric scholarship has led to a situation in which the concept of sovereignty has become so misunderstood that its significance is routinely overlooked. Both extant pluralist treatments of sovereignty specifically addressed to the Scottish context and its recent invocations in contemporary constitutional debate have depended on erroneous or impoverished constructions of its meaning and function. It is submitted that the model of sovereignty developed by Martin Loughlin provides a superior analytical framework for investigations into the current constitutional position of Scotland, and offers a more illuminating account of the forces which are at work in a nascent Scottish public sphere.

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**AUTHOR'S DECLARATION**

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

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## INTRODUCTION

The concept of sovereignty has proved indispensable for understanding the intertwined legal and political authority of government. As the essential theoretical framework for understanding modern state power, its durability has seen it so far survive attempts to expel it from academic discourse in public law and political science<sup>1</sup>. Despite its continuing importance it remains an endlessly contested notion. Particular local interpretations of how the idea should be understood have shaped the differing constitutional designs of a variety of modern regimes<sup>2</sup>. This tendency to generate differing interpretations on the practical level is mirrored on the theoretical level. Contemporary global challenges to orthodox theories of constitutionalism have led to a bewildering variety of contradictory publications on the current meaning and function of sovereignty<sup>3</sup>.

This combination of centrality and contestability means that the idea of sovereignty often frames political conflict over rightful governance<sup>4</sup> and this thesis is concerned with the example presented by Scotland's contemporary political discourse. The constitution has become increasingly central to this discourse in recent years, and not only at the urging of nationalist ideologues. Attempts to invoke the concept of sovereignty as a part of that discourse are confused by the fact that Scotland has retained an indistinct but powerful idea of its own constitutional tradition whilst formally subsumed under a different British one since 1707. The problems presented to constitutional analysis by the idiosyncratic nature of the UK polity (most often characterised as comprising a single state

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<sup>1</sup> Neil Walker notes that even those who do not wish to abandon the concept entirely as 'hypocrisy' still seek to 'relocate' it, 'question' it, 'search for its fragments' or at least illustrate that the concept is in 'crisis'. Walker, N, 'Sovereignty Frames and Sovereignty Claims' in Loughlin, M & Walker, N (Eds) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford, OUP, 2007) p18. Martin Loughlin cites as examples the efforts of JP Nettl and Hans Kelsen in the 20<sup>th</sup> century to abolish the concept altogether. Loughlin, M, 'Why Sovereignty?' in Rawlings R, Leyland P & Young A (Eds) *Sovereignty and the Law: Domestic, European and International Perspectives* (Oxford, OUP, 2013), p35

<sup>2</sup> The constitutions of the USA, France, Germany and Spain are all predicated on popular sovereignty, but each takes a different approach to reflecting that principle in institutional and legal forms.

<sup>3</sup> Loughlin, after noting that approximately 330 books with sovereignty in the title were published in the decade to 2009, lists the following distinct attempts to qualify or modify the concept in recent literature: 'shared sovereignty', 'mixed sovereignty', 'divided sovereignty', 'pooled sovereignty', 'cooperative sovereignty', 'floating sovereignty', 'multiple sovereignty', 'fractured sovereignty', 'perforated sovereignty', 'complex sovereignty', 'agonal sovereignty', 'polymorphous sovereignty', 'late sovereignty' and 'post-sovereignty'. Loughlin, M, 'Why Sovereignty?' in Rawlings R, Leyland P & Young A (Eds) *Sovereignty and the Law* p37

<sup>4</sup> In addition to the challenges posed to orthodox liberal models of constitutionalism by resurgent sub-state nationalism, challenges to the nation-state's traditional monopoly on meaningful power in a given territorial space have also arisen as a consequence of the sectoral challenges presented by globalised capital flows and competing supra-national sites of political authority (such as the European Union or the World Trade Organisation). The concept of sovereignty was also used to great protectionist, nationalist and often xenophobic effect on both sides of the Atlantic in 2016 by both the referendum campaign in favour of the UK leaving the EU and the presidential campaign of Donald Trump in the USA.

and multiple nations governed through a unitary, monistic constitution<sup>5</sup>) conspire with the fact that the UK has an underdeveloped theory of the state in comparison to its continental counterparts<sup>6</sup> to exacerbate difficulties in drawing conclusions about the abstract components of the UK constitution.

That uncodified “organic” constitution itself has always been an outlier in international terms, and the same exceptionalist tendency is replicated in the doctrinally uncomfortable accommodation of Scotland within it, an accommodation which has been described by the late Professor Sir Neil MacCormick as “the Scottish Anomaly”<sup>7</sup>. Some claim that Scotland’s own constitutional tradition, to the extent that such a tradition can be said to exist separately from a British or United Kingdom constitutional tradition, is grounded in a historic idea of a popular sovereignty which provides real limits on the legitimate exercise of state power. The persistence of such an idea is an affront to the UK constitutional orthodoxy of the sovereign Queen-in-Parliament, a composite institutional construction which cannot acknowledge any fetter on its own power nor recognise any rival source of authority within its jurisdiction<sup>8</sup>. The conceptual difficulties in reconciling these two constitutional traditions had however been more or less successfully avoided until the past three decades, until when promoters of a distinct Scottish constitutional tradition tended to inhabit the fringes of popular political discourse.

The uneasy equilibrium was upset at the close of the twentieth century. Scotland has since 1999 elected representative lawmakers to a devolved legislature and enjoyed the associated administrative machinery. These new pieces of *Staatsgewalt*<sup>9</sup> joined the extant Scottish institutions of state: distinctive legal, educational and religious institutions that

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<sup>5</sup> Some call this a “plurinational” polity - see Tierney, S, *Constitutional Law and National Pluralism* (Oxford, OUP, 2004) and Keating, M, *Plurinational Democracy: Stateless Nations in a Post-Sovereignty Era* (Oxford, OUP, 2001)

<sup>6</sup> A deep-seated pragmatism is often identified as the prime constitutional virtue of the British and perhaps this explains why our public lawyers are slow to interrogate what seems to be working on a practical level. Neil MacCormick illustrated a reluctance to apply the tools of continental jurisprudence by adopting the voice of an imagined critic of his own attempts: “But it will just be a confusion to ask whether it could be a *Rechtstaat*. The very term is one that has no currency in English, and “law-state” is a barbarous neologism devised to spatchcock into British constitutional theory a concept which has no native home there.” MacCormick, N, *Questioning Sovereignty: Law, State and Practical Reason* (OUP, Oxford, 1999) p49

<sup>7</sup> MacCormick, N, ‘The English Constitution, the British State and the Scottish Anomaly’ (1998) 25 *Scottish Affairs* 129

<sup>8</sup> The classic statement of this view, which is more than one hundred years old and still requisite reading on undergraduate public law courses, is expressed in AV Dicey’s *An Introduction to the Study of the Law of the Constitution* (10<sup>th</sup> ed) (London, MacMillan, 1964) and it is examined in greater detail below.

<sup>9</sup> Loughlin uses the three fundamental elements of the state from the German public law tradition of *Staatslehre*, of which *Staatsgewalt* is one: “The second aspect, *Staatsgewalt*, refers to the institutional apparatus of rule that secures sovereign territory, both internally and externally.” Loughlin, M, *Foundations of Public Law* (Oxford, OUP, 2010) p192. The other two elements are *Staatsgebiet* (territory) and *Staatsvolk* (citizenry). To what extent Scotland possesses these fundamentals is discussed in later chapters.



were guaranteed by the union settlement<sup>10</sup>. The devolution project which gave Scotland its current structures of devolved governance was largely designed by a 1990s Scottish constitutional convention which was broadly representative of Scottish civic life, and which not only invoked the concept of a particular Scottish popular sovereignty but also mobilised considerable cross-party-political and wide public support behind its campaign<sup>11</sup>. The secessionist Scottish National Party has been extending its dominance of electoral politics in Scotland since it captured enough seats in the devolved legislature to form a minority administration in 2007. The meteoric recent rise of the SNP and the resultant permanent prominence of constitutional issues have confounded proponents of devolution who once argued that its unique accommodations would derail the nationalist cause<sup>12</sup>.

If the question of what function the concept of sovereignty plays in the constitution of Scotland is to be one of formal public law then the answer appears to be tolerably clear; it plays exactly the same role as it does in England, where it simply serves the unfettered will of the parliament and reinforces its ultimate authority<sup>13</sup>. This answer is unsatisfying, not least because the continuing dominance of Scotland's constitutional relationship with the rest of the UK in contemporary politics suggests such complacency is misplaced. This thesis seeks to demonstrate that idea of sovereignty contained in the dominant strand of Victorian positivism is ill-equipped to adequately describe the constitutional complexities at work in the 21<sup>st</sup> century United Kingdom. In addition to barring the way to a proper understanding of its function, the characterisation of sovereignty as something to be jealously guarded by the Westminster Parliament exacerbates political tensions<sup>14</sup>.

It is submitted that a proper understanding of the way in which the concept of sovereignty functions, rescued from a rich European history of political philosophy by

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<sup>10</sup> TB Smith took the view in the 1950s that such an arrangement was potentially unparalleled: "The merging of one State in another, by cession for example, is well enough known in the annals of international law; but the supersession of two existing States by their incorporation in a third which has no prior existence is less usual. Such an incorporating Union, maintaining complete severalty of administration of justice, may well be unique." Smith, TB, 'The Union of 1707 as Fundamental Law' [1956] *Public Law* 99, 99 (emphasis in original)

<sup>11</sup> The predecessor of the convention was the Campaign for a Scottish Assembly, which published a document in the late 1980s (referred to somewhat unoriginally as the "Claim of Right") partially grounding the justification for devolution in an ancient right of the Scottish people to select its government. The circumstances of the creation of that document and its wider effect will be examined in later chapters. See *Scotland's Parliament, Scotland's Right* (Edinburgh: Scottish Constitutional Convention, 1995) and Edwards, O. D. (Ed) *A Claim of Right for Scotland* (Polygon, Edinburgh, 1989)

<sup>12</sup> Scottish Labour politician George Robertson MP, then shadow Secretary of State for Scotland, said in 1995 that devolution would kill nationalism "stone dead".

<sup>13</sup> There are some qualifications to this premise, such as the judicial checks on executive power known as "common law constitutionalism" or the "incoming tide" of EU law, described in *Bulmer v Bollinger* [1974] Ch 401, 418 (Lord Denning MR).

<sup>14</sup> In the words of Bernard Crick, comparing the Scottish situation with the political problems which eventually resulted in the establishment of the United States of America: "The concept of sovereignty itself is the great obstacle to empathy and imagination in the English political mind." Crick, B, 'For my Fellow English' in Edwards, O. D. (Ed) *A Claim of Right for Scotland* p155

Martin Loughlin<sup>15</sup>, provides a novel and distinctive method for understanding how the present constitutional position of Scotland presents an immanent challenge to both the continuity and the normative coherence of the UK state. It will be argued that Loughlin's more sophisticated sovereignty can help explain Scotland's precarious constitutional position within the UK and also address the confusion generated by contemporary and historical misuse of the term; a confusion which has meant disputes about sovereignty in the Scottish context, typically a variation on the question of whether sovereignty inheres in the Scottish people or in their symbolic representative form in the UK parliament, usually misunderstand what it is and therefore fail to appreciate its true function.

This thesis will first describe the dominant understanding of the functioning of the UK's constitution and briefly outline the difficulties presented to that theory by the position of Scotland within that constitution since the incorporation of the smaller nation into the British state in 1707. It will proceed to explain how the apparent resurgence of the Scottish tradition of popular sovereignty in the late 20<sup>th</sup> century created the political and constitutional environment in Scotland. It will then seek to show how the application of Loughlin's reflexive model to contemporary Scotland demonstrates how current debates over sovereignty are missing out on a valuable insight into the function of the concept by confusing, denying, modifying or obfuscating it, and illustrates how his more nuanced understanding of its function suggests that the constitutional status quo in Scotland cannot be maintained indefinitely.

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<sup>15</sup> Loughlin, M, *Foundations of Public Law*. See also 'Why Sovereignty?' in Rawlings R, Leyland P & Young A (Eds) *Sovereignty and the Law*, and 'Ten Tenets of Sovereignty' in Loughlin M and Walker N (Eds) *The Paradox of Constitutionalism*. For an earlier statement of the description of sovereignty in *Foundations of Public Law*, see *The Idea of Public Law* (Oxford, OUP, 2004), and for a recent return to these themes see 'The Erosion of Sovereignty' *Netherlands Journal of Legal Philosophy*, 2016 (2) p57-81. For a trenchant response to the "constitutional pluralist" school, associated in Scotland with the work of successive Regius Professors at Edinburgh, Neil MacCormick and Neil Walker, see Loughlin, M, 'Constitutional Pluralism: An Oxymoron?' (2014) *Global Constitutionalism* 9. References to IPL or FOPL appearing in footnotes hereafter refer, respectively, to *The Idea of Public Law* and *Foundations of Public Law*.

## CHAPTER I: THE SCOTTISH ANOMALY

### A. NATION, STATE, CONSTITUTION

The unified British state, governing the countries of England, Wales and Scotland, came into being in 1707 as a result of respective Acts of Union passed by the English and Scottish Parliaments. A later incorporation of the island of Ireland lasted from 1800 until 1922, when it split into two countries and created the current borders of the United Kingdom of Great Britain and Northern Ireland. One unified and supremely powerful centralised government controls the state machinery across each of the four constituent nations.

In Scotland, to a much greater extent than across the border in England, exactly what happened in the Union has been debated ever since. The motivations for and the implications of the joining of England and Scotland's governments together has generated a wealth of literature. The space is not available in this thesis for a detailed unpacking of the gamut of theories about the Union's formation, operation and apparent demise<sup>1</sup>. Michael Keating has summarised the academic arguments about the history of the Union and its making as "the usual cycle of interpretation and revisionist re-interpretation" whilst acknowledging that these debates are critical to understanding Scotland's present perception of its place in the Union<sup>2</sup>. The discussion of the historiography of the Union which follows is therefore necessary, but also brief by necessity.

The UK's idiosyncratic constitution echoes the unusual nature of its political arrangements. There is no formal federal relationship between the nations and the centre despite established but varied schemes of devolved governance<sup>3</sup>. Like the government, the British constitution is unitary and centralised. It is often characterised as unwritten when it is more properly described as uncodified<sup>4</sup>. Its creation and function, and the criticisms which have been levelled against it, are the focus of the following two chapters.

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<sup>1</sup> A selection of recent examples includes Fry, M, *The Union: England, Scotland and the Treaty of 1707* (Edinburgh, Birlinn, 2006), Robertson, J (Eds) *A Union for Empire: Political Thought and the British Union of 1707* (Cambridge, Cambridge University Press, 1995), MacInnes, I, *Union and Empire: The Making of the United Kingdom in 1707* (Cambridge, Cambridge University Press, 2007), Brown, S.J. & Whatley, C.A. (Eds) *The Union of 1707: New Dimensions* (Edinburgh, Edinburgh University Press, 2008), Kidd, C, *Union and Unionisms: Political Thought in Scotland 1500-2000* (Cambridge, Cambridge University Press, 2008)

<sup>2</sup> "Unionists and nationalists alike make recurrent appeals to the true meaning of Union, whether as annexation by England; a corrupt bargain by treacherous Scottish elites (Burns' parcel o' rogues); the creation of a shared British ideal; or a union of equals" Keating, M, *The Independence of Scotland: Self-government and the Shifting Politics of Union* (Oxford, OUP, 2009) p18

<sup>3</sup> The devolution settlement in Scotland is the focus of this thesis but Wales and Northern Ireland also have their own devolved legislatures and executives (although the delicate power-sharing balance in the Northern Irish scheme at Stormont has at the time of writing broken down, leading to a suspension of its operations).

<sup>4</sup> Many scholars seek to exonerate the unique British variant of constitutionalism as the ideal of "political constitutionalism". See Griffith, JAG, 'The Political Constitution' (1979) 42 *Modern Law Review* 1-21 and Tomkins, A, 'What's Left of The Political Constitution?' (2013) *German Law Journal* 14 (12) 2275

Before examining the British constitution we must deal briefly with definitions of nation and state. It is important to bear in mind that whilst the terms are often elided into a composite concept, the “nation-state”, they are not interchangeable. Keating notes that social sciences have been “thirled to a model of the nation-state” from which they have “difficulty in escaping”<sup>5</sup> but pithy definitions of nation, state, or the composite concept are not easy to come by. In everyday usage the two are usually interchangeable and used variously to denote a country in the sense of a physical place with defined and controlled borders; a group of people which is united politically, ethnically, culturally or otherwise; the specific government in control of both of the former; or some combination of the preceding three manifestations. The ease of substitution is tied to a widespread but erroneous presumption that the borders of one map neatly onto the other, with nation and state in perfect congruence. Scotland is not the only example capable of rebutting this presumption. Stephen Tierney, adopting Keating’s concept of the “plurinational” state, has compared Scotland to Quebec and Catalonia<sup>6</sup>. Keating, noting that this presumed correspondence between nation and state “jars with sociological fact”, states that it is particularly problematic in the UK, where nation and state have “long been in tension”:

The term ‘nation’ is applied to both the whole and to its constituent parts, while the theory of the state is less developed than in most European countries. The non-English parts have an intermediary level of political identification between the citizen and the state, while in England the state is largely identified with its largest component.<sup>7</sup>

The layered multiple national identities experienced by most British people have created a complex and often indistinct sense of nationhood on the British level, with most Scots identifying as more Scottish than British<sup>8</sup>. This has meant that it is the British nation, rather than its Scottish counterpart, which scholars seem to fear most for the future of; although some have decided it died already, whilst others are still nervously pacing at its hospital bedside. It seems to be generally agreed that the end of the British nation began around the mid-20<sup>th</sup> century. Amongst the myriad reasons proffered for its demise are the end of the British Empire; the declining threat to Protestantism from continental

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<sup>5</sup> Keating, M: *The Independence of Scotland* p10

<sup>6</sup> Tierney, S: *Constitutional Law and National Pluralism*

<sup>7</sup> Keating, M: *The Independence of Scotland* p11

<sup>8</sup> Keating draws on research showing that given a straight choice between identifying as British or Scottish between 72 per cent and 80 per cent have preferred Scottish since the year 2000. *Ibid* p61

Catholicism; European political integration; the declining relevance of class identities; and diminishing economic advantages available to Scots through their place in the Union.<sup>9</sup>

Tierney calls the concept of the nation a “definitional minefield” but is confident in calling Scotland a nation nevertheless, noting that the term is widely applied to polities which operate under the level of the nation-state, partially because that is how people in these societies view themselves, but also because it signifies the resilience of these groupings of people into discrete *demosi* capable of undermining a unitary Jacobin conception of a singular *demos*<sup>10</sup>. It is an entirely uncontroversial proposition (even in the most impenetrable redoubts of British political Unionism) that Scotland is in fact a nation, regardless of how one chooses to define the concept. It will be argued that the citizenry of Scotland can, and that some citizens do, conceive of themselves as a discrete political unity and that claims to that status are supported by a long history and continually reinforced by distinctive traditions and practices<sup>11</sup>. The Scottish institutions, a popular sense of shared history, identity and culture, and a long tradition - even within the UK’s unitary model - of a high level of administrative independence and political difference from the centre all conspire to ensure that it is universally acknowledged in British politics that a Scottish nation does in fact exist<sup>12</sup>.

The concept of the state is likewise difficult to define, and as such has weathered similar attacks to those made on sovereignty<sup>13</sup>. The idea of the state emerged in early modernity, as the ruler’s powers and functions began to be separated from his corporeal person and expressed through offices and institutions. Today the concept remains, in the words of Quentin Skinner, “the master noun of political argument”<sup>14</sup>. Georg Jellinek recognised the multi-faceted nature of the state and insisted that it could not be reduced to any one single aspect. Loughlin, who goes even further than Skinner and Geertz, claiming that the “concept of the state is nothing less than the *sine qua non* of public law”<sup>15</sup>, cites Jellinek’s formulation as one of the snappier definitions: “an associational entity of settled peoples,

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<sup>9</sup> *Ibid*, p1-10

<sup>10</sup> Tierney, S, *Constitutional Law and National Pluralism* p5. Tierney carries out a thorough review of relevant literature on nations and nationalism, particularly in Chapter 2.

<sup>11</sup> Hans Lindahl’s work on how such a political unity comes about and how it is maintained and redefined over time suggests a reflexive redrawing of the boundaries of legal collectives continually takes place. See Lindahl, H, *Fault Lines of Globalisation: Legal Order and the Politics of A-legality* (Oxford, OUP, 2014)

<sup>12</sup> For a historical account of the formation of the Scottish nation which takes into account the complex relationship between it and the British nation see Davidson, N, *The Origins of Scottish Nationhood* (London, Pluto Press, 2000). The idea of the nation as a political unity - of the nation as ‘the people’ - plays a central role in Loughlin’s model of sovereignty, and its application to Scotland will be examined in Chapter IV.

<sup>13</sup> “I begin by rejecting the existence of that abstraction called the state” Griffith, JAG ‘The Political Constitution’ p16. For comparable scorched-earth approaches to sovereignty see Introduction at n1.

<sup>14</sup> Skinner, Q, ‘The State’ in Ball, T, Farr, J & Hanson, RL (Eds) *Political Innovation and Conceptual Change* (Cambridge, Cambridge University Press, 1989) 90-131, p123

<sup>15</sup> Loughlin, M, *Foundations of Public Law* p183

invested with incipient powers of rule”<sup>16</sup>. The state, and the interrelation and interaction between it and the nation, is at the heart of Loughlin’s concept of sovereignty. In Loughlin’s model the state is best conceived of as an irreducibly multi-faceted “scheme of intelligibility” which is socially constructed and which provides the key to modern governmental ordering. His idea is unpacked in Chapter III and applied to Scotland in Chapter IV. His definition of the state, and of the crucial relationship between its institutional manifestations (*Staatsgewalt*) and the nation of people subject to its laws (*Staatsvolk*)<sup>17</sup>, will therefore be postponed for the time being.

If the object is to appraise the function of sovereignty in the constitution which operates in Scotland then an obvious place to look would seem to be the constitution itself. It is inherent in any constitution that its meaning can be contested, but the peculiar circumstances which gave rise the British State and its constitution make it especially open to wildly differing interpretations<sup>18</sup>. This level of disagreement is unhelpful, but unsurprising, given the notoriously vague nature of that constitution. The most widely-accepted view is that in the process of merging the parliaments of Scotland and England any Scottish state, along with whatever constitutional tradition animated it, was simply subsumed into its English counterpart<sup>19</sup>. This view, in which Scotland the nation falls under the peculiar constitutional regime that held sway in England as soon as its parliament was abolished, dominates in the most popular and uncontroversial account of the British constitution to the present day. This is what MacCormick has referred to as the “Dicey view” in honour of its most popular proponent, the institutional English jurist Albert Venn Dicey. Dicey’s model of the British constitution allows no quarter to an opposing interpretation, subsisting outside of the British mainstream, which MacCormick calls the “Defoe View”<sup>20</sup>. A description of these agonistic positions follows after a brief sketch of the beginnings of the unified British state.

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<sup>16</sup> *Ibid* p193

<sup>17</sup> See Introduction at n9 and Chapter III.

<sup>18</sup> “...we have a single state, but it is at least possible that we have two interpretations, two conceptions, two understandings, of the constitution of that state.” MacCormick, N, ‘Is There a Constitutional Path to Independence?’ 2000 *Parliamentary Affairs* 721, p727.

<sup>19</sup> “The dominant story of the Union is Parliaments in English constitutional thinking is that of an incorporating marriage; the normative structure of the English constitution subsumed that of Scotland and thereby the English Parliament in effect continued in existence, surviving the Union of Parliaments despite the formula contained in the Acts of Union which provided for a new parliament.” Tierney, S, *Constitutional Law and National Pluralism* p111. Tierney goes on to quote Keating in a footnote on the following page: “The implication of the dominant unionist and Anglocentric historiographies is that British constitutional development is English constitutional development”. *Ibid* p112

<sup>20</sup> MacCormick, N, *Questioning Sovereignty* p55

## B. NEW STATE, NEW CONSTITUTION?

Practically speaking the Union was achieved by using extant the political process in both countries. The form of the process chimes with modern “dualist” interpretations of the implementation of international obligations of states; first agreed by executives on the “international plane” before parliamentary approval gives them domestic legal effect<sup>21</sup>. Commissioners appointed by the respective executives of the two nations agreed the terms of the Union, known as “articles”, before the two parliaments debated and duly approved them<sup>22</sup>. Scotland’s parliament was the first to legislate, in January 1707, and it effectively legislated itself out of existence<sup>23</sup>. The English parliament followed suit, following some discord over the perpetual protections afforded to the Presbyterian Scottish Kirk, and the Act of Union with Scotland was passed on 1 May. The first parliament of Great Britain summoned thereafter was identical in form and function to the former English parliament save for the addition of 16 Scottish members of the House of Lords, elected from the Scottish peerage, and 45 members of the Commons, drawn from new Scottish parliamentary constituencies. Remarkably, it appears that no general election was thought necessary or desirable to populate the new House of Commons.

Having thereby joined the representative assemblies and executive arms of government of the two nations together, the institutions specifically guaranteed a continuing existence became living remnants of a Scottish state. The body of Scots law and its courts were to remain almost unchanged; “public law” in both countries could be brought into line but Scots private law was not to be tampered with, save “for the evident utility of the subjects of Scotland”<sup>24</sup>, and the courts retained their jurisdiction<sup>25</sup>. The powerful Scottish

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<sup>21</sup> Smith “anxiously” accepted that the Treaty of Union was indeed a treaty *jure gentium*, but not without indentifying substantial procedural irregularities in the negotiations which produced its terms and resultant legislative ratification processes. See Smith, TB, ‘The Union of 1707 as Fundamental Law’ p100-101. He notes that the executives of the two countries were ministers of Queen Anne, effectively making the treaty one which she made with herself.

<sup>22</sup> The Scots debates were passionate and eloquent arguments were made, particularly by Andrew Fletcher of Saltoun, for a more federal accommodation and for protected constitutional status for the terms on which the Union was entered into. The leader of the Scottish parliamentary faction against Union, The Duke of Hamilton, became a notorious historical villain after dodging the critical debate and blaming it on toothache. Fletcher’s arguments failed to convince a parliamentary majority and the government of the day had its way, no doubt in large part through use of what MacCormick called “all the forms of pressure and inducement available to it.” MacCormick, N, *Questioning Sovereignty* p51

<sup>23</sup> MacCormick describes the dominant interpretation of the ongoing function of that Scottish Act in the wider constitutional scheme that followed its enactment: “Then it passed into legal history as the basis on which union was achieved peacefully and by agreement rather than by force of arms. As a law, its force was spent, and its author disbanded.” *Ibid* p55

<sup>24</sup> Treaty of Union, Article XVIII. It should perhaps be noted that, in a clear demonstration of the difficulties facing those who argue for the sacred foundational status of the Treaty, it has since been observed by Lord Keith in the Court of Session (in *Gibson v Lord Advocate* 1975 S.C. 136) that this provision is non-justiciable.

<sup>25</sup> *Ibid*, Article XIX

Kirk was also protected<sup>26</sup>. Administrative incorporation over the following years pragmatically left much of Scottish local government intact, and to a large extent Scots were left to govern themselves in practical terms on the local level<sup>27</sup>.

The consensual terms on which Scotland was accommodated in the wider British state therefore failed to rub out all traces of its prior statehood, and it is submitted that the continued existence of Scottish institutions made it possible to conceive of Scotland as something more than a mere province of a larger unit. The present situation in Scotland is far harder to imagine in Wales, for example - a nation which, despite the possession of a strong and vital cultural identity, retained no distinct state institutions following its annexation by England in 1535. The differing dispensations perhaps reflect the fact that Wales' incorporation into Britain was carried out by force, in contrast to the Scottish model of agreement (however coercive the reality of the underlying political and economic situation at the time might have been), its conquest ushering in a simple extension of English law and language over previously foreign territory.

Conceptions of Scotland's place in the UK constitution have been coloured by differing understandings of the bargain driven in 1707 and its import. It was noted that MacCormick has characterised the opposing schools of thought on the foundational legal basis of the Union the "Dicey" and "Defoe" schools. The Dicey school predates its namesake and has been in the ascendant since long before he was born. As the doctrinaire view of the British constitution, it holds sway in courtrooms and textbooks. This has not stopped adherents of the opposing "Defoe" school making just enough noise to sustain an alternative vision. The dominant Dicey view is the one which will be described first, before considering how the minority Defoe view has been a constant - if somewhat fringe - alternative.

In the absence of a single constitutional text the UK relies on a variety of sources for its constitutional rules, namely statute, common law, convention, the Royal prerogative, the "laws and customs of Parliament", international treaties, and (arguably) EU law and the European Convention on Human Rights<sup>28</sup>. The space is not available for a detailed examination of the characteristics of each. Peter Leyland summarises the dominant view

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<sup>26</sup> This was achieved by attaching an amendment (incorporating another act dealing with the Scottish religious establishment) to the act of the Scottish Parliament which ratified the Treaty.

<sup>27</sup> Keating notes the parochial interests of many Scottish Members of Parliament and the discrete institutional structures which are used to govern the nation. He described the resultant level of political difference, even in the years prior to devolution, as creating "a distinct Scottish sphere of government, administration, legislation and parliamentary business". Keating, M, *The Independence of Scotland* p35. This is echoed by MacCormick, who states that "under the managers of the day, Scotland went its own way, block-funded according to the Goschen proportion or the Barnett formula [...]. Nobody in other parts of the UK gave this much serious attention." MacCormick calls this accommodation of difference "managed federalism" or "quasi-federalism". MacCormick, N, *Questioning Sovereignty* p61

<sup>28</sup> Leyland, P, *The Constitution of The United Kingdom: A Contextual Analysis* (3<sup>rd</sup> ed) (Oxford, Hart, 2016)



of the operation of the UK constitution, which takes these sources as its rules, as comprised of three central tenets, namely the sovereignty of Parliament, the rule of law, and the separation of powers<sup>29</sup>. Of these three distinct but closely-related principles, the first is the most important for the purposes of this thesis as it has gained a stranglehold on British understandings of the concept of sovereignty. The sovereignty of Parliament (in this context Parliament means the entire institutional complex of Commons, Lords and Monarch acting together, known to public lawyers as the ‘Queen-in-Parliament’) was given its classic expression by Dicey, who stated unambiguously that it was “the very keystone of law of the constitution”.<sup>30</sup> Dicey conceived of this rule as conferring fundamentally legally unlimited power<sup>31</sup> on Parliament, meaning that “...under the English constitution,” [Parliament has] “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 the right to set aside the legislation of Parliament.”<sup>32</sup> Although the language employed suggests otherwise, when Dicey makes statements about the English constitution or the law of England in these passages he is in fact referring to the constitutional laws of Britain as a whole.

The principle of parliamentary sovereignty, characterised as a common law principle<sup>33</sup>, confirms that statutes passed by Parliament are higher sources of law than any other (such as EU law or constitutional convention) and in theory Parliament can therefore pass any law it pleases. A necessary corollary of this is the doctrine of implied repeal (that a later statute automatically repeals any pre-existing and contradictory statutory provision) which also serves to ensure that no Parliament can entrench any provision so as to limit the scope of action available to its successors. Although the principle is still safely in place as the foundation of the UK’s constitution<sup>34</sup> the extent to which this conception of parliamentary sovereignty adequately explains concrete constitutional praxis has been subject to question. Again, constraints of space preclude a review of those criticisms here<sup>35</sup>. We will however see below how this doctrine, with its offer of untrammelled

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<sup>29</sup> “Any discussion of the British constitution depends upon a knowledge of the sources of the uncodified constitution, allied to familiarity with the main principles which underpin the current workings of that constitution.” *Ibid* p45

<sup>30</sup> Dicey, AV, *An Introduction to the Study of the Law of the Constitution* p70

<sup>31</sup> Another celebrated English jurist, and Dicey’s predecessor as leader of the orthodox school, William Blackstone, said that “Parliament can do everything that is naturally possible.” Blackstone, W, *Commentaries on the Laws of England*, Book I, (19<sup>th</sup> ed) (London, Sweet and Maxwell, 1836) p161

<sup>32</sup> Dicey, AV, *An Introduction to the Study of the Law of the Constitution* p40

<sup>33</sup> Jennings, I, *The Law and the Constitution* (5<sup>th</sup> ed) (London, University of London Press, 1959) p152

<sup>34</sup> This was confirmed in 2016 by an *en banc* UK Supreme Court in *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

<sup>35</sup> In addition to the collection of late 20<sup>th</sup> and early 21<sup>st</sup> century judicial precedents often banded together under the heading of “common law constitutionalism” and the effect of EU law described as described by Lord Denning and quoted at Introduction n13, there are also those who take the view that domestic incorporation of the European Convention on Human Rights in the Human Rights Act 1998 limits the sovereignty of Parliament, and judicial dicta exist (such as the statements of Laws LJ in *Thoburn v Sunderland City Council* [2003] QB

power to whoever controls the legislature, is difficult to reconcile with the old Scottish constitutional idea of a “legal limited monarchy”<sup>36</sup>.

Leyland explains that Dicey’s second principle, the rule of law, has three “different connotations”.<sup>37</sup> The first is that all should be free from the exercise of arbitrary power; nobody should be punishable but for a breach of the law established in the ordinary courts. The second connotation is the strict equality of all before the courts and a rejection of the special legal status of government officials seen in continental legal systems such as that of France. The actions of the highest-ranking government minister are subject to the control of the courts, as are the actions of the humblest citizen. The third connotation of the rule of law is the idea of negative liberty. For Dicey the courts had defined and enforced the rights of the individual in such a way as to obviate the requirement for a codified statement of their rights, as the common law had developed in such a way as to protect the liberties of the citizen by permitting everything not expressly prohibited. As was with the sovereignty of Parliament, this is not a perfect description of current realities<sup>38</sup>, but constraints of space similarly restrict deeper analysis.

The remaining principle of the UK constitution in Dicey is the separation of powers. The desirability of the prevention of the accretion of power in one location has a long and celebrated tradition in modern constitutional thought<sup>39</sup>. Leyland points out that in the UK there is more accurately “a limited separation of functions and a considerable number of overlapping powers”.<sup>40</sup> The fact that the executive is comprised of members of the legislature and the senior members of the judiciary were until recently also members of the legislature (not to mention the office of the Lord Chancellor until 2005) undermines any description of the UK system as one in which the powers are adequately separated<sup>41</sup>.

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151) which suggest that certain statutes are now, if not entrenched, at least protected from implied repeal. Dicey would have had no truck with the latter - he famously said that the Act of Union 1707 was as entrenched as the Dentists Act 1878 (IE not at all). Dicey, AV, *An Introduction to the Study of the Law of the Constitution* p145

<sup>36</sup> See for example Bowie, K, ‘A Legal Limited Monarchy’: Scottish Constitutionalism in the Union of Crowns, 1603-1707’ *Journal of Scottish Historical Studies* (2015) 35.2 131-154. The limits placed on Scotland’s rulers by its constitutional tradition will be examined in greater detail in Chapter II.

<sup>37</sup> Leyland, P: *The Constitution of The United Kingdom* p66

<sup>38</sup> Criticisms offered by Leyland are the proliferation of discretionary government powers such as the Security Services Act 1989 (in contradiction to the rule against arbitrary and private power), the special protections offered to the Crown in legal proceedings (in contradiction to the rule of equality before law); and the Human Rights Act 1998 (in contradiction to the assertion that no enumerated list of rights is necessary). *Ibid*, p67

<sup>39</sup> Leyland quotes Montesquieu (1748) and Paine (1791) *Ibid* p72

<sup>40</sup> *Ibid* p72. Walter Bagehot, another English constitutional authority, described this “nearly complete fusion of the legislative and executive powers” as the “efficient secret of the English constitution”. Bagehot, W, *The English Constitution* (1<sup>st</sup> ed) (London, Chapman & Hall, 1867)

<sup>41</sup> Until the judicial responsibilities of the office were transferred to the Lord Chief Justice by the Constitutional Reform Act 2005 the Lord Chancellor was simultaneously a member of the government, legislature and judiciary. The Act also established the UK Supreme Court, ending the judicial functions of the House of Lords as an appellate court.

Nevertheless, the UK does have a tradition of limiting the exercise of executive power<sup>42</sup>, and it has largely managed to maintain an independent judiciary which will stand up to the executive and a parliament which is able, *in extremis*, to hold it to account.

This, then, is the constitution that it is widely understood that the Scottish nation joined in 1707. Just as modern political actors have appealed to the existence of a distinct Scottish constitution in order to advance specific contemporary goals, there has always been an opposing and distinctly Scottish conception of the constitution of the Union, grounded in the idea that the arrangement was based upon an agreement between equals and that the pact formed the basis of an untouchable settlement. An important consequence of this approach is that the constitution of the new state formed in 1707 cannot be presumed to derive solely from its English inheritance. This is what MacCormick called the ‘Defoe view’. Daniel Defoe, the famous author, was a contemporary agent (and spy) for the Unionist cause and he argued that the tenets of the Union would be a new and entrenched constitution for the new state:

the articles of the Treaty... cannot be touched by the Parliament of Great Britain; and the moment that they attempt it, they dissolve their own constitution; so it is a Union upon no other terms, and is expressly stipulated what shall, and what shall not, be alterable by the subsequent Parliaments. And, as the Parliaments of Great Britain are founded, not upon the original right of the people, as the separate Parliaments of England and Scotland were before, but upon the Treaty which is prior to the said Parliament, and consequently superior; so, for that reason, it cannot have power to alter its own foundation, or act against the power which formed it, since all constituted power is subordinate, and inferior to the power constituting.<sup>43</sup>

As MacCormick observes, it is difficult to conceive of a position further away from the Dicey’s *vis-a-vis* the Union and the Dentists Act<sup>44</sup>. From these beginnings it sustained an undercurrent which undermined the orthodox view, reaching the peak of its judicial popularity in the dictum of the Lord President in the 1950s case of *MacCormick v Lord Advocate*<sup>45</sup>. Lord President Cooper said in his opinion that “the principle of the unlimited sovereignty of Parliament is a distinctively English principle which has no counterpart in

<sup>42</sup>(1607) 77 ER 1342: in which it was held by Sir Edward Coke CJ that there were fundamental restrictions on the judicial powers of the King. See Tomkins, A, *Our Republican Constitution* (London, Bloomsbury, 2005) p70

<sup>43</sup> Defoe, D, *The History of the Union Between England and Scotland* (London, 1786) p246, as quoted by Scott, P in *1707: the Union of Scotland and England* (Edinburgh, Chambers, 1979)

<sup>44</sup> MacCormick, N: *Questioning Sovereignty* p53. See also n35 above.

<sup>45</sup> 1953 S.C. 356 The petitioner in the case was Neil MacCormick’s father, John, also a lawyer and one of the founding fathers of the Scottish National Party in the 1930s. Neil’s elder brother Iain was also an SNP politician before he went on to help form the Social Democratic Party in the late 1970s.

Scottish constitutional law... I have difficulty in seeing why it should be supposed that the new Parliament of Great Britain must inherit all the peculiar characteristics of the English Parliament but none of the Scottish Parliament.” His Lordship went on to say, in an endorsement of the Defoe view of the Treaty as a sacred constitutional document, that he had “not found in the Union legislation any provision that the Parliament of Great Britain should be able to alter the Treaty at will”<sup>46</sup>. His remarks were, however, *obiter dicta*.

Tierney notes that this doctrine, which he calls the ‘union-state argument’<sup>47</sup>, has enjoyed precious little support from the bench in the years since. He considers that the extent to which the Act of Union has been partially repealed or modified since its passing, not least by the Scotland Act 1998, tends to undermine its contentions in fact, whatever academic attraction the argument may hold. He also distinguishes between this ‘union-state argument’ and what he sees as the related ‘popular sovereignty argument’<sup>48</sup>. Tierney observes that the latter has been the more popular of the two in recent years. The background which led to the increasing popularity of that latter argument in the public discourse, and the consequences of its widespread currency, are addressed in Chapter II. At this point it is sufficient to note that its promoters are able to draw on a long line of authority to the effect that the people are sovereign in the Scottish constitution<sup>49</sup>. The inherent logic of this position demands that those in control of the UK’s institutions of state cannot possess the unlimited power which an orthodox interpretation of the British constitution offers. This implication, alongside the more widespread liberal ideal that the relationship between governors and governed should be consensual, has been exploited by Scottish political actors seeking to justify resistance to the centre of political power.

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<sup>46</sup> *Ibid* at 411

<sup>47</sup> Tierney, S, *Constitutional Law and National Pluralism* p 111

<sup>48</sup> Tierney also characterises the difference between these two strands of argument against the dominant constitutional interpretation as the difference between ‘legal’ and ‘political’ critiques of sovereignty, although he does admit that they work together. It will be submitted in Chapter III that this is wrong; the distinction between legal and political sovereignty actually confuses the concept by trying to wrest apart its inseparable inherent characteristics. *Ibid* p109

<sup>49</sup> Various historical texts are cited in support of this notion, including the 1320 declaration of Arbroath and the writings of George Buchanan in the sixteenth century. The tradition in which Buchanan sits will be discussed in greater detail in Chapter II below. Mason, R.A. & Smith, M.S: *A Dialogue on the Law of Kingship amongst the Scots: A Critical Edition and Translation of George Buchanan’s De Jure Regni apud Scotos Dialogus* (Aldershot, Ashgate, 2004); see also n35 above.

## CHAPTER II: CONTEMPORARY CONSTITUTIONAL DEBATE

### A. THERE SHALL BE A SCOTTISH PARLIAMENT

First, some definitions: contemporary is intended to encompass the period of time from the late 1980s to the present day. The diverse manifestations of disputes in Scottish public life about Scotland's proper place within the wider United Kingdom in that period of recent history, particularly as regards the interface between law and government that any constitution seeks to regulate, is what is meant in the broad sense by constitutional debate. The topic has been the central feature of Scottish political life since at least the election of the first nationalist government in 2007, and arguably since Margaret Thatcher's Conservative governments in the 1980s. It will later be argued that the constant primacy of questions of constitutionalism in recent Scottish politics described in this chapter can itself be illuminated by a proper understanding of sovereignty.

The Scotland Act 1998 was the piece of primary legislation which enabled the creation of the offices and institutions of the devolved government, and the devolved legislature, at Holyrood. Its striking opening section states simply "There shall be a Scottish Parliament".<sup>1</sup> The Act, and the new political environment and institutional architecture it created in Scotland, owe their existence to proposals made by the extra-parliamentary Scottish Constitutional Convention (SCC), and that convention made the sovereignty of the Scottish people the central justification for its demands. The appearance of the SCC marks the point when the idea of popular sovereignty begins to gain increasing traction in Scottish constitutional discourse.

The SCC emerged out of the Campaign for a Scottish Assembly (CSA), which had its roots in the 1979 referendum on devolution to Scotland. An amendment was added to the enabling legislation for that referendum<sup>2</sup> which required 40 per cent of those on the electoral roll rather than a simple majority to legitimate the result<sup>3</sup>. A majority of those voting (32.9 per cent of 63.9 per cent of the electorate<sup>4</sup>) backed a Scottish Assembly but the required voter turnout was not achieved and the subsequent Conservative administration more or less refused to acknowledge the issue<sup>5</sup>. In the late 1980s, as

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<sup>1</sup> s1(1) Scotland Act 1998

<sup>2</sup> Scotland Act 1978. The amendment in question came from a Labour MP named George Cunningham.

<sup>3</sup> Keating notes the "bitter legacy" left by this perceived sleight of hand. Keating, M: *The Independence of Scotland* p83

<sup>4</sup> Edwards, O. D. (Ed) *A Claim of Right for Scotland* p1

<sup>5</sup> Paul Maharg has called referred to this as "the devolution failure in 1979", arguing that failure led not only to the development of legal and political alternatives to the constitutional status quo such as those outlined in this section but also a re-construction of a sense of Scottish cultural nation, bolstered by the arts. Maharg, P, 'Imagined Communities, Imaginary Conversations: Failure and the Construction of Legal Identities' in Farmer,

widespread frustration with the perceived indifference of Thatcherite governments to Scotland's interests grew, the CSA appointed a committee led by Professor Sir Robert Grieve and counting members of the clergy, the trade union movement, diplomats, civil servants, academics and Scottish cultural and literary figures amongst its membership<sup>6</sup>. The work of the group, named the Constitutional Steering Committee, culminated in the July 1988 publication of *A Claim of Right for Scotland*. The name was lifted straight from the Claim of Right of 1689, legislation adopted by a convention of the Scottish Estates formed in the wake of James VI and II's flight from England during the "Glorious Revolution" of 1688. The 1689 claim listed the ways in which the assorted nobles, clergy (dominated by a hardcore of Presbyterians from the south-west) and representatives of the burghs considered James' conduct had infringed on the constitutional laws of Scotland<sup>7</sup>, and formed the basis on which the new Hanoverian monarch William accepted the Scottish throne. If the 1689 claim is viewed as a delineation of the legitimate extent of executive power in Scotland and an expression of the "fundamental law" governing the Scottish public sphere it is clear to see why the CSA sought to cast their claim in a similar light. The prologue to the 1988 Claim attempts to place it squarely in this Scottish constitutional tradition of acting "against misgovernment" by issuing such a document.

The 1988 Claim stated that "parliamentary government under the present British constitution had failed Scotland and more than parliamentary action was needed to redeem the failure".<sup>8</sup> Its authors characterised the underlying reasons for the Union as "English reasons of State" and labelled the resultant settlement as "what the English were prepared to concede"<sup>9</sup>. Despite their apparently low view of the Union they conceded that the protections it afforded to Scots institutions were "considerable" before echoing the view of the Lord President in *MacCormick*<sup>10</sup> when they stated that there was "never any mechanism for enforcing respect" for its terms, and that those terms had since been "violated".<sup>11</sup> The document goes on to list perceived inadequacies of the practices of the United Kingdom government as they related to the governance of Scotland and criticise

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S & Veitch, S (Eds) *The State of Scots Law: Law and Government after the Devolution Settlement* (Butterworths, Edinburgh, 2001) p139

<sup>6</sup> For a comprehensive list of the committee's wide membership see Edwards, O. D. (Ed) *A Claim of Right for Scotland* p2.

<sup>7</sup> The Claim of Right Act 1689 includes a long list of powers which are beyond the use of the King acting alone, including limits on the extent of executive power to interfere with laws without proper parliamentary procedure: "That all proclamations asserting an absolute power to cass, annul and disable laws [...] are contrary to law."

<sup>8</sup> Report of the Constitutional Steering Committee of the Campaign for a Scottish Assembly (Edinburgh, 1988) at 1.1

<sup>9</sup> *Ibid* at 2.5

<sup>10</sup> See Chapter I n45

<sup>11</sup> Report of the Constitutional Steering Committee of the Campaign for a Scottish Assembly (Edinburgh, 1988) at 2.6

the “democratic deficit” whereby the Scottish population, as a small minority of the UK electorate, is often governed by a party which fails to achieve a majority of the Scottish vote. The authors referred to the Dicey model of the British constitution as “the English constitution” and accused it, *inter alia*, of a failure to provide adequate protection for the rights of minorities (such as the Scots).<sup>12</sup> They said the Conservative government of the time was driving that constitution to its limits by failing to show the necessary prudential restraint when it wielded the unrestrained power afforded by the Diceyan approach. The committee claimed this behaviour, measured against the “legal limited” government cited in the 1689 Claim, justified resistance to the centre of UK political power and to the dominant view of the constitution of the British State. Its members invoked a distinct Scottish constitutional tradition to lend legitimation to that resistance.

The extent to which a distinct Scottish constitutionalism did in fact perform in pre-1707 Scotland the role claimed for it in later political invocations is open to contestation. At the very least there is a body of evidence which can be led in support of the notion that in Scotland the relationship between governors and governed was based on consent and therefore conditional. The idea surfaces in the 1320 Declaration of Arbroath when a collection of mediaeval Scottish nobles in a letter to the Pope reserve the right to “exert ourselves at once to drive” [Robert I of Scotland, recently victorious against the English in the wars of Scottish Independence] “out as our enemy and a subverter of his own rights and ours, and make some other man who was well able to defend us our King” if Robert failed to maintain the nation’s independent status. The consensual nature of proper Scottish governance returns in the Renaissance-era writings of George Buchanan, in which Buchanan was concerned to justify the deposition of Mary, Queen of Scots. In 1579 Buchanan’s *De Jure Regni apud Scotos Dialogus*, subtitled “A dialogue concerning the due priviledge” [sic] “of government in the kingdom of Scotland”, argued that an ancient idea of an elective kingship placed the law above the King and meant that a monarch who failed to adhere to the fundamental laws of Scotland could rightfully be deposed<sup>13</sup>.

Karin Bowie has highlighted the way in which the Covenanters’ oaths in the 17<sup>th</sup> century sought to set the laws protecting the Presbyterian religious establishment outwith the King’s control and how the Covenanters gained control of Parliament in the early 1640s, allowing them to pass statutes which placed “explicit statutory limits on royal power”<sup>14</sup>. The pre-1707 union debates referred to in Chapter I also contained arguments (albeit on the losing side) which appealed to the idea of a fundamental law of the realm which could

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<sup>12</sup> *Ibid* at 4.8

<sup>13</sup> Bowie, K: “‘A Legal Limited Monarchy’ p135. Buchanan was also a tutor to King James VI and I.

<sup>14</sup> *Ibid* p141

only be altered with the consent of the whole nation<sup>15</sup>. Broadly similar concerns about the limits of the prerogative and the religious loyalties of Charles I informed many of the conflicts which led to the wars of the three kingdoms, culminating in the eventual triumph of the forces of the English Parliament against Charles I's cavalier army in the final English Civil War. The consensual basis of the relationship between governors and governed inspired the radical mid-17<sup>th</sup> century political movements which arose out of that war, such as the group within the ranks of Oliver Cromwell's New Model Army known as the Levellers<sup>16</sup>. The cross-border similarities should not be overstated, however; Bowie notes that the Scottish body of fundamental law contained in statute differed from the English conception of a body of fundamental *common* law. By setting historic developments in Scottish constitutional theory in a wider international context - she points out related theories developing at the same time on the continent<sup>17</sup> - and drawing attention to a recent literature which rejects "teleological readings" of the English constitution as the "wellspring of modern constitutions", Bowie aims to disprove what the "received opinion" of 20<sup>th</sup> century scholarship on the subject: that the struggles in Scotland had their origins in "second order religious quarrels" of lesser importance than concurrent disputes over the limits of the royal prerogative taking place south of Hadrian's Wall<sup>18</sup>.

Charles I's civil wars and the accommodations their results necessitated marked the beginning of the period in which popular sovereignty, understood as the idea that rulers are ultimately accountable to "the people", became a central tenet of modern government, although it took until the close of the 18<sup>th</sup> century to see the full republican implications come to the fore in the American and French revolutions. In his book on the origins of the doctrine, Edmund S Morgan quotes a 1758 essay by the Enlightenment philosopher David Hume, which states: "... as force is always on the side of the governed, the governors have nothing to support them but opinion". Morgan goes on to say that whilst "we may perhaps question today whether force is *always* on the side of the governed, or even whether it ever has been... Hume's observation commands assent. Put it another way, all government rests on the consent, however obtained, of the

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<sup>15</sup> Colin Kidd considers the example of Robert Wylie, who insisted in those debates on a distinction between fundamental and ordinary laws with the former "out of reach" of the power of the latter. Kidd points out that Wylie here drew on a line of authority which ran through the work of 17<sup>th</sup> century Scots jurists Sir George Mackenzie and Sir John Nisbet. See further Kidd, C, *Union and Unionisms: Political Thought in Scotland 1500-2000* p87-88

<sup>16</sup> The constitutional debates around the English Civil War are examined in detail in Morgan, ES, *Inventing the People: The Rise of Popular Sovereignty in England and America* (Norton, New York, 1989)

<sup>17</sup> Bowie, K, "'A Legal Limited Monarchy' p136

<sup>18</sup> *Ibid* p132-134. It is important to bear in mind however that, like almost every aspect of Scottish constitutional history examined in this work, this characterisation is one of many, with the currently retreating opposite end of the historiographical spectrum consisting in "Victorian Unionist-nationalists" who contended that a "a Scottish past of rebellion and resistance" should "be attached to an Anglo-British parliamentary constitution valorised by Scottish historians from the Enlightenment onwards."



governed.”<sup>19</sup> Morgan’s observation serves here to illustrate that by the time of his writing it was generally accepted that the proper basis for government was popular consent. The authors of the 1988 Claim of Right - which was published the year before Morgan’s book was printed - did not therefore have to lean exclusively on historical evidence of a Scottish constitution based on consent for their claims to be taken seriously; although, as noted above, they did cite historical evidence as precedent to buttress those claims. The desirability of government by consent was illustrated contemporaneously in Scotland by the vivid example of a government with no local electoral mandate forcing unpopular policies on Scotland, such as the early introduction of the reviled “Poll Tax”<sup>20</sup>. The democratic deficit illustrated thereby made the claims of the CSA less outrageous than they might have otherwise seemed. It also reinforced a strong sense of political difference between Scotland and the wider UK, particularly when the UK has a Conservative government, which arose in the late 20<sup>th</sup> century and which obtains to the present day.

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<sup>19</sup> Morgan, E. S., *Inventing the People* p13 (emphasis in original)

<sup>20</sup> For detailed discussion of how the failure of the constituted power in Scotland to adequately represent the people of Scotland (exemplified by the introduction of the Poll Tax in Scotland before it was introduced across the wider UK) created a vacuum of legitimacy that the SCC could step in to fill, see Goldoni, M & McCorkindale, C, ‘Why We (Still) Need a Revolution’ (2013) *German Law Journal* 2197-2228

## B. A SELF-GENERATED CONSTITUTION FOR SCOTLAND

Against a polarised and volatile<sup>21</sup> political backdrop in the UK both the criticisms and the proposals of the 1988 Claim were widely well-received and in the same year the Poll Tax was introduced in Scotland the CSA's successor body, the Scottish Constitutional Convention (SCC), began to work towards securing the devolved government demanded by the CSA. Membership of the SCC was wider still than that of the CSA. All of Scotland's major political parties participated except for the SNP, which quickly withdrew from the process because it failed to consider outright independence as a potential solution, and the Conservatives, who remained opposed to any devolution. It was chaired by an Episcopal priest and the convention included, like its predecessor, a wide range of civic bodies such as churches, local authorities, and trade unions, along with representatives of business groups and of ethnic and linguistic minorities. Amongst its membership were politicians who would later form part of the New Labour government which implemented much of what it proposed, including future Prime Minister Gordon Brown and future Chancellor of the Exchequer Alastair Darling, alongside all but one of the sitting Scottish Labour MPs and two future UK leaders of the Liberal Democrats. They endorsed the Claim of Right produced by the CSA at a signing in Edinburgh in March 1989, and, despite its broadened membership, the SCC went even further than the CSA in claiming a popular sovereignty for the Scottish people, declaring: "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".<sup>22</sup>

This seems incendiary in light of what has been said so far about the operation of the British constitution, an orthodox reading of which allows no such right. Regardless, its sentiment was endorsed by politicians of all stripes at Westminster in the 1990s, and by the time Tony Blair's New Labour government was elected in 1997 devolution was a central plank of its policy platform and an important part of its programme of wider constitutional reform. The proposals for devolution generated by the work of the SCC were largely adopted by that administration and, as noted above, provided both the

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<sup>21</sup> There were demonstrations, campaigns of civil disobedience and out-and-out riots across the UK against the Poll Tax (properly called the "Community Charge"), including a 1990 riot in London which resulted in 113 injuries to police and protestors and 339 arrests. The policy later proved to foreshadow the demise of the Thatcher government, which had through implemented policies few in Scotland voted for turned large parts of the country, along with large parts of Northern England, against the Conservative party and its ideology.

<sup>22</sup> *Scotland's Claim, Scotland's Right*

justification for and to a large extent the design of the scheme of devolution<sup>23</sup> that was eventually introduced in the Scotland Act 1998 and implemented in stages up to 2000.

The scheme of devolution put in place by the 1998 Act is necessarily limited by the doctrine of parliamentary sovereignty. In terms of formal constitutional law the UK government could repeal it with no more than a bare majority in the House of Commons. In the scope of its power, the unicameral Scottish Parliament is inferior to the UK parliamentary complex of Monarch, Lords and Commons that created it; its legislation is therefore subject to review by the courts in the same way as all ‘secondary’ legislation in the UK<sup>24</sup> and the courts regularly police whether a legislative measure emanating from Holyrood is *ultra vires* or *intra vires*<sup>25</sup>. The ‘legislative competence’ or *vires* of the Parliament is defined negatively and therefore non-exhaustively rather than positively; the statutory language states broadly that it “may make laws”<sup>26</sup>, but goes on to qualify the statement in the next section by stating that the types of laws which are to be considered “not law” if the Parliament does indeed make them.

The laws passed in Edinburgh are not law if they legislate for territory outwith Scotland, if they relate to the matters specified by Schedules 4 (which forbids laws altering the *kompetenz-kompetenz* of the devolved institutions) and 5 (in which certain policy areas which are “reserved” to the UK level, such as defence and the constitution), if they infringe on provisions of the EU *acquis* or the rights enumerated in the European Convention on Human Rights, or if they remove the office of Lord Advocate as head of criminal prosecutions<sup>27</sup>. The entrenchment of these constraints on the capacity of the Scottish Parliament stands in stark contrast to the unimpeded powers of the UK legislature at Westminster, whose statutes are famously above the power of the courts to overturn<sup>28</sup>. The 1998 Act also ensures that Westminster retains the power to make laws even in areas

<sup>23</sup> “Although not presented in the form of a draft Bill and lacking some of the detail eventually needed, the Convention’s report was highly influential as a blueprint for adoption by the Labour Government elected in 1997 with a manifesto commitment to legislate for a Scottish parliament” Himsworth, CMG & O’ Neill, CM, *Scotland’s Constitution: Law and Practice* (Butterworths, Edinburgh, 2003) p84

<sup>24</sup> Himsworth and O’ Neill quote the late Lord President Rodger’s description of the limits on the Scottish Parliament’s powers, in contradistinction to the unchecked powers of the Westminster Parliament, from *Whaley v Watson* 2000 SC 340: “... the Parliament” [is] “a body which - however important its role - has been created by statute and derives its powers from statute. As such, it is a body which, like any other statutory body, must work within the scope of its powers.” Himsworth, CMG & O’ Neill, CM, *Scotland’s Constitution* p93-94. *Sensu stricto* this puts Scottish legislation from Holyrood on a level with local authority byelaws.

<sup>25</sup> Examples include *Imperial Tobacco Ltd v Lord Advocate* [2012] UKSC 61 and *AXA General Insurance Ltd v Lord Advocate* [2011] UKSC 46.

<sup>26</sup> Scotland Act 1998 s28 (1)

<sup>27</sup> *Ibid* s29 (2)

<sup>28</sup> In contradistinction to Lord Rodger’s dictum quoted above at n24, Lord Morris of Borth-y-Gest succinctly expressed the traditional hands-off judicial approach to UK statutes in the House of Lords case *British Railways Board v Pickin* [1974] AC 765 at 789: “In the courts there may be an argument as to the correct interpretation of the enactment; there must be none as to whether it should be on the statute book at all.”

of devolved competence, although in practice that most British of constitutional devices, a parliamentary convention, arose to preserve some semblance of protection<sup>29</sup>.

The Parliament at Holyrood was governed by a coalition of Labour and Liberal Democrat MSPs until its third general election in 2007, when the SNP won enough seats to form a minority government. The rise of the party in Scotland has been ongoing since then, and it is currently the largest party in the Scottish Parliament and holds the majority of Scottish seats at Westminster<sup>30</sup>. The outright majority for the SNP in the Scottish Parliament in 2011<sup>31</sup> saw a Conservative and Liberal Democrat coalition UK Government agree to pave the way for the implementation of the nationalists' manifesto pledge for the 2014 referendum on Scottish independence by passing enabling primary legislation at the UK level<sup>32</sup>. Although the SNP failed to secure a majority for secession in that vote - the result went 55 per cent against to 45 per cent in favour of an independent Scotland on a turnout of almost 85 per cent - the party continued to increase its share of the vote and the size of its membership and it captured all but three of Scotland's 59 Westminster seats in the UK general election the following year. In the 2016 UK referendum on membership of the European Union the party was staunchly pro-European and the result in Scotland was the opposite of the wider UK result. "The democratic wishes of the people of Scotland"<sup>33</sup>, in the words of SNP leader and First Minister of Scotland Nicola Sturgeon, were to remain a member of the European Union, whilst the rest of the UK voted to leave it.

This clear and democratically expressed difference on a fundamental element of the constitutional underpinning of the UK state saw the SNP attempt to weaponise the result of the plebiscite. Initially loud calls for a second independence referendum to protect Scotland's place in the EU were muted when the party received lukewarm backing from the Scottish electorate in the snap UK general election of 2017. Its opponents have argued

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<sup>29</sup> This is known as the Sewel Convention after its most vocal champion, former Labour minister at the Scotland Office and shamed Labour life peer Lord Brian Sewel. Its principle is that the UK Parliament will not "normally" legislate in areas of devolved competence without first obtaining a motion indicating consent to the measure from the Scottish Parliament. The convention has now been enshrined in primary legislation in Scotland Act 2016 s28 (8), and the judicial attitude to that enshrinement is considered in more detail below.

<sup>30</sup> At the time of writing, the SNP held 35 of 59 Scottish Westminster seats and had 63 of 129 MSPs at Holyrood.

<sup>31</sup> The proportional electoral system of the Scottish Parliament, with party lists providing regional members to counterbalance parties with a strong showing in particular seats, was designed to and indeed did guard against majority governments by design for the first three sessions of the Parliament. The 2011 SNP administration was the first single-party government at Holyrood, and it was re-elected on a reduced majority in 2016.

<sup>32</sup> Arrangements agreed between the UK and Scottish Governments for the conduct of the 2014 referendum were detailed in a document known as the "Edinburgh Agreement". In the absence of such an agreement litigation over whether it was *ultra vires* would have been near-certain in the courts, as the constitution is "reserved" by Scotland Act 1998, Sch5.

<sup>33</sup> "Let me be clear: I recognise and respect the right of England and Wales to leave the European Union. But the democratic wishes of the people of Scotland and the national parliament of Scotland cannot be brushed aside as if they do not matter." Brooks, L and Bowcott, O, 'Scottish Government to Intervene in Article 50 Case, Says Sturgeon' *The Guardian*, 8 November 2016

the reduction in the party's Westminster seat count<sup>34</sup> is a clear rejection of its claims that circumstances necessitated a second independence referendum<sup>35</sup>. Its supporters and their fellow travellers point to the fact that an allegedly inevitable Scottish exit from the EU post-independence was one of the main arguments advanced in favour of keeping the Union together. Current SNP policy appears to be to hold a second independence referendum at some point in the future when the settled terms of the UK's exit from the EU are known<sup>36</sup>, although like that of most of the UK's political parties the party's grassroots are split on the issue of EU membership.

No space is available to attempt an account of the multifarious reasons for the SNP's rise to Scottish political prominence in recent years. It is sufficient to note that a party with the *raison d'être* of ending the Union and re-making Scotland as a nation-state has risen to become the dominant force in Scottish politics, demonstrating that the permanence of the unitary union state - and the allegiance of Scots to it - cannot be taken for granted. The party and its supporters have made use of the distinctive Scottish constitutional traditions outlined in the preceding section to contend that, short of their stated goal of full independence, Scotland's distinctive political voice within the Union should be recognised and protected through the concrete constitutional machinery of the wider UK.<sup>37</sup> Perhaps with an eye on the growing popularity of these ideas in Scottish politics, and the threat posed by an ascendant SNP, the UK government appeared to make a concession which moved towards that objective with the passage of the Scotland Act 2016. The act purported to provide guarantees of permanence to the devolved institutions and ongoing respect for the extant distribution of powers. The methods adopted to achieve this included section 28 (8), which replicated the Sewel convention in primary legislation, and section 63A, which stated that the "Scottish Parliament and the Scottish Government are a permanent part of the United Kingdom's constitutional arrangements" and that they can only be abolished by popular consent, to be measured with a referendum. The protection offered by the former has since been tested in the courts and found wanting. A full bench of the UK Supreme Court recently ruled on the application of s28 (8) as part of its

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<sup>34</sup> The SNP's share of Scotland's 59 seats at Westminster went from 56 in the 2015 general election to 35 in 2017. By the time of the 2017 election the SNP total had already come down to 54 MPs, after the party whip was removed from Michelle Thomson and Natalie McGarry.

<sup>35</sup> Carrell, S 'Nicola Sturgeon Hints Independence Off Agenda After SNP Loses Seats' *The Guardian*, 9 June 2017

<sup>36</sup> The First Minister has been vague about the timing of another referendum but it is expected to be held sometime before the next elections to the Scottish Parliament in 2021. Carrell, S, 'Nicola Sturgeon Shelves Second Independence Referendum' *The Guardian*, 27 June 2017.

<sup>37</sup> Tierney notes that dissatisfaction with existing constitutional realities in plurinational polities can manifest itself in interpretational or amendatory critiques, arguing respectively for change in the constitution itself or a better interpretation of the extant constitution. The SNP's insistence on the protections of the Sewel Convention is a good example of its willingness to employ the latter, although they of course also use the former, up to and including leaving the oversight of the extant UK constitution altogether. Tierney, S: *Constitutional Law and National Pluralism* p100

judgement in *Miller*<sup>38</sup>, which concerned the UK's withdrawal from the EU under Article 50 of the Treaty on European Union. The court held, ruling against the submissions of the Lord Advocate on behalf of the intervening Scottish Government, that despite conversion of the convention into black-letter law it essentially remained a political device and as such was not something that the court would enforce adherence to<sup>39</sup>. In light of this judicial approach, and particularly when considered in tandem with the fundamental UK constitutional rule against a Parliament binding its successors, one could be forgiven for being sceptical about the extent to which any legal protection can be in fact be afforded by the promise of permanence contained in s63A, notwithstanding its existence as what the dominant strand of positivism acknowledges as the highest law of the land.

However precarious its existence seems when considered against orthodox doctrine, the 1998 Act did give Scotland a parliament. The piece of institutional apparatus that had been lost in the process of Scotland's parliamentary subsumption into the Union in 1707 had been both re-imagined and embodied<sup>40</sup>. For the first time in nearly 300 years the nation had a representative assembly with the power to promulgate positive law and from which the government responsible for enforcing those laws could be drawn. The gap in the Scottish *Staatsgewalt*<sup>41</sup> created in 1707 had been filled and many of the distinctive state institutions in Scotland which had endured throughout the Union came under the control of an executive and a parliament chosen by Scots and operating from Edinburgh. The devolution of power to Scotland improved the political accountability of its institutions beyond what had been possible under the Scotland Office, the Whitehall department formerly tasked with management of the country from London.

Veteran SNP politician Winnie Ewing was undoubtedly exaggerating the position when she opened the inaugural session of the post-devolution parliament by saying "the Scottish Parliament, adjourned on the 25<sup>th</sup> day of March in the year 1707, is hereby reconvened". The Estates, as the pre-Union parliament of Scotland was known, can be distinguished from its successor in a number of ways; in terms of its procedural rules, its legislative competence, the composition of its membership and its governmental functions. But the new Parliament did mean Scotland was now arguably possessed of the full suite of institutions required to notionally govern an independent country; Keating uses a taxonomy derived from Jellinek to suggest that the change in the composition of the

<sup>38</sup> *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5

<sup>39</sup> "...the UK Parliament is not seeking to convert the Sewel Convention into a rule which can be interpreted, let alone enforced, by the courts; rather, it is recognising the convention for what it is, namely a political convention, and is effectively declaring that it is a permanent feature of the relevant devolution settlement." *Ibid* at para 145

<sup>40</sup> See Chapter III n34 and Chapter IV (B).

<sup>41</sup> See Introduction n10 and Chapters III and IV.

Scottish polity created by devolution can be described as a move from Scotland being an example of what Jellinek called *Staatsfragmente*, territories having only some of the attributes of states, to an example of a “non-sovereign” state, which are states possessed of “the bureaucratic infrastructure” enabling them to “easily continue if necessary without the parent state”. Keating claims that “Scotland pre-devolution might... be seen as a fragment of a state, while since 1999 as a non-sovereign state”, which illustrates well the increase in governing capacity since the Parliament ‘reconvened’.<sup>42</sup>

In support of the notion that the devolutionary arrangements are more akin to a Scottish state than a form of local government which exists at the pleasure of Westminster, it has been widely recognised that the Scotland Act 1998 has come closer to foundational constitutional status than the Treaty of Union ever did. Alan Page plainly called it a constitution, noting that in 1964 such a claim would have been dismissed out of hand even by Andrew Dewar Gibb, Regius Professor of Law at Glasgow and a 1930s leader of the Scottish National Party:

In *A Preface to Scots Law* [...] Gibb wrote that it would be impossible to write a book or short essay from the constitution from a Scottish point of view ‘for today there is no Scottish Constitution. Whatever was written would of necessity be pure history... To write at length on this subject in a book of Scots Law would be something of an absurdity’. Devolution, however, has once more made it meaningful to talk of a Scottish constitution.

Page goes on to catalogue its inherent limitations before concluding that “It is a constitution nevertheless.”<sup>43</sup> In *Robinson v Secretary of State for Northern Ireland*<sup>44</sup> one of the UK’s most senior judges expressed a similar view of devolution in Northern Ireland, calling the settlement contained in the Northern Ireland Act 1998 “a constitution for Northern Ireland, framed to create a continuing form of government against the background of the history of the territory”<sup>45</sup>. It is not clear to see how a lesser status can be justified for its Scottish counterpart.

It is important here to note that the purpose of a constitution is to govern the power relationships between the constituted and the constituent; it is meaningless to speak of a constitution for Scotland unless Scotland as a nation has complementary institutions of

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<sup>42</sup> Keating, M: *The Independence of Scotland* p14

<sup>43</sup> Page, A, ‘Constitutionalism, Judicial Review and “the Evident Utility of the Subjects Within Scotland”’ in Farmer, S & Veitch, S (Eds): *The State of Scots Law* (Butterworths, Edinburgh, 2001) p11

<sup>44</sup> [2002] UKHL 32

<sup>45</sup> *Ibid* at para 25

government to shape and regulate with it<sup>46</sup>. If Scotland has no institutions of government, it cannot have a constitution. More fundamentally, without the governing framework they provide, contemporary Scotland cannot have sovereignty, popular or otherwise, in terms of Loughlin's reading of the concept. According to him, sovereignty is an expression of the relationship between a people and its government. The following chapters argue in detail that Loughlin's account of the juridical concept of sovereignty, understood as the expression of the power-generative and power-distributive relationship between the Scottish nation and its institutions of government, aids our understanding of the challenges presented to the UK's unitary constitution and to the very fabric of the extant UK state.

Leyland quotes fellow British constitutional scholar Vernon Bogdanor: "As Bogdanor observes, the continuing sense of Scottish distinctiveness has meant that: 'There is... some degree of conflict between the idea of sovereignty of Parliament and the idea of the sovereignty of the Scottish people. From this point of view the Scotland Act represents a self-generated constitution... rather than, as the term devolution implies, one imposed by Westminster.'"<sup>47</sup> In addition to supporting a constitutional reading of the Scotland Act, this encapsulates the way in which the argument has most often been characterised; as one over the correct *location* of sovereignty, whether "the Scottish People" or "the Queen in Parliament"<sup>48</sup>. The problems with this approach, and the problems with the methods of the school of constitutional pluralism which has attempted to describe how sovereignty might transcend this standoff, are the subject of the remainder of this thesis. It is submitted that the model of sovereignty developed by Loughlin provides a clearer understanding of the concept and a better way of understanding how its operation impacts on the extant constitution of the UK and Scotland's accommodation within it. Loughlin himself notes the peculiar difficulties presented by the Scottish situation when he observes: "sovereignty is an expression of a political relationship between the people and the state... in this sense, the 'devolutionary' arrangements of the Scotland Act 1998, which establish a Scottish parliament able to give institutional expression to Scots political identity, potentially provide the more radical challenge to the sovereignty of the United Kingdom state."<sup>49</sup> Loughlin's theory will be described in detail in Chapter III before the insights which can be gained from a Scottish application are addressed in Chapter IV.

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<sup>46</sup> "The state assumes sovereignty, just as sovereignty assumes the state; the notion of the 'sovereign state' is tautological." Loughlin, M: *Foundations of Public Law* p183-184

<sup>47</sup> Leyland, P, 'Referendums, Popular Sovereignty and the Territorial Constitution' in Rawlings R, Leyland P & Young A (Eds): *Sovereignty and the Law* p152-153

<sup>48</sup> Tierney, discussing the problems Scotland creates for the concept of parliamentary sovereignty, states that debates "within Scotland have revolved around the coherence of this notion". Tierney, S: *Constitutional Law and National Pluralism* p109

<sup>49</sup> Loughlin, M: *The Idea of Public Law* (OUP, Oxford, 2003) p95 (emphasis added)



## CHAPTER III: THE LEGAL EXPRESSION OF POLITICAL AUTHORITY

### *A. LES PRINCIPES DU DROIT POLITIQUE*

The background outlined in preceding chapters means that the usual ‘legal’ answer given to the question of whether Scotland’s people are sovereign is that they cannot be; from the secondary nature of the country’s devolutionary arrangements, the dominant interpretation of the UK constitution and the orthodox view of the circumstances of the creation of the British State, flows the conclusion that the Scottish Parliament at Holyrood is merely a creature of statute like any local authority. As the Parliament at Westminster is unquestionably sovereign, the assertion of the sovereignty of the Scottish people cannot conceptually be accommodated within the doctrines of formal British constitutional law.

Although it is clear that claims of popular sovereignty in Scotland were central to the establishment of its system of devolved government, when those claims are made they tend to largely escape meaningful juristic investigation, more often than not dismissed under the heading of ‘political’ sovereignty by lawyers who appear to consider the intrusion of politics into law an unwelcome interdisciplinary exchange at cross-purposes<sup>1</sup>. The importance of the distinction between legal and political sovereignty was first insisted upon by Dicey, who it will be remembered placed the Westminster Parliament at the apex of the British constitution, and its central role has rendered the effects of the emergence of a gap between the discrete fields of study of public law and political science across the world particularly acute in the British context.<sup>2</sup> It is widely considered crucial that the type of sovereignty relevant to one discipline should not be confused with the type of sovereignty relevant to the other, but it will be argued that this kind of categorisation has helped frustrate a coherent juristic understanding of Scottish claims to popular sovereignty. As these claims do not disclose grounds which could form the basis of a

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<sup>1</sup> The distinction between legal and political sovereignty was of central importance to Dicey: “The Courts will take no notice of the will of the electors. The judges know nothing about any will of the people except in so far as that will is expressed by an Act of Parliament, and would never suffer the validity of a statute to be questioned on the ground of its having been passed or being kept alive in opposition to the wishes of the electors.” Dicey, AV: *An Introduction to the Study of the Law of the Constitution* p74

<sup>2</sup> “At the same time as political scholars were seeking to burnish their scientific credentials, legal scholars, determined to establish the autonomous normative authority of law, were devoting their energies to the severance of any significant connection between law and political power.” Loughlin, M: ‘The Erosion of Sovereignty’ p63-64. See also Loughlin, M, “Why Sovereignty?” p35: “During the twentieth century, this dual legal and political dimension became a source of deep discomfort for scholars in the emerging academic disciplines of law and political science. In their quest for scientific credibility, political scientists sought to specify causal laws of political behaviour and in this empiricist frame sovereignty was felt only to express the metaphysics of a bygone era. At the same time, legal philosophers were determined to establish the autonomous normative authority of law. They, therefore, felt obliged to sever any connection between law and political power concluding that ‘the sovereignty concept obviously must be radically displaced’.”

successful action in the courts, they fall to be proven or disproven in another, non-legal, forum, and therefore by political scientists or sociologists rather than lawyers<sup>3</sup>.

The treatment of sovereignty as a question of positive constitutional law concerned with which actor in the state has the highest power of command has permeated both sides of the debate. Even when claims to popular sovereignty are made in Scotland they often make the mistake of accepting the reductive terms of that debate. The contention that sovereignty resides in the Scottish people carries the implicit admission that what is indeed at issue is sovereignty's proper location in the state schema. But this is to be drawn into fighting at a disadvantage. Any attempts to redefine the location of sovereignty have the entire corpus of British constitutional legal authority ranged against them. This insurmountable obstacle allows the idea to be pushed out of the sphere of legal inquiry for want of submissions deemed appropriate for determination by litigation.

Extant attempts to deal with sovereignty in Scotland in juristic terms almost invariably take an irreconcilable division between the legal and the political for granted, and are as such dependent on what will be argued are confused and confusing readings of sovereignty<sup>4</sup>, not to mention partial readings of the related concepts of law and state, which reveal little if anything about the work actually being done by sovereignty in the Scottish context. The ongoing tug-of-war between parliamentary sovereignty and the popular sovereignty of the SCC is a contest between equally misconceived positions which both start from fundamental errors and as such the conflict between them is incapable of providing any illumination. It is submitted that the relational and reflexive model of sovereignty advanced in the work of Loughlin can not only help us move beyond this unsatisfying impasse but also point the way towards a juristic explanation of the primacy of constitutional questions in contemporary Scottish political discourse. For Loughlin, it is essential to comprehend that sovereignty is both legal *and* political; it is fundamentally impossible to separate its political aspects from its legal aspects. The two "strands", as Loughlin terms them, are always present to each other, locked in a dynamic relationship in which the political powers the legal and the legal in turn strengthens the political.<sup>5</sup>

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<sup>3</sup> The most senior lawyers in the UK seem to share a pathological aversion to encroaching on matters they consider more properly 'political'. *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 provides a strange example where this distinction was pressed into service to dodge an issue with a heated political background and real political implications despite the argument turning on a point of statutory construction, a legal question which the judiciary usually considers its exclusive constitutional domain.

<sup>4</sup> The treatments favoured by three Scottish scholars in particular will be considered in detail in Chapter IV when considering the work of Neil MacCormick, Neil Walker and Stephen Tierney.

<sup>5</sup> "I distinguished between legal and political conceptions of sovereignty mainly for the purpose of showing how a legal doctrine concerned with identifying an institution which has the 'last word', thereby acting as the guarantor of the regime, should not be confused with the more fundamental political conception of sovereignty, which signifies the autonomy of the political realm." Loughlin, M, 'Reflections on the Idea of

In order to grasp the complexities of Loughlin's sovereignty it is necessary to clearly define our terms of reference. First we must clarify what is encompassed by his use of the term 'public law'. His relational concept is not concerned with public law in the sense that it is usually understood in the British tradition; that is, as ordinary public law, the corpus of posited constitutional law. This public law is public only in the sense that it is not 'private law': that is, the collection of legal rules governing relations between private legal persons, such as principles of contract or property law. A narrow definition of public law as everything 'not private' is useful insofar as it captures a distinction between private power, power in property, and power in the sense of public power<sup>6</sup>. Beyond helping make this distinction, however, such a strict definition actually serves to promote an impoverished concept of public law, one which is narrowed down to its enacted provisions and hollowed out to transcendental principles abstracted from the peculiar facts of reported cases, and one which is always striving to maintain its distance from politics in order to better promote its claims to rational and objective scientific authority. The plausibility of such a politically purified system of self-sustaining norms, and whether it can credibly be used as a convincing model for thinking about constitutional law, have long been controversial issues in legal scholarship<sup>7</sup>, and Loughlin's approach can be viewed as a reaction against the tendency of modern scholars to work within variants of what he considers to be a thin and reductive positivist frame.

Loughlin's work<sup>8</sup> abandons a narrow characterisation of public law in favour of a definition he derives from a rich tradition of classical continental political and legal philosophy, a tradition which he considered "had fallen off contemporary maps of knowledge" through an excessive academic emphasis on positive law. Loughlin argues for a conceptualisation of the discipline of public law which acknowledges yet moves beyond law in the sense of "rules posited by the constituted authority"<sup>9</sup> to embrace a high-order system of law as *Recht*, which operates on a distinct plane and is concerned specifically

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Public Law' in Christodoulidis, E & Tierney, S (Eds) *Public Law and Politics: The Scope and Limits of Constitutionalism* (Ashgate, Aldershot, 2008) p55

<sup>6</sup> Loughlin includes 'public power must be differentiated from private power' in his "ten tenets of sovereignty". He draws on Hannah Arendt and Michael Oakeshott to illustrate that "political power cannot be possessed like property, nor applied like force". He quotes Arendt to show how political power 'comes into being only if and when men join themselves together for the purpose of action', and explains how this political power, generated by the association of notionally equal individuals, becomes public power by expression through institutional forms. Loughlin, M, *The Idea of Public Law* p77-78. A conceptualisation of the different types of power and its modes is central to Loughlin's theory and will be explored in detail later in this chapter.

<sup>7</sup> The starting point is usually taken from the opposing views presented by the German jurists Hans Kelsen and Carl Schmitt in the 1920s. See Kelsen, H, *Das Problem der Souveranitat und die Theorie des Volkerrechts* (Tubingen, Mohr, 1920) cf Schmitt, C, *Verfassungslehre* (Munich, Duncker & Humblodt, 1928)

<sup>8</sup> The two most important pieces of Loughlin's writing with respect to his concept of public law are IPL and FOPL, cited in full at Introduction n15.

<sup>9</sup> The distinction and also the connection between constituent and constituted power is of central importance in Loughlin's theory of sovereignty and both are discussed further detail later in this chapter.

with “those precepts of ‘political right’ that establish and maintain public authority”<sup>10</sup>. In Loughlin’s scheme these precepts - of which sovereignty is one - provide the best frame through which to understand the development and sustenance of the existential system of order which makes a modern state, with its institutional complex and attendant system of positive law, possible in the first place. He argues that, despite the historical British aversion to their examination, these precepts of political right can and should be discerned by legal scholarship and in fact operate to instantiate and regulate an “autonomous” political domain - a social construct or “specific way of world-making”.

He is at pains to emphasise that his theory is not a normative prescription: “Rather than elaborating the structure of some ideal constitution, the task for public law is different: it is to understand the precepts through which constitutional ordering makes sense or, to express this slightly differently, to understand the ways in which existing constitutional arrangements can be said to work.”<sup>11</sup> This is the sense in which Loughlin means his project is one of ‘political jurisprudence’<sup>12</sup>; it is a descriptive exercise which aims to use the analytical tools of the “science of political right” to uncover the “conceptual building blocks” put to work in the making and shaping of modern constitutional forms of government. This is public law as the “juristic method by which the political world is first established and then maintained”<sup>13</sup>. The autonomy Loughlin claims for his project is bound up with his characterisation of the work as a “pure theory of public law”, by which he means that his goal is an attempt to present the science of political right “in terms that are properly its own”<sup>14</sup> in much the same way as Kelsen attempted for the system of positive law; it is submitted that by this description, Loughlin simply intends to signal that the methods required for the study of public law in its widest sense have their own discrete logic and field of application, and therefore do not need to be imported from other disciplines. Loughlin, taking his terminology from Rousseau, calls this ‘science’ of public law in the wider sense *droit politique*.

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<sup>10</sup> Loughlin, M, ‘Reflections on the Idea of Public Law’ in Christodoulidis, E & Tierney, S (Eds) *Public Law and Politics* p48. Loughlin uses the term ‘precepts of political right’ as an English translation of what Rousseau called *les principes du droit politique*. The terms ‘political right’ and ‘*droit politique*’ therefore bear the same meaning and are used more or less interchangeably in Loughlin’s writing.

<sup>11</sup> *Ibid* p49

<sup>12</sup> “Political jurisprudence is a discipline that explains the way in which governmental authority is constituted. It flourished within European thought in the period between the sixteenth and nineteenth centuries and since the twentieth century has been in decline. That decline, attributable mainly to an extending rationalization of life and thought, has led to governmental authority increasingly being expressed in technical terms. And because many of the implications of this development have been masked by the growth of an academic disciplinary specialization that sacrifices breadth of understanding for depth of knowledge, sustaining the discipline has proved difficult.” Loughlin, M (2016) *Political Jurisprudence* Jus Politicum: Revue de Droit Politique, 16

<sup>13</sup> Loughlin, M, ‘Reflections on the Idea of Public Law’ in Christodoulidis, E & Tierney, S (Eds) *Public Law and Politics* p49

<sup>14</sup> Christodoulidis, E, ‘Public Law as Political Jurisprudence: Loughlin’s Idea of Public Law’ in *Ibid* p35

The autonomous political world created and maintained by the principles of *droit politique* - the arena in which the public power of modern constitutional governments is generated and exercised - is what Loughlin means when he refers to the state, which he also calls the 'public sphere' in order to avoid the difficulties presented by the discrepant meanings that are routinely assigned to the state.<sup>15</sup> He argues that it is within the context of the state in this wider sense that sovereignty operates, and it is therefore in this context that the concept must be apprehended.

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<sup>15</sup> Loughlin's idea of the state or public sphere as a "scheme of intelligibility" was mentioned briefly in Chapter I and is discussed in more detail in the following section.

## B. A SCHEME OF INTELLIGIBILITY

It has been noted that Loughlin considers that the autonomous public sphere or state created by the operation of the principles of *droit politique* is a modern social construct. He traces the emergence of this “imaginative world of the political”<sup>16</sup> from roots in monarchical systems of government, and shows how the powers of ‘sovereign’ ruler with absolute authority over his subjects and himself subject to no higher authority<sup>17</sup> became idealised and institutionalised. As the sovereign’s control extended into new areas and he thereby acquired new responsibilities, Loughlin argues it became necessary to conceive of the powers of the sovereign as official and representative rather than personal.

The multiplication of governmental functions in turn led to corporatization of the office, with a resultant differentiation and distribution of powers. Whilst the powers of rule were so divided it is important to bear in mind that for Loughlin sovereignty itself - the absolute authority which legitimises the exercise of those powers - cannot be<sup>18</sup>. He claims that “the distinction between sovereignty and government took on a further twist with the acceptance that the sovereign right was not bestowed from above by God but conferred from below by the people”, noting the people’s existence *qua* ‘the people’ defies logic unless they are defined as such by a set of governing arrangements. This difficulty was “finessed” by inventing the idea of a foundational, virtual, representational act which only acquires its meaning retrospectively; the idea of the social contract, by means of which the move from natural existence to a formal, associational civil existence on agreed terms under a central authority. Implicit in this notional settlement is the idea that the office of government is one of public trust; power is entrusted to the government with the consent of the people because the government exists only to further common interests, and the justification of any accordant restriction on the individual liberty of one person is the common good of the whole. Of course, common interests and a common good can only exist where there is some form of unity amongst the people.

Loughlin contends that the symbolic, virtual unifying pact is what creates the world of public law, the realm in which the principles of *droit politique* are at work, stating: “Sovereignty now presents itself as a representation of the autonomy of the public sphere;

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<sup>16</sup> FOPL p186

<sup>17</sup> Loughlin shows how in Britain, for example, the emergence of the internally coherent self-governing realm subject to no external higher authority owed much to Henry VIII’s break with Rome in the sixteenth century. *Ibid* p38-39

<sup>18</sup> “The sovereign powers of government - what Bodin had called the ‘marks of sovereignty’ - no longer inhere directly in the person of the ruler, but came to be exercised variously through the King-in-Parliament, the King-in-Council, the king’s ministers and the king’s courts... As Bodin was the first to note, the concept of sovereignty had to be distinguished from the exercise of the sovereign powers of government.” *Ibid* p185

in other words, as a symbol of the absolute authority of that sphere.” The “assertion of absolute authority involves a double juristic claim”: first, that this absolute authority must assume a concrete, institutional form, by conferring the offices of government with an absolute power, and, second, that this absolute power manifests itself as the unlimited competence to govern through law.”<sup>19</sup> He quotes Skinner’s assertion that the shift towards this conception of the state - as a “distinct form of ‘civil’ or ‘political’ authority which is wholly autonomous, which exists to regulate the public affairs of an independent community, and which brooks no rival as a source of coercive power” - was effected by republican Renaissance thinkers. The more precise identification of “the nature of the ‘commonwealth’” continues through the work of Bodin and Thomas Hobbes, the latter providing “the modern concept of the state as a political authority, differentiated not only from the people who originally established this authority but also from the personality of the particular office-holders”.<sup>20</sup>

Loughlin notes that the search for a more precise definition of the state inspired much of the work of the post-revolutionary philosophers. It is from the development of this tradition in 19<sup>th</sup> century Germany that Loughlin takes the concept of *Staatslehre*, in which the state is necessarily comprised of three aspects. The first of these is *Staatsgebiet*, the physical territory governed by a state. The second is *Staatsgewalt*, the “institutional apparatus of rule that secures sovereign authority”; the offices of government, which enable the exercise of the sovereign power and through which the state has agency in the world. The third aspect is *Staatsvolk*, or the nation; “the state as an aggregation of the members of the association”, ‘the people’ or citizens who are the ultimate source of political power. In this tradition the state is a multi-faceted entity which cannot be reduced to any of its aspects. The influence of Jellinek makes itself felt here too: Loughlin adopts his approach, in which the state is “simultaneously a governing and a communal association” and in which the people are concurrently both the duty-bearing subjects of the governing power and the rights-bearing objects of it<sup>21</sup>. This modern version of the state, unlike the state that monarchs once sought to maintain as their personal property, is “an abstract entity above and distinct from both government and governed”<sup>22</sup>.

Having asserted that the state depends on collective association, Loughlin turns to address “one of the most obscure questions in political science”, namely “the way in

<sup>19</sup> “The first claim concerns the establishment of the authority of government by operation of political right (*potestas*); the second suggests that, through the operations of political right, an unlimited competence to govern by way of positive law is conferred (*potentia*)”. Loughlin, M: ‘The Erosion of Sovereignty’ p60

<sup>20</sup> “It is Hobbes, Skinner claims, ‘who first speaks, systematically and unapologetically, in the abstract and unmodulated tones of the modern theorist of the state’.” FOPL p189

<sup>21</sup> *Ibid* p191-194

<sup>22</sup> Shennan, JH, *The Origins of the Modern European State 1450-1725* (London, Hutchinson, 1974) p114

which the collective association of the state varies from other types of group entities”. He contends that to grasp the character of the state, “two contrasting types of collective association must be distinguished: community and society.”<sup>23</sup> This state exists, Loughlin argues, to mediate between these competing modalities. Community is the most basic and immediate form of group life; it evokes close and intimate bonds with fellow group members in which the common good of the group takes precedence over the protection of individuality, and requires obedience to a central authority figure who presides over a hierarchy which supplies a concrete focus and serves to draw the group closer together. This mode of association is the province of the family or clan, and it finds its widest manifestation in the type of nationalism which maintains “similarity of culture is the basic social bond”.<sup>24</sup> Loughlin notes Michael Oakeshott’s objection that this mode of association in isolation is insufficient for understanding political association, as in the strictly ethnic sense of the term nationalism has never existed, before concluding that it does have a role to play in fostering bonds of allegiance to authority.

The other mode of association is society, connected to the rise of individualism and dependent on an ability to distinguish between the public and private spheres of human life: “Whereas the unity of community requires the renunciation of a private sphere of individuality, society asserts the necessity of recognising a zone of privacy of human flourishing”<sup>25</sup>. This mode of association, with the primacy of the individual over the group, and with man conceived of as a market actor, stands in contrast to community. In this connection Loughlin follows Helmuth Plessner: because the state is “uniquely concerned to address the collective claims of modern life” it is required to draw these two agonistic modes of association together, “out of the recognition that community and society present two competing modalities of life that each possesses a sway over the modern world without being able to offer a plausible account of collective action”. The autonomous world of the political is required to integrate the competing claims of community and society. It does so by rejecting the idea of man as a dutiful member of the clan, as in community, or the representation of man as the polite but fundamentally self-interested free individual, as in society, in favour of the state’s representation of man as a *citizen*.<sup>26</sup>

The unique realm of the political escapes the stand-off between the unity of the community and the unity of the society by appealing to another different sense of unity, the unity of the citizenry as a ‘people’ or a ‘nation’. This achievement is rendered

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<sup>23</sup> FOPL p196-197

<sup>24</sup> Gellner, E, *Nationalism* (London, Phoenix, 1997) p3

<sup>25</sup> FOPL p200

<sup>26</sup> *Ibid* p202-203



possible by the state's capacity to make its power manifest as law: "On the imaginary cut between the circle of community and society lies law [*Recht*] as the unity of legislation and the dispensation of justice - a unity eternally in the process of change. The principle of law is sovereignty - the principle according to which the state supports itself, in terms of which it limits itself and through which it exists."<sup>27</sup>

Loughlin contends that this characterisation reveals the state as an "autonomous mode of association with its source neither in the primacy of the organism over its parts, nor in that of the individual over the group, but in the distinctive set of relations that this mode of association itself creates". He argues that this version of the state should be conceived of as "the foundational concept from which the grammar, the vocabulary, and syntax of political right (i.e. public law) is derived" and "the entity which offers access to the nature of modern political reality: the state is, in short, a scheme of intelligibility". In this connection he approves of Bernard Bosanquet's wide approach to the state, which defines it as "the entire hierarchy of institutions by which life is determined, from the family to the trade, and from the trade to the Church and the University". The state is the structure which gives life and meaning to the political whole" as a "working conception of life". Loughlin seeks to rescue conceptions of the state from "the weight of argument that reduced the state to *Staatsgewalt*" in favour of a model which makes clear that the state is not only "a set of institutions with a monopoly on coercive power", it is also an expression of the political world.<sup>28</sup>

An important aspect of Loughlin's account of the state is the way in which he uses the account of Peter Steinberger to explain the principle of 'necessary embodiment'. Whilst Loughlin insists on the socially-constructed and incorporeal nature of the state, he admits that emphasis on its existence as a disembodied idea reveals an "important truth" which is less than the "whole truth". Although the state is essentially constituted by ideas, those ideas must be given real material form in order that they may be put to work in the world; the ideas which comprise the state must "animate, guide and give meaning to the workings of the component material entities".<sup>29</sup>

Loughlin summarises this "highly complex" theory of state thus:

If the state is defined as 'the autonomous organisation and activation of social co-operation within a territory' comprising three constituent

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<sup>27</sup> Plessner, H, *The Limits of Community: A Critique of Social Radicalism* [1924] Wallace, A (trans) (Amherst NY, Humanity Books, 1999) p174-175, quoted at FOPL p203

<sup>28</sup> FOPL p205-206

<sup>29</sup> *Ibid* p208

elements of territory” [*Staatsgebiet*], “people” [*Staatsvolk*] “and institutional form” [*Staatsgewalt*], “then it cannot be reduced to any of its constituent parts. In this sense, the state is an institution: it is both an idea and the instantiation of that idea. Through an exercise in representation, it brings into existence a comprehensive way of seeing, understanding and acting in the world. The state cannot exist only as an abstract idea; it must also be set to work. And in practice the scheme of intelligibility it discloses is highly complex, not least because of the tension between freedom and belonging that the scheme discloses.”<sup>30</sup>

This serves to make clear that both government (*Staatsgewalt*) and citizens (*Staatsvolk*) are by themselves incomplete constructs, necessary but insufficient for the existence of the state as the public sphere. ‘Government’ only makes sense defined as the government of the citizens in a particular place. There is no such thing as a government with no citizens or subjects. The concepts of citizens or subjects are only sensible when defined by reference to a government. *Staatsgebiet*, the definite geographic territory, does the work of marrying these two statements together by providing the setting. Only all three together are sufficient, and it is against this background that the principles of *droit politique* operate. Just as an overemphasis on a narrow definition of public law obstructs a clear understanding of the ordering of modern constitutional regimes, the associated reduction the state to one of its component parts obscures much of the detail essential to appreciate sovereignty as relational. Traditional British constitutional scholarship regularly falls into both of these traps, and each hinders us in attempting to sensibly re-join the political to the legal. Loughlin’s sovereignty instead requires us to simultaneously focus on the legal *and* the political.

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<sup>30</sup> *Ibid* p207-209

### C. RELATIONAL SOVEREIGNTY

Loughlin's sovereignty resides in a relationship. Now that his concept of the state has been unpacked, the nature of that relationship can be examined in detail. Sovereignty is the concept which expresses the relationship between the *Staatsvolk*, the people as 'the nation', and the *Staatsgewalt*, the institutions and offices which govern that nation. To adopt more commonly-used terms in the relevant literature, this is the relationship between the constituent power and the constituted power. Loughlin notes that the idea of a constituent power provides rational<sup>31</sup> justification for modern government. The constituent power is the term of political right which more clearly and juristically specifies 'popular sovereignty':

The concept emerges from the secularizing and rationalizing movement of 18th century European thought known as the Enlightenment and rests on two conditions: recognition that the ultimate source of political authority derives from an entity known as 'the people' and acceptance of the idea of a constitution as something that [it] created. The concept comes into its own only when the constitution is understood as a juridical instrument deriving its authority from a principle of self-determination: specifically, that the constitution is an expression of the constituent power of the people to make and re-make the institutional arrangements through which they are governed.<sup>32</sup>

Loughlin's views *vis-a-vis* the treatment of constituent power in British constitutional theory are less than complementary<sup>33</sup>. He contends that having invented the concept during their Civil War the English promptly abandoned it at the restoration, and that a continual failure to engage with the idea has led to it "becoming entirely absorbed into the doctrine of the absolute authority of the Crown-in-Parliament to speak for the British nation," which he labels a "subversion".<sup>34</sup> As Loughlin considers that the relation between the constituent and constituted powers is where sovereignty resides, the collapse of the former into the latter hardly helps us to understand sovereignty more clearly. In tandem

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<sup>31</sup> In this he adopts Max Weber's three sources of authority (charismatic, traditional, rational) and places the concept of constituent power in the latter category. Loughlin, M, 'The Concept of Constituent Power' (2014) 13 (2) *European Journal of Political Theory* 218-237, 219

<sup>32</sup> *Ibid*

<sup>33</sup> Loughlin observes in a footnote that, despite the failure of the "self-styled radical reformers" in the UK to make use of the idea of a constituent power: "The only movement that came close was Scotland's Claim of Right... But in the course of the transition from constitutional claim to statutory reform in the Scotland Act 1998 virtually all the constitutional issues concerning Scotland's position within the United Kingdom had become fudged." Loughlin, M, 'Constituent Power Subverted: From English Constitutional Argument to British Constitutional Practice' in Loughlin, M & Walker, N (Eds): *The Paradox of Constitutionalism* p48

<sup>34</sup> *Ibid* p27

with the tendency discussed above to reduce the state as a scheme of intelligibility to its *Staatsgewalt* alone, this absorption of *Staatsvolk* into *Staatsgewalt* serves to demonstrate the faith of some scholars in the inexhaustible capacities of the British *Staatsgewalt*.

For Loughlin the relation between the people as the authors of the constitution (the constituent power, *Staatsvolk*) and the institutional arrangements thereby created as the material embodiment of that constitution (the constituted power, *Staatsgewalt*) is dialectical: “Constituent power and constituted power exist in a dialectical relation, operating between the *Staatsvolk* (the people as an active political agency) and *Staatsgewalt* (the institutional apparatus of the governing authority). Only in this dialectical form do they together constitute the State - what alternatively might be called the public sphere.”<sup>35</sup> The concept of sovereignty is foundational; for Loughlin it is the principle which not only regulates, but in fact constitutes, the modern state. The dialectic is adopted by Loughlin in order to transcend the difficulties presented by way constituent power is treated in the opposing schools of normativism and decisionism, exemplified by Hans Kelsen and Carl Schmitt respectively. Loughlin leans closer to Schmitt than to Kelsen, and disdain for the dominance of the normative school, particularly in British jurisprudential thinking, is often palpable in his work.

He considers that the normative school is the “prevailing mode of legal thought today”<sup>36</sup>. Its positivist, neo-Kantian approach is founded on the idea that legal ordering itself is autonomous. It is therefore meaningless to speak of a constituent power; the people can only exist as ‘the people’ once identified as such by a legal order. As the individual legal order is a system which makes perfect hermeneutic sense, deriving its character from immanent precepts, any acknowledgement of external influences is avoided. A concept of ‘legality’ with an internally derived morality and authority is introduced as the justification for constitutional regimes and the people as a political unity are no longer necessary as an active constitutional ingredient. In this way, Loughlin claims, the normative school achieves “the severance of any significant connection between law and political power”<sup>37</sup> and “in this mode constituent power becomes a redundant category”<sup>38</sup>.

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<sup>35</sup> FOPL p228

<sup>36</sup> Loughlin, M, ‘On Constituent Power’ in Dowdle, MW and Wilkinson, M (Eds) *Constitutionalism Beyond Liberalism* p152

<sup>37</sup> Loughlin, M, ‘The Erosion of Sovereignty’ p63

<sup>38</sup> Loughlin, M, ‘On Constituent Power’ in Dowdle, MW and Wilkinson, M (Eds) *Constitutionalism Beyond Liberalism* p152

Kelsen's contemporary, Schmitt, shared Loughlin's scepticism towards this doctrine<sup>39</sup>. Where normativism collapsed the concepts of sovereignty and state into its singular concept of the constitution, Schmitt sought to demonstrate that *the* constitution, in the sense of a particular codified system of norms, was only one of many meanings of the constitution. For Schmitt the statutory constitution, however fundamental the rules contained within it seemed, was merely the 'relative' constitution. The observation that the treatment of these rules as 'fundamental' in any real sense depends on an 'approach to law that is indiscriminately formalistic and relativistic' is approvingly quoted by Loughlin, who equates the relative constitution with the constitution of the office of government (of *Staatsgewalt*), rather than the constitution of the public sphere. A monocular focus on the former distorts understanding of the latter by "[reducing] ...the constitution to a series of written laws", when the latter is where sovereignty is engaged. In addition to this formal 'relative' constitution stands the 'absolute' constitution, which is the substantive constitution. Normativism only deals with the 'ideal' sense of the absolute constitution; the absolute constitution as a "unified, closed system of higher and ultimate norms" and a "reflective, ideal one" at that, rather than a "concrete, existing unity". The ideal concept of the absolute constitution substitutes the state for a legal order which is an "imperative entity".<sup>40</sup>

For Schmitt, this could never reveal much about the constitution of the state itself. Whilst a coherent system of norms is necessary, viewing it in isolation falls into the trap of reducing the public sphere to one of its components, and ignores the fact that such a system of norms must in the first instance be established by an act which expresses "the will of [the]... constitution-making power". It follows that such a power must be an "actually existing power as the origin of command", and that constitutional unity and order in fact lies in the prior unity of a people, "the political existence of the state". This is the existential sense of the absolute concept of the constitution, and Schmitt uses the example of his native Germany to argue "the unity of the Republic rests not on the 181 Articles of the Weimar Constitution but on 'the political existence of the German people'; the 'will of the German people', that is 'something existential' which establishes 'the unity and political in political terms and in public law terms'." For Schmitt, "the political

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<sup>39</sup> Schmitt's approach was not without its own problems: the fact that Schmitt remained an unrepentant Nazi until his death serves to illustrate the dangers of the valorisation of a political will which must be uncheckable by constitutional constraints.

<sup>40</sup> FOPL p211

shape taken by the state and reflected in its constitutional arrangements is not simply the product of legal form; it is a lived condition of order.”<sup>41</sup>

Loughlin considers Schmitt’s approach assists by emphasising that constitution-making “is not merely an exercise in norm construction; it requires the formation of a political unity.”<sup>42</sup> Schmitt forcefully re-asserts the necessity of the political in theories of the modern state. His scheme, however, founders on the converse of the paradox encountered and dodged by normativist theory. For Schmitt the political unity sets up the constitution rather than *vice versa*, but this only changes the piece of the scheme that is posited as an existential prior entity, simply taken for granted. Where the normative theory had an unexplained prior legal order, Schmitt’s approach substitutes an equally unexplained prior political unity. The problem with an approach which insists on the primacy of the *Staatsvolk* is that, in the absence of a legal order which creates governmental institutions of some description the people are, in the words of Joseph de Maistre, “the sovereign which cannot exercise their sovereignty”<sup>43</sup>. Without *Staatsgewalt*, how can the *Staatsvolk* act at all? How can the people even draw themselves into the necessary unity?

Loughlin calls his dialectical solution to the impasse between normativism and decisionism relationalism, and it owes more to the latter than the former. His third way recognises a number of the insights in Schmitt: that it is necessary to relate the normative to the existential; that the political is “a domain of indeterminacy and therefore one that cannot be organised in accordance with some grand theory”; that the gulf between norm and fact “must be filled by the activity of governing”; and that governing itself “is a sphere of domination in which decisions must be taken”.<sup>44</sup> His criticism of Schmitt is that he fails to appreciate that “once representation is invoked for the purpose of generating political power, ‘the people’ must itself be regarded as a representation. Political power is generated only when ‘the people’ is differentiated from the existential reality of a mass of particular people (the multitude).”<sup>45</sup> Loughlin identifies that it is this moment of differentiation which is crucial and argues that it is overlooked in decisionism and normativism. Drawing on the work of Hans Lindahl, which contends that the initial exercise of the constituent power *simultaneously* constitutes the *Staatsvolk* that exercises it<sup>46</sup>, Loughlin observes: “Constituent power expresses the fact that unity is created from

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<sup>41</sup> *Ibid* p212-213

<sup>42</sup> *Ibid* p214

<sup>43</sup> Loughlin, M, ‘On Constituent Power’ in Dowdle, MW and Wilkinson, M (Eds) *Constitutionalism Beyond Liberalism* p155

<sup>44</sup> *Ibid* p165

<sup>45</sup> *Ibid* p166

<sup>46</sup> FOPL p232-233; see also Lindahl, H, *Fault Lines of Globalisation* Chapter I n11

disunity, inclusion from exclusion. Constitutional ordering is dynamic, never static. So instead of treating the constituent power of the people as an existential unity preceding the formation of the constitution, this power expresses a dialectical relation between ‘the nation’ posited for the purpose of self-constitution and the constitutional form through which it can speak authoritatively.”<sup>47</sup>

Neither *Staatsgewalt* nor *Staatsvolk* takes precedence<sup>48</sup>. Loughlin quotes Schmitt’s contemporary, Herman Heller, who used the Hegelian method to demonstrate positive law exists only in tension with the *idea* of law, the “fundamental principles of law which are foundational of positive law” - *les principes du droit politique*: “Every theory that begins with the alternatives, law or power, norm or will, objectivity or subjectivity, fails to recognise the dialectical construction of the reality of the state and goes wrong in its very starting point”.<sup>49</sup> The “power-forming quality of law” means power and law are “mutually constitutive and reciprocally dependent”. The power which is in play in the realm of *droit politique* is public power<sup>50</sup>, and Loughlin’s theory depends on an appreciation of the distinctions between different types of power.

In this connection the distinction between *potestas* (the rightful power of rule) and *potentia* (the actual power of the government to achieve its objectives) is adopted from Spinoza.<sup>51</sup> Loughlin claims that the tendency of modern social scientists is to define power as the latter - the ability of a government to achieve its objectives, that is, “power simply as a general capacity for action” - is reductive.<sup>52</sup> *Potentia* is the power of governments to assess and tax income and wealth, gather and store information about individuals, regulate economic activity, and “penetrate everyday life in many different ways”.<sup>53</sup> Loughlin contends that studies of this type of power seldom pay any attention to *potestas*, ‘power to’, the generative aspect of power relations, and that these shortcomings render

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<sup>47</sup> FOPL p227

<sup>48</sup> “The space of the political can be seen as a space of freedom (‘the absolute beginning’), but if it is to be maintained institutionalization of rule is required. This institutionalization, needed for power-generation, implies domination. This leads to a dialectical engagement between what Ricoeur calls conviction and critique, institutionalization and its irritation. It forms a dynamic of constitutional development without end.” Loughlin, M: ‘On Constituent Power’ in Dowdle, MW and Wilkinson, M (Eds) *Constitutionalism Beyond Liberalism* p168

<sup>49</sup> Loughlin writes: “Heller’s state theory is considered to be both highly abstract and vague in its formulation. While this is true, Heller does manage to identify more precisely than any other legal scholar a juristic logic that makes sense of the constitution of the state” FOPL p237

<sup>50</sup> See Chapter III n6.

<sup>51</sup> FOPL p164

<sup>52</sup> *Ibid* p169

<sup>53</sup> *Ibid* p165

accounts depending entirely on *potentia* “an inadequate basis on which to found an analysis of the public sphere in general and public law in particular.”<sup>54</sup>

In order to explicate the distinction Loughlin uses Hannah Arendt’s treatment of *potestas* to demonstrate that it is not, like *potentia*, simply an exercise in domination, but a “rightful exercise of authority that, in some form or other, is based on consent”. This type of power, according to Arendt, “comes into being only when people ‘bind themselves through promises, covenants and mutual pledges’.”<sup>55</sup> The political power generated in this way is what enables a government to take form and imbues it with power to act in the first instance; this symbolic, foundational pact awakens the Leviathan and bestows its offices of governance with a rightful power to rule over its citizens. Rather than master and slave, the government and the individual are stakeholders in a mutual enterprise, where each acts for the common good of their overarching object. Although an unlimited authority to rule is conferred, arbitrary or oppressive exercise of that power will undermine its strength. The command of the sovereign only carries weight insofar as it is respected as power justly exercised<sup>56</sup>: this is the function of *potestas*.

A crucial aspect of this complex relationship between *Staatsvolk* and *Staatsgewalt* - the relationship which sovereignty expresses - is the way in which the interplay between *potentia* and *potestas* means that restraint of the latter in fact increases the sum total of *potentia* in circulation. Arendt acknowledges that, *per* Bodin, the restraint of power conditions and grows it, just as Spinoza insists that arbitrary or excessive exercise of an absolute power in fact undermines that power. It is this dynamic which leads Loughlin to state: “The elaborate frameworks of modern constitutional contracts do not impose a set of constraints on the exercise of public power; they establish the institutional frameworks through which power can be generated.”<sup>57</sup>

If *potentia* engages the legal aspect of sovereignty - the law backed up with monopolistic violence - then elements of consent and of restraint at work in *potestas* open up our view of the political ‘strand’ of sovereignty, the aspect which allows Loughlin to state unambiguously: “Governmental authority rests on the allegiance of the people. Once support is withdrawn, the authority of the governors dissipates.”<sup>58</sup> The more just the distribution and the use of public power is perceived to be in a particular state, the more

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<sup>54</sup> *Ibid* p169-170

<sup>55</sup> *Ibid*

<sup>56</sup> “There may be an absolute right to rule, but if the sovereign weakens his power by oppressive or inappropriate action, the regime may collapse.” *Ibid* p106

<sup>57</sup> FOPL p231

<sup>58</sup> IPL p82. Schmitt clearly knew this, and he acknowledged the importance of ‘public opinion’, but it had of course already been recognised longer ago and closer to home: see for example the David Hume quote from ES Morgan at Chapter II n16.



that state will be strengthened by the allegiance of its *Staatsvolk*. The more the *Staatsvolk* approves of and cleaves to its *Staatsgewalt* the stronger the political authority of the state; its supply of *potestas* grows in concert with the allegiance of its citizens. An increased level of *potestas* in turn manifests itself in an increased store of *potentia*<sup>59</sup>, the concrete physical power at its disposal. In modern constitutional regimes the *Staatsgewalt* exercises *potentia* through a system of positive law which is recognised as the absolute and highest authority in the state. Increases in *potentia* - in governing capacity - are rendered possible only by consent to increased state interference in their lives of the governed. The extent to which such interference is justified and therefore capable of further reinforcing the process will be judged each time against its compliance with fundamental principles of *droit politique*. Whilst some of these principles may be reduced to writing in formal declarations or constitutions, others will escape codification<sup>60</sup>.

Sovereignty therefore simultaneously represents the legal manifestation of the political and the political underpinning of law. As a juristic concept it can be likened to a machine which maintains the equilibrium of a particular modern constitutional state. The metaphorical input is *potestas*, the rightful authority which any government requires and which is conferred by the consent of the governed. All the *potestas* that is initially required is generated by the joining of a multitude into a political unity which institutes a system of government. In order to maintain a state, however, the *potestas* must be turned into a metaphorical output in the form of *potentia*, actual power to change reality which is expressed through governing institutions. In this unavoidably symbiotic relation the political aspect, concerned with *potestas* generated by the consent of an association of free individuals to a particular system of government, and the legal half, concerned with *potentia* and expressed by that system of government through law, depend on each other and the strength of one is directly proportional to the strength of the other. The political aspect of the relation is power-generative, the legal aspect power-distributive.

Loughlin states:

Sovereignty, then, is simultaneously a political and a legal concept: it is the regulatory idea that enables us to conceive of an autonomous political domain and to grasp it in jural terms. As a representation of this autonomous domain, sovereignty might be compared to the double helix of

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<sup>59</sup> "Allegiance - the generator of power - is enhanced not so much when competence is limited but when the conditions for open, accountable and responsive government are in place." FOPL p231

<sup>60</sup> "In seeking to identify the most basic elements in the constitution of the public sphere, the predominant theme is that constraints are enabling; apparent limitations on power generate power; power and liberty are correlative terms." *Ibid*

DNA, in which the political and legal run as anti-parallel strands. The essential coding information of the political domain is contained within this structure, in which the political strand is power-generational and the legal is power-distributive. This configuration of coding information contains the basic elements of state formation.<sup>61</sup>

An immediate consequence of this approach is that it allows the inquiry into the function of sovereignty in the Scottish constitution to move beyond the stand-off between the mutually exclusive definitions of sovereignty usually adopted in contemporary constitutional debate<sup>62</sup>. When it is understood that sovereignty in fact relates to a wider notion of public law we can see that when we try to force it into the narrower frame offered by the positive scheme of posited public law we are attempting to apprehend and apply the concept by making one of its mere “marks”<sup>63</sup> represent the whole; we reduce the complex relational model to its particular manifestation in a specific, unduly narrow, context. By making this category error, the zero-sum game over the locus of ultimate legal authority in the Scottish polity, which manifests itself as a tug of war between rival and equally myopic constructions of sovereignty, turns sovereignty on its head; it seeks to make the specific and particular manifestation do all the work of the underlying precept.

Moreover, it uses the grammar of *droit politique* to try and make sense of a related but distinct language, the technical language of the ordinary law, and this ensures confusion. The attempt to deploy the concept of sovereignty on the wrong analytical level has meant that sovereignty gets conflated with the sovereign in a reductive approach. This ignores the political aspect which operates in tandem with the legal structures which police the distribution and exercise of public power. The tendency to split sovereignty into its legal and political components, and then try to deal with one component in isolation, is only possible on the basis of a partial and monocular rendering of the concept. To distinguish the ‘legal’ from the ‘political’ wholly fails to appreciate their fundamental unity, the unity which is expressed by sovereignty.

Loughlin’s sovereignty is a dynamic, reflexive concept which is able to maintain the stability and viability of a modern constitutional state and allows us to appreciate the ways in which much of the applicable scholarship in Scotland works within a frame which has been shorn of most of its crucial complexity. The relational model, in which neither

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<sup>61</sup> Loughlin, M, ‘The Erosion of Sovereignty’ p60

<sup>62</sup> As noted in the Introduction and in Chapter I this usually boils down to a winner-takes-all contest between “the Scottish people” and the “Queen-in-Parliament”.

<sup>63</sup> In this instance, the “mark” of sovereignty *per* Bodin is the highest power of lawful command, or the sovereign power. To reduce the concept of sovereignty is to substitute the sovereign for sovereignty, which is reductionist and unhelpful. Loughlin, M, ‘The Erosion of Sovereignty’ p63

the legal nor the political takes precedence, and in which the link between them is essential to the viability of a set of constitutional arrangements, also allows us to bring the importance of the consensual, political elements of the modern Scottish state back into the realm of juristic analysis. A selection of the extant attempts to specify the work done by sovereignty in the Scottish context will be critiqued in the following, final chapter, and the implications of Loughlin's model for Scotland will then be considered in detail.

## CHAPTER IV: A PURE THEORY OF SCOTS PUBLIC LAW

### A. METAPHYSICS OF A BYGONE ERA

The most celebrated attempt to grapple with sovereignty in the modern Scottish context was made at the end of the 1990s by Neil MacCormick. His innovative treatment of the creation of the British state, and his diagnosis of the constitutional difficulties raised in that process, were quoted extensively in Chapter I. Having since suitably specified Loughlin's conception of public law, we can turn now to specifically address the claims that MacCormick made about the function of sovereignty in contemporary constitutional arrangements. For MacCormick, writing at the dawn of the 21<sup>st</sup> century, sovereignty was an increasingly useless artefact of a statist era then fading away<sup>1</sup>. He contended that the concept's influence was waning as supra-national legal orders subsumed areas formerly considered the exclusive competence of national governments, and relied particularly on developments occurring against the backdrop of the European Union to illustrate his points. His position was characterised as 'post-sovereign'<sup>2</sup> and it was as influential in academia as it was in the formation of SNP policy during the first term of majority nationalist government in Scotland<sup>3</sup>.

MacCormick followed Dicey in accepting the distinction between legal and political sovereignty. He defines both variants as essentially concerned with the existence of a power unconstrained by a higher power<sup>4</sup>; legal sovereignty is, in his somewhat circular definition, "normative power or 'authority' conferred by law [...] which is enjoyed, legally, by the holder of a constitutional power to make law, so long as the constitution places no restrictions on the exercise of that power."<sup>5</sup> Political sovereignty is treated in the same way, conceptualised as "political power unrestrained by higher political power."<sup>6</sup> He then turns to the question of which of these sovereignties, the political or the legal, should take precedence. Tracing a line of thought through Hobbes, John Austin and Schmitt which "unhesitatingly ascribes primacy to the political"<sup>7</sup>, MacCormick considers this school has "been found wanting in respect of those situations in which there is a

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<sup>1</sup> Loughlin, M, 'The Erosion of Sovereignty' p63

<sup>2</sup> See MacCormick, N, 'Beyond the Sovereign State' (1993) 56 (1) *Modern Law Review* 1-18

<sup>3</sup> MacCormick was the originator of the school of 'constitutional pluralism' and an important figure in the modern nationalist movement. He hailed from a family of SNP politicians (Chapter I n46) and served as one himself in the European Parliament. His theory was to have a continuing academic influence, particularly in the context of the constitutional theory of the European Union, and his service as an advisor to Scotland's first nationalist First Minister no doubt influenced the party's Europhile brand of independence. See also Walker, N, 'Scottish Nationalism For and Against the Union State' in Walker, N (Ed) *MacCormick's Scotland* (Edinburgh, Edinburgh University Press, 2012) p185-190 ("The Future of Political Nationalism")

<sup>4</sup> "Power without restriction is on this view the key idea." MacCormick, N, *Questioning Sovereignty* p127

<sup>5</sup> *Ibid*

<sup>6</sup> *Ibid*

<sup>7</sup> *Ibid* p128

standing constitutional tradition”, where “the powers of state are effectively divided according to a constitutional scheme that is respected in the practical conduct of affairs”<sup>8</sup>. Here MacCormick means countries where executive action is constrained by constitutional rules and divisions of power, and he considers that the existence of such rules and divisions hobbles political sovereignty as the power exercised can no longer be said to be exercised without restriction. The inability of MacCormick’s political sovereignty to provide an adequate explanation of these regimes serves in his theory to demonstrate the redundancy of political sovereignty altogether.

Where the political has been restrained in this way, MacCormick argues, a *Rechtstaat* exists. He defined the *Rechtstaat* as “a state which has law, and in which law regulates and restricts the conduct of political officials as well as citizens, presupposing no monolithic political sovereign power outside or above the law.”<sup>9</sup> It is worth noting that in his scheme the political and legal modes of sovereignty cannot coexist; these sovereignties are by virtue of their immanent characteristics engaged in a zero-sum game for control of a polity. MacCormick’s characterisation of the two, and the scholars he cites as their respective exponents, recalls the distinction between Loughlin’s “decisionist” and “normativist” schools<sup>10</sup>, exemplified by the work of Schmitt and Kelsen respectively; MacCormick clearly favours the latter, preferring legal control of political power to political control of the law.

So far, so familiar: the argument more or less follows the contours of the disputes between “power-as-law” theorists and their normative opponents<sup>11</sup>, and sees MacCormick siding with the latter. But having characterised modern governing arrangements as a *Rechtstaat*, and thereby rejected the necessity of political sovereignty, the more radical departure occurs when MacCormick goes on to contend that his definition of legal sovereignty is also unnecessary. One might expect in a situation where there is no political sovereignty that legal sovereignty might have to step into the breach to rescue the coherence of the scheme, but MacCormick considers that a *Rechtstaat* is not “necessarily constructed around some constitutional organ which enjoys sovereignty conferred by law.”<sup>12</sup> He notes the counter-example provided by the “classical theory of the British constitution”, which used this notion of legal sovereignty when it “ascribed sovereignty to the monarch in Parliament”, but he states that this is “neither necessary to the existence

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<sup>8</sup> *Ibid*

<sup>9</sup> *Ibid*

<sup>10</sup> See Chapter III C above and Loughlin, M, ‘On Constituent Power’ in Dowdle, MW and Wilkinson, M (Eds) *Constitutionalism Beyond Liberalism* p151-175

<sup>11</sup> Tierney, S, ‘Sovereignty and the Idea of Public Law’ in Christodoulidis, E and Tierney, S (Eds) *Public Law and Politics* p15

<sup>12</sup> MacCormick, N: *Questioning Sovereignty* p129

of law and state nor even desirable.”<sup>13</sup> Again, he relies on the examples of federal dispensations to demonstrate that a legal system based around such a single supreme institution does not necessarily need to be the shape taken by a *Rechtstaat*.

But, before he dismisses sovereignty “out of hand”, MacCormick considers it necessary to deal with another distinction: that between internal and external sovereignty. Having specified the crucial cleavage between legal and political sovereignty before rejecting both, MacCormick carries out a similar two-stage manoeuvre here. He accepts that his definition of sovereignty as “power not subject to limitation from higher or co-ordinate power” can be read in two distinct senses. Internally, and particularly in a federal constitution like that of the United States or Germany, he states: “Either in the political or legal sense, we may discover that all power holders are subject to some legal or political checks or controls. In that case, there is no single sovereign internal to the state, neither a legal nor a political sovereign.” He goes on to explain that such a state could still however be considered sovereign in an external sense, that is, if “the totality of legal or political powers exercised within it is in fact subject to no higher power exercised from without”<sup>14</sup>. This is closely related to the definition of sovereignty encountered in international law, and which guarantees states in possession of it certain rights against states which are equally endowed. External sovereignty, however, meets the same fate as each of the variants which preceded it, as unnecessary as the political, legal, or internal.

By way of illustrating this position MacCormick relies heavily on the example of the extra-state legal order of the European Union, returning to his theme: that where there are checks and balances which prevent the unconstrained exercise of power, there can be no sovereignty. For him, the ability of the EU’s “institutional normative order” to restrain the scope of legislative or executive action available to member states both internally and externally means that there is now no untrammelled exercise of legal power either inwardly or outwardly in those states, and therefore no sovereignty: “... it is clear that absolute or unitary sovereignty is entirely absent from the legal and political setting of the European Community [...] So the states are no longer fully sovereign states externally, nor can any of their internal organs be considered to enjoy present internal sovereignty under law; nor have they any unimpaired political sovereignty.” The chance of sovereignty simply moving up one level to reside in the complex arrangements of the European Union is discounted, as the EU is “clearly not a state” and its institutions have been denied the right to determine their own competence. It will be remembered that for MacCormick,

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<sup>13</sup> *Ibid*

<sup>14</sup> *Ibid*

*kompetenz-kompetenz* is an indispensable facet of sovereignty.<sup>15</sup> By this stage in MacCormick, sovereignty is now wholly absent. To the extent to which the concept retains any currency, it is in helping describe the way the bloc as a whole relates to states outwith the EU, with “a kind of compendious legal external sovereignty towards the rest of the world”<sup>16</sup>. This is an attempt to describe a process of division and recombination of the previously exclusive international competences of the member states.

The disappearance of sovereignty does not trouble MacCormick. Rather, he considers that a step away from the terminology and conceptual toolkit associated with the term is a progressive, worthwhile and overdue move to make.<sup>17</sup> It is easy to see how his version of sovereignty supports a strong centralising and absolutist tendency, particularly when he applies it in the context of his native Britain, and MacCormick contends that conceiving of constitutional methods for the protection of minorities of every sort - including Scots in the UK - requires rejection of the concept. Arguing in favour of an increasingly diffuse distribution of power and an increased recognition of disparate claims made on behalf of groups which exist apart from the majority, he claimed that the EU project and the democratic ideals it promotes can provide a better template for government than reliance on the anachronistic notion of sovereignty could<sup>18</sup>.

The brave new world promoted by MacCormick is one in which the interweaving of the EU’s supranational order with its national equivalents creates a novel democratic constitutional arrangement, offering new concepts with which to remodel modern governance: “The idea of subsidiarity points us to better visions of democracy than sovereignty ever did. There is a possible future reality preferable to the past of nostalgic mythology.”<sup>19</sup> For him, in the context of the EU, that future had begun to take shape. The EU legal order was an order distinct from the legal orders of its members; moreover, neither the former nor the latter automatically took precedence. The constitution of the EU and the constitutions<sup>20</sup> of the member states “each acknowledge the legitimacy of every other within its own sphere, while none asserts or acknowledges constitutional

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<sup>15</sup> *Ibid* p132

<sup>16</sup> *Ibid* p133

<sup>17</sup> “It is a serious issue whether it is possible to envisage a world ‘beyond the sovereign state’ in which new types of legal and political interaction come into being that exclude claims of out-and-out sovereignty either from old states or from new communities devised to re-order economic and political coexistence [...] The case to be made here is one welcoming the prospect of Europe beyond sovereign statehood.” MacCormick, N, *Ibid* p126; cf Loughlin’s categorical and diametrically opposed position: “State and sovereignty exist in a reciprocal relationship: the State assumes sovereignty just as sovereignty assumes the State.” Loughlin, M, ‘Why Sovereignty?’ in Rawlings R, Leyland P & Young A (Eds) *Sovereignty and the Law* p34

<sup>18</sup> MacCormick considered his Europhilia complementary to his “liberal nationalism”, and he served as an SNP MEP from 1999 to 2004, during which time he was involved in drafting an ill-fated European constitution.

<sup>19</sup> MacCormick, N: *Questioning Sovereignty* p126

<sup>20</sup> A constitution is meant here as a collection of formal legal rules conferring distributions of governmental power, which is constitution as a synonym for a legal order formed of a fusion of primary and secondary rules.

superiority over the other. In this case, ‘constitutional pluralism’ prevails.” Conflicts between different constitutions are rendered unproblematic, because to the extent that the EU order impinges on another, the intrusion is itself constitutional by virtue of the reconciliation of the EU order with the domestic by way of legislation or constitutional amendment implementing the relevant treaty obligations, those treaties of course themselves forming part of the corpus of international public law.<sup>21</sup>

In this way, MacCormick turned to international law to supply a unitary order that makes his ‘post-sovereign’ scheme coherent. The EU legal order and the national legal order are each “subsystems of the overarching international legal order”<sup>22</sup>, coherent “within a common legal universe governed by the norms of international law”; he calls this “pluralism under international law”<sup>23</sup>. The space opened up for realising the aspirations of MacCormick’s brand of Scottish nationalism in this context is clearly wide and exciting; as a small European country with long experience of negotiating the interface between multiple legal orders within the UK, Scotland seemed well-placed to benefit from the more finely-tailored forms of government made possible by the pooling and redistribution of *potentia* in emerging EU institutional infrastructure equipped with a novel capacity to operate both above and under the traditional boundaries of the nation-state<sup>24</sup>.

Read in the context of Loughlin’s work, MacCormick’s optimistic theory drowns in a sea of conceptual confusion. His normativist scheme, characterised by Loughlin as “an echo of Kelsen’s idea that there is only one legal order in the world”<sup>25</sup>, seems at the very least to contradict itself in that it appeals to a strongly unitary - indeed, a universal - sense of law and legality to promote a purportedly pluralistic vision. For Loughlin the shortcomings of his positivist tendency are clear. MacCormick prefers to treat law purely as positive law; that is, always as *gesetz*, never as *recht*. This treatment means that his theory cannot address sovereignty in the context that Loughlin contends is crucial to a proper comprehension of its function, the level on which the interaction of popular political input with formal legal structures of governance can be more clearly conceptualised; that is, the realm of *droit politique*. However moral or inclusive a particular legal order may appear to be, it can only ever be a conditional and contingent manifestation of *Staatsgewalt*. Sovereignty is an expression of a principle that constitutes the political realm in which a scheme of positive law becomes possible, not an attribute of an institution of government; an autonomous precept of the purely representational realm of

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<sup>21</sup> *Ibid* p110

<sup>22</sup> Loughlin, M, ‘Constitutional Pluralism: An Oxymoron?’ p18

<sup>23</sup> MacCormick, N, *Questioning Sovereignty* p117

<sup>24</sup> See Chapter 12: ‘New Unions for Old?’ in *Ibid* p193

<sup>25</sup> Loughlin, M, ‘Constitutional Pluralism: An Oxymoron?’ p18



modern politics. MacCormick's separation of the political and legal aspects of sovereignty means that his theory is fundamentally incompatible with Loughlin's relational model, in which the political and the legal facets are locked together in a symbiotic fusion.

In comparison to Loughlin, the treatment of sovereignty in MacCormick suffers from an emphasis on *potentia* at the expense of any consideration of *potestas*. He characterises political power as "interpersonal power over the conditions of life in a human community or society... the ability to take effective decisions on whatever concerns the wellbeing of the members". He elaborates that it is not necessarily based on agreement, being "the ability within some determinable context to take decisions that affect that other's (or those others') interests regardless of their consent or dissent", and contends that this power is legal rather than political when the right to exercise it is "conferred by law", turning it into "normative power, or authority"<sup>26</sup>. MacCormick thereby treats power only as available concrete power, and to the extent that he engages with the question of rightful authority he does so only to circularly state that once power is conferred by law it somehow becomes rightfully exercised. This is the fetishisation of law encountered in much of the normativist tradition of Kelsen and his followers<sup>27</sup>, and perhaps MacCormick feels the need to overthrow sovereignty precisely because of the threat an uncontrolled and all-powerful "sovereign state" presents to the normative supremacy of positive law which he promotes. MacCormick conflates actual material power with the right to exercise it when in fact these two facets of public power must be kept distinct. His concept of power deals exclusively in *potentia* and underlines the dependence of his theory of the *Rechtstaat* on an exclusive focus on the *Staatsgewalt* in possession of the means to make a tangible difference in the material world. For Loughlin, sovereignty expresses the balance between *potentia* and its equally important counterpart, *potestas*, a distinct form of power which is generated and sustained by a complex self-reinforcing loyalty incomprehensible to MacCormick's model of universal positive constitutionalism.

It is submitted that the valorisation of an abstract notion of thin constitutionalism as a source of legitimising principle for modern government in MacCormick in fact severs law from politics. If the machine can effectively run itself, powered and legitimised by the immanent normative properties of law which are translated into positive constitutionalism, then there is no requirement for the input of politics into systems of public law save in the prescribed formal ways permitted by what Schmitt called the

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<sup>26</sup> MacCormick, N, *Questioning Sovereignty* p127

<sup>27</sup> Here it is submitted that it is notable, as an illustration of the inherent tendency of even the more radical elements of the British academy to follow in the footsteps of Dicey, the close parallels - however superficially agonistic the two approaches appear - between MacCormick's concept of a supreme and unrestrained power and the orthodox British approach exemplified by the doctrinal obsession with the sovereignty of Parliament.

‘relative constitution’<sup>28</sup>. As was observed in Chapter III, this normativist approach disposes with any need for popular sovereignty. If the people can only exist *qua* people in respect of their definition as citizens by positive law, then the idea of ‘the people’ does no real work outside of the specific role allotted to it by that system of law<sup>29</sup>. The precepts which inform the constitution in this theory depend on the immanent virtues of some transcendent constitutional legality. The subjugation of the political to the legal that the approach taken by MacCormick requires suggests one reason that the *juristic* meaning of popular sovereignty is under-theorised in his work: an emphasis on ‘the people’ which goes beyond the respect accorded to them by the universal liberal constitutional values of democracy and equality is quite simply unnecessary. Law, operating on its own hermeneutic rationality, doesn’t need ‘the people’, except as a placeholder. Although he repeatedly acknowledges the Scottish tradition which conceives of the people as authors of their constitution, and is indeed part of that tradition by virtue of his involvement with the Claim of Right<sup>30</sup>, MacCormick seems at certain points to be quite hostile to the notion of popular sovereignty altogether, and his discomfort seems based upon a suspicion of the inherent political dynamic of inclusion and exclusion, an operation which is of course very much to the fore in the work of Schmitt: “...the state-sovereignty version of popular sovereignty can itself be an enemy of democratic rights. In general, any form of popular government or majoritarian democracy inevitably poses the questions: ‘Who are the people? Of what group must the majority be a majority?’”<sup>31</sup>.

The tension between his endorsement of a distinct Scottish constitutional tradition and his novel normativist model, which has no need for it, renders these words of his successor in the Regius Chair at Edinburgh, and fellow ‘constitutional pluralist’, Neil Walker, perplexing: “For all that MacCormick eschews the language of sovereignty as inappropriate to the contemporary legal and political coding of authority, he often refers approvingly to the underlying idea of popular sovereignty - of ‘the people’ as constituent power whose assent is required for any legitimate system of government - and notes with satisfaction how the 1989 Claim of Right chose to revert to the language of ‘the sovereign right of the Scottish people’.”<sup>32</sup> It is submitted that for MacCormick that language made claims which were *political*, adopted in virtue of their historical resonance, rhetorical usefulness, and

<sup>28</sup> See Chapter III n40

<sup>29</sup> After defending a weak international variant as the only juristically coherent variant of popular sovereignty, MacCormick immediately qualifies: “Popular sovereignty in this sense does not imply or presuppose the existence internal to the state of any constitutional or political organ enjoying either legal or political sovereignty in the internal sense [...] on the contrary, they count as ‘a people’ by virtue of the constitution that makes them so.” MacCormick, N: *Questioning Sovereignty* p130-131

<sup>30</sup> See Chapter II A

<sup>31</sup> MacCormick, N: *Questioning Sovereignty* p134

<sup>32</sup> See Walker, N: ‘Scottish Nationalism For and Against the Union State’ in Walker, N (Ed) *MacCormick’s Scotland* p185

perhaps even the soundness of the democratic ideals they espoused. But as assertions of a political sovereignty, they were necessarily outside the realm of *juristic* analysis, given his view of legal sovereignty as something entirely distinct from political sovereignty.

In a separate but related confusion, the reductive focus on *Staatsgewalt* and the *potentia* it exercises in MacCormick leads him into another conflict with Loughlin. He makes the mistake specifically warned against by Bodin, confusing the ‘marks of sovereignty’ with the concept when he conflates sovereignty and government. Ignorance of the “great difference between the State and the government of the State”, Bodin warned, would cast a man “headlong into an infinite labyrinth of errors”.<sup>33</sup> Loughlin says MacCormick’s contention that the division and limitation of the powers of government destroys sovereignty does exactly this, being based on “errors of the most elementary kind”. For Loughlin, the distinction between sovereignty and government which MacCormick fails to appreciate “forms a central pillar of public law thought”.

Loughlin elaborates: “Sovereignty expresses a principle of unity: it is an expression of illimitability, perpetuity, and indivisibility. Any limit on sovereignty eradicates it, any division of sovereignty destroys it. Yet the powers of rule, the ‘marks of sovereignty’ can be divided and limited. Indeed, for the purpose of maintaining political authority they must be so divided and limited.”<sup>34</sup> He goes on to argue that the pooling of governmental competence at a European level, an agglomeration of *potentia* which the member states agree to bestow upon the EU institutions<sup>35</sup>, does not touch on sovereignty at all: “Unless the argument is that this arrangement is now so fixed and permanent that it is no longer within the political authority of a Member State to withdraw from these treaty arrangements, then no issue of ultimate authority - and no question of sovereignty - is involved. This is an argument that, to my knowledge, no jurist has yet made.”<sup>36</sup> Although MacCormick can hardly be criticised for failing to predict the future, the apparently impending exit of the United Kingdom from the bloc forecloses the possibility of that argument being made now. Although Loughlin himself elsewhere specifies ways in which

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<sup>33</sup> “Having lost the sense of this distinction, this is precisely what is now happening.” Loughlin, M, ‘Why Sovereignty?’ in Rawlings R, Leyland P & Young A (Eds) *Sovereignty and the Law* p39

<sup>34</sup> *Ibid* p38-39. The reference to the necessity of the division and limitation of the powers of the government for the maintenance of political authority recalls the ideas of the strengthening of potestas that ensues upon increasing institutional conditioning of the exercise of potentia. The potentially radical implications in the context of contemporary Scotland will be examined in detail in section B of this chapter.

<sup>35</sup> “Certain powers of government - governmental competences - have undoubtedly been restricted and limited as a consequence of EU membership; just as certain powers of government are limited and restricted whenever a State enters into any treaty. But this has no bearing on sovereignty.” Loughlin, M, ‘Why Sovereignty?’ in Rawlings R, Leyland P & Young A (Eds) *Sovereignty and the Law* p47

<sup>36</sup> *Ibid* p46

he considers sovereignty may be ‘eroded’ by the EU institutions<sup>37</sup>, on this point he is particularly scathing; the position adopted here by MacCormick “suggests the absence of even an elementary grasp of the science of public law”<sup>38</sup>.

The way in which MacCormick’s simplistic rendering of sovereignty is open to criticism has been acknowledged by Walker, who noted that “one may challenge MacCormick’s understanding of internal sovereignty as unduly narrow, impatient to give up on a deeper conception of the coherence of the modern polity”.<sup>39</sup> Walker’s own work, a more nuanced variation of MacCormick’s constitutional pluralism, eschews the latter’s post-sovereign language in favour of the slightly less categorical ‘late sovereignty’<sup>40</sup>. For Walker, “late sovereignty is still sovereignty”<sup>41</sup>. He is reluctant to follow MacCormick in rejecting the concept of sovereignty altogether, claiming that late sovereignty “remains connected to the modernist paradigm to the extent that sovereignty language and its associated ideas of ultimate authority continue to be used across existing States and, indeed, are increasingly endorsed across other non-State sites of political or legal community”. Late sovereignty is described as “an ‘emerging sense of ‘autonomy without territorial exclusivity’”<sup>42</sup>, in which “the claim to authority as flowing from and through some underlying unity is no longer combined with the notion that it need be monopolistic within the territorial boundaries of the polity.”<sup>43</sup> Here the pluralist inheritance of MacCormick is clear, but Loughlin admits that Walker at least engages with the question of authority grounded in loyalty<sup>44</sup>.

Walker’s distinction between “frames” and “claims” - sovereignty as the “stable *frame* through which the legal world as a whole is apprehended and shaped as well as the

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<sup>37</sup> “Of particular significance is that this innovation has been used to promote economic over political freedoms, and using law as an instrument for realising a liberalising, de-regulatory agenda. This instrumentalisation of law, without the explicit authorisation of member states, suggests the deployment of *potentia* without *potestas*. To this extent, it amounts to an erosion of sovereignty.” Loughlin, M, ‘The Erosion of Sovereignty’ p73

<sup>38</sup> Loughlin, M, ‘Why Sovereignty?’ in Rawlings R, Leyland P & Young A (Eds) *Sovereignty and the Law* p46. Of course by public law Loughlin here means *droit politique*, the law which constitutes a political unity, not the legal order enacted by a political unity (positive law).

<sup>39</sup> Walker, N, ‘Scottish Nationalism For and Against the Union State’ in Walker, N (Ed), *MacCormick’s Scotland* p171

<sup>40</sup> “One may object that such an approach,” [MacCormick’s post-sovereign position] “by focusing too much on the *display* of institutional diversity too readily dismisses what is resilient and what remains distinctive about sovereignty as it is imagined and understood within the polity, namely its capacity to represent and re-order the manifest and manifold diversity of the political domain as a unity. This, indeed, is the main reason why, in my own work, I prefer the terms ‘late sovereignty’ to post-sovereignty in mapping and evoking the decline of the Westphalian order.” *Ibid*. It is submitted that Walker here tacitly admits the core vulnerability Loughlin sees in the pluralists’ theories: He clings to this modified sovereignty because of the enduring lack of any alternative conceptual vehicle for legitimate authority, despite the considerable academic effort expended in the fruitless search for one.

<sup>41</sup> Walker, N, ‘Sovereignty Frames and Sovereignty Claims’ in Rawlings R, Leyland P & Young A (Eds) *Sovereignty and the Law* p26

<sup>42</sup> *Ibid*

<sup>43</sup> *Ibid*

<sup>44</sup> “MacCormick, I suggested, fudged the questions of power and authority. Walker, by contrast, does address them, but only implicitly.” Loughlin, M, ‘Constitutional Pluralism: An Oxymoron?’ p21

discursive form of a *claim* variously, and sometimes speculatively or contentiously, made in respect of a State, a federal province, a nation, a people, a supra-State, a constitution, a constitutive rule or rule-set, a governmental complex, or a specific institution of government or governance” - seems at least to recognise that the manifestation of sovereignty has legal *and* political facets<sup>45</sup>, although here again we see the characteristic pluralist reluctance to discriminate as to the plausibility of these various claims to sovereignty. The stubborn persistence of the concept of sovereignty appears to frustrate Walker, impatient to move beyond its limitations<sup>46</sup>. In his rush to abandon the idea, however, he admits a gaping conceptual chasm is opened up: “...if there is a sovereignty shaped hole emerging in our understanding of the legal and political universe, how do we begin to conceive of an alternative matrix of political agency? For sovereignty will not fade and become irrelevant in a conceptual vacuum, but only to the extent that such an alternative emerges and ‘catches on’. Yet precisely because we still tend to think, however implicitly, with a sovereigntist frame and perspective, we lack the means to assess how likely the emergence of such an alternative paradigm might be or what shape it might take.”<sup>47</sup> This observation serves to illustrate that if sovereignty is to cease to be relevant, then so will the entire conceptual edifice of public law, and perhaps Walker therefore pre-empts too much. His account lacks any specific proposal for an alternative way of constructing the relationship between law and politics; as such, it is of limited usefulness in comparison to Loughlin’s detailed explanation.

Building on a more sophisticated - if still under-specified - treatment of sovereignty than MacCormick’s, Walker’s work is more alive to the criticisms that can be made of a purely normativist and positivist vision. Building on the political theory of James Tully, Walker recognises that the “normative bias”<sup>48</sup> created by the modern positivist tendency can lead to what he labels “constitutional fetishism”.<sup>49</sup> He seeks to establish whether a more sophisticated type of constitutionalism<sup>50</sup> is possible, and if it is, whether it can prove a useful tool for regaining meaningful democratic control of public power when “an increasing proportion of governmental power is being exercised in arrangements

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<sup>45</sup> Indeed Walker uses the device of “frames” and “claims” to lament the tendency of the British academy to collapse the entire concept of sovereignty into its institutional mark, the Queen-in-Parliament, thereby eliding or blurring the very distinction between the wider concept and its manifestation in this single ‘mark’. Walker, N, ‘Sovereignty Frames and Sovereignty Claims’ in Rawlings R, Leyland P and Young A (Eds) *Sovereignty and the Law* p29

<sup>46</sup> *Ibid* p28-33

<sup>47</sup> *Ibid* p27

<sup>48</sup> Walker, N, ‘The Idea of Constitutional Pluralism’ (2002) *Modern Law Review* 65 (3) 317-359, p328-331

<sup>49</sup> *Ibid* p324-7

<sup>50</sup> Walker seeks to promote an imaginative and diverse constitutionalism which promotes “variable reiteration” of constitutional forms, in opposition to a tendency toward a “conservative reproduction” of conventional sovereign states which has a limiting effect on fresh constitutional thinking. Walker, N, ‘Sovereignty Frames and Sovereignty Claims’ in Rawlings R, Leyland P & Young A (Eds), *Sovereignty and the Law* p27

established beyond the frame of the nation-state”<sup>51</sup>. He, like MacCormick, takes the EU as his live specimen of constitutional pluralism, and asserts that the EU now makes its own constitutional claims, and that these claims exist alongside the constitutional claims of member states. In Walker’s scheme, constitutionalism, as well as being a set of practices observed in relation to governmental structures in a certain type of modern polity, is also a *lingua franca* through which polities which share the same ideal can not only communicate but invigorate and strengthen each other - “a structural characteristic of the relationship between certain types of polity”<sup>52</sup>.

He considers that in the context of the UK, and other polities with comparable regional governing arrangements<sup>53</sup>, the constitutional dynamic operating externally between EU and member state is replicated internally between the central authority and devolved or federated centres of power, creating in these polities a multi-level, variegated system of interlocking legal orders, each with their own claims to legitimacy worthy of being taken seriously<sup>54</sup>. He seeks to use the constitutional pluralist method to suggest a means of developing new forms which can be used to legitimate authority, based on broad constitutional values which can help negotiate this emerging layered system of governance in order to better control the more unaccountable forms of power which increasingly exist outside the nation state. Loughlin considers this project is explicitly political where MacCormick’s was excessively legal and summarises the “great ambition” of the theory as no less than “the European Union rescue of the constitutional state”<sup>55</sup>. Walker’s scheme seems to suggest that power (*potentia*) and authority (*potestas*) can perhaps be reconciled in the EU through widespread adoption of a set of complex but universal constitutional values<sup>56</sup>, and seeks to recover a more balanced sense of constitutionalism from the dangers of a monolithic and imperial liberal positivism.

While this project may well amount to a laudable ambition, it is submitted that Walker’s constitutional pluralism is as unsuited as MacCormick’s earlier version was as a vehicle for

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<sup>51</sup> Loughlin, M, ‘Constitutional Pluralism: An Oxymoron?’ p19

<sup>52</sup> Walker, N, ‘The Idea of Constitutional Pluralism’ p340

<sup>53</sup> Walker cites Canada, Belgium, Spain and the UK as ‘quasi-federal’ states, in which an asymmetrical treatment of their provinces’ ‘created a looser and more fluid political form’. Walker, N, ‘Sovereignty Frames and Sovereignty Claims’ in Rawlings R, Leyland P & Young A (Eds) *Sovereignty and the Law* p25

<sup>54</sup> “So when considering the overall challenge to the universality, comprehensiveness, and mutual exclusivity of the modern system of States and its sovereigntist frame, we must look to both flanks - to pressures from the substate interior as well as from the transnational beyond.” *Ibid* p26. In an echo of MacCormick’s indiscriminate collection of apparently equal ‘legal orders’, Walker here also includes the WTO in his set of competing sites of authority which threaten the once-exclusive domain of the nation-state.

<sup>55</sup> Loughlin, M, ‘Constitutional Pluralism: An Oxymoron?’ p21

<sup>56</sup> Loughlin believes that Walker is ambiguous about whether his project is a descriptive or a normative one, noting his claim that “the attraction of constitutional pluralism ‘is a matter of both of fact and of value’”. *Ibid*. See also Walker, N, ‘Constitutional Pluralism in Global Context’ in Avbelj, M & Komarek, J (Eds) *Constitutional Pluralism in the European Union and Beyond* (Oxford, Hart, 2012) p18

conceptualising the recent centrality of constitutional change and confrontation in Scotland's public sphere. If, as the pluralist school posits, the existence of constitutional pluralism is mutually beneficial to the multiple centres of authority involved, and if the interaction of heterarchical systems of law and government is something to be celebrated and even encouraged as a means to strengthen the authority of each of the participating orders, then how is the demonstrable failure of devolution to settle the question of Scotland's accommodation within the constitutional arrangements of the UK to be explained? Experience of something approaching constitutional antagonism, rather than pluralism, between the centres of power in London and Edinburgh over the past decade suggests that confidence in the idea of concurrent multiple centres of constitutional authority coexisting harmoniously is misplaced, if not downright hubristic, in the Scottish context. If the pluralists are correct, we should be able to expect that the years since devolution would have resulted in a strengthened British state, creating a rich texture of interwoven yet distinct centres of constitutional authority respectful of each other's jurisdictions. Given that this is more or less the opposite of what has actually happened, the pluralist analysis seems inadequate.

An ever simpler question occurs, which presents an equally serious problem for the pluralist model. If we adopt their approach and accept there are now multiple centres or levels of constitutional authority in the UK, "each of which makes sovereigntist or supremacy-based claims in respect of the other", and that this in turn means that the "connection between ultimate authority and exclusivity of authority"<sup>57</sup> has been broken, then how can we establish which order will prevail in a given constitutional conflict? It will be recalled how in the recent case of *Miller*, discussed in Chapter II<sup>58</sup>, that despite having the highest form of UK law on its side in an Act of the Westminster Parliament<sup>59</sup> the Scottish Government failed to win its case. A resoundingly orthodox judgement of the UK Supreme Court confirmed that Westminster so far retains the power that Walker and MacCormick believed was irreversibly<sup>60</sup> being lost, upwards to supra-state, and downwards to sub-state, to new sites of authority outwith the exclusive control of the centre, by confirming that not only can the UK leave the EU under its own steam, but also that its central power remains free to dictate to manner and form of its departure without

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<sup>57</sup> Walker, N, 'Sovereignty Frames and Sovereignty Claims' in Rawlings R, Leyland P & Young A (Eds): *Sovereignty and the Law* p26-27

<sup>58</sup> Full citation at Chapter I n34

<sup>59</sup> Specifically s2 of the Scotland Act 2016

<sup>60</sup> "Yet late sovereignty is both a distinctive and probably an irreversible phase in the history of modern sovereignty." Walker, N, 'Sovereignty Frames and Sovereignty Claims' in Rawlings R, Leyland P & Young A (Eds) *Sovereignty and the Law* p26

reference to Scotland's devolved government. This is difficult to square with Walker's claim that states are "increasingly bereft of sovereign power."<sup>61</sup>

The failures of pluralism as an adequate descriptive account demonstrate just how crucial a function sovereignty in fact performs as an expression of unity; if the state is a scheme of intelligibility, a social construct through which forms of modern government are made coherent, then it is critical that there is closure and finality. Importantly, in Loughlin, the foundational constitutional moment is one which "both constitutes a unity (a state) and establishes a hierarchy (a governing relationship)."<sup>62</sup> An open-ended dynamic of constitutionalism which brooks no definite physical or theoretical border is one which, precisely because of its lack of unity and hierarchy, cannot sustain the ultimate authority required to manage the irresolvable conflict of politics. That ultimate authority is created and sustained by the function of the principles of *droit politique*, of which sovereignty is one. They create an autonomous world wherein the modern state can, to a greater or lesser degree, internalise the conflicts of the political realm - "the negotiation of the brokenness of politics and the handling of tensions within the state"<sup>63</sup> - using juridical forms in order to ensure that its forms of governance hold the polity together rather than encourage its dissolution. For Loughlin, the state which is created and maintained by these principles is founded on the three indispensable elements of *Staatsvolk*, *Staatsgebiet*, and *Staatsgewalt*. Walker and MacCormick's vision suggests that we can do without, and perhaps do better without, fixed definitions of all three, instead adopting situation-specific definitions of people, territory and government dependent on the question at hand. If the pluralists wish to proceed in this direction then it follows that they must indeed abandon the related concepts of state and sovereignty. But in order to do so they must specify an alternative framework through which to understand the relations of power and authority in modern governmental regimes, and this is something that they have so far signally failed to do<sup>64</sup>.

A third professor of public law at Edinburgh, Stephen Tierney, has explicitly recognised the value of Loughlin's relational sovereignty as a device which allows us to escape the "otiose" debate between the respective "caricatures... drawn by the 'law as politics'

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<sup>61</sup> Walker, N, 'Scottish Nationalism For and Against the Union State' in Walker, N (Ed) *MacCormick's Scotland* p172

<sup>62</sup> Loughlin, M, 'On Constituent Power' in Dowdle, MW and Wilkinson, M (Eds) *Constitutionalism Beyond Liberalism* p173

<sup>63</sup> Tierney, S, 'Sovereignty and the Idea of Public Law' in Christodoulidis, E and Tierney, S (Eds) *Public Law and Politics* p15

<sup>64</sup> "We cannot move beyond sovereignty without destroying the idea of public law. That may of course be the destination that certain radical thinkers, using the language of post-sovereignty, are driving towards. If so, they must do something that has not yet been done: develop a conceptual vehicle through which to address the issues coherently." Loughlin, M, 'Reflections on the Idea of Public Law' in *Ibid* p56



reductionists on the one hand, and the ‘pure theorists of positive law’ on the other”<sup>65</sup>. Tierney’s work has dealt in detail with a particular brand of constitutional pluralism he calls the ‘plurinational state’; not so much a state with a plurality of legal orders (*Staatsgewalt*) but a state in which there is a plurality of nations or peoples (*Staatsvolk*), which he calls “demotic pluralism”. He directly engaged with Loughlin’s concept of relational sovereignty in a thoughtful commentary on *The Idea of Public Law*, in which it seems he saw an opportunity for rethinking the underlying theory of Scotland’s accommodation in the UK. Alongside Walker and MacCormick, Tierney criticises the “rigid positivist approach,” which in his account “repeating simple mantras about the ‘sovereignty’ of Parliament as an abstract higher norm, becomes increasingly irrelevant in ontological terms as the normative significance of Westminster’s legislative supremacy is upturned by political plate changes which re-order the constitutional landscape beneath the surface of legal formalism.”<sup>66</sup> He recognises that the obsession with the institutional complex of the Queen-in-Parliament is reductive, leading to a “narrow positivism” which “has tended to foreclose debates about sovereignty by applying a restrictive focus”<sup>67</sup>.

Tierney adopts Loughlin’s account of relational sovereignty to ask whether the sovereignty Loughlin describes must be indivisible; he questions whether ‘sub-state’ nations can maintain “different sovereign relationships both with their sub-state governments and with the central government of the state”. This project is no less ambitious than those encountered in the work of the other pluralists, with Tierney accepting that his idea of “variegated pathways of identity and loyalty” animating plural political relationships between peoples and a state requires “the reinvention of the state along plurinational lines which will be capable of containing within it deep societal pluralism and the patterns of shared and disaggregated sovereignty which are required to make it viable.”<sup>68</sup> His approach, like that of Walker, suffers from a lack of specification on how that radical version of the future might actually arise or maintain itself.

Loughlin, rephrasing Tierney’s inquiries as “can the Nation be divided? Can the Nation be superseded?” says his “questions can easily be answered”, and he answers in the negative. Where MacCormick took the division of governmental competences as a sufficient indicator that sovereignty had been ‘divided’, Tierney appears to attempt to win the battle on the other flank, arguing that “societal, and hence demotic or constituent,

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<sup>65</sup> Tierney, S: ‘Sovereignty and the Idea of Public Law’ in *Ibid* p15

<sup>66</sup> *Ibid*

<sup>67</sup> *Ibid* p16

<sup>68</sup> *Ibid* p24-25

plurality”<sup>69</sup> necessarily means that “sovereignty within a state is in fact divisible, or at least shared.”<sup>70</sup> Loughlin considers that Tierney has here, like his predecessors, reduced the state as a scheme of intelligibility to *Staatsgewalt*, the particular manifestation of a legal order. He has equated a complex division of power (*potentia*) between devolved and central governing institutions with a division of state and sovereignty, which brings us back to the now familiar tenet from Bodin: whilst the powers of governing can and should be divided, sovereignty cannot. Tierney’s treatment is also open to the criticisms made of the preceding pluralist theories. His assertion that a set of concurrent sovereignty relationships is desirable or even possible fails to grasp sovereignty as the expression of unity and finality. It can only perform its function as “an authoritative expression of a particular way of being”<sup>71</sup> if it is in fact authoritative, and a multiplicity of claims to an authoritative way of being is guaranteed to generate conflict which undermines unity.

It is submitted that the overall effect of the each of the pluralist errors outlined, both separately and cumulatively, is that none of the three foregoing accounts specifies with sufficient clarity the principles which are at work to shape the constitutional terrain in Scotland. In the following, final section of this thesis it will be argued that an entirely novel application of Loughlin in the context of Scotland is possible and indeed preferable to the foregoing pluralist approaches, an application which does not need to modify his account in the way that Tierney considers necessary. The insights made possible by Loughlin’s model reveal how, requiring nothing more than the ordinary workings of immanent precepts of political right, the system of devolved Scottish government has become a serious challenge to existing governmental arrangements in ways which have so far remained obscure. Loughlin’s approach allows us to conceive of the constitution of a Scottish public sphere, created and sustained simply by the operation of public law in its widest sense, to unite the legal to the political in a way which highlights their inextricability and specifies their relationship with greater clarity than any pluralist account has so far managed, and which, most importantly, allows us to more clearly perceive the challenge that Scottish public sphere represents to the UK’s unitary state.

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<sup>69</sup> *Ibid* p23

<sup>70</sup> Tierney, S, ‘We The Peoples: Constituent Power and Constitutionalism in Plurinational States’ in Loughlin, M & Walker, N (Eds) *The Paradox of Constitutionalism* p239

<sup>71</sup> Loughlin, M, ‘Reflections on the Idea of Public Law’ in Christodoulidis, E and Tierney, S (Eds) *Public Law and Politics* p56

## B. THE MORE RADICAL CHALLENGE

It has been observed that for Loughlin the capacity of a Scottish Parliament to give “institutional expression to Scots political identity”<sup>72</sup> provided a more radical challenge to the sovereignty of the UK state than the growth of “new institutional frameworks of governance” at the EU level which inspired the investigations of the scholars whose work was addressed in the preceding chapter. The implications of this statement<sup>73</sup>, and the insights provided by Loughlin’s theory into the vexed question of the constitutional position of Scotland in the wider United Kingdom, are the subject of this final section. It is submitted that the application of Loughlin’s ideas illuminates a nascent Scottish public sphere which remained invisible or indistinct in alternative approaches, a reluctance to engage with the rich vein of continental jurisprudence mined by Loughlin having allowed the work done by the principles of *droit politique* in Scotland to pass by unremarked.

The central contention of this section is that both the traditional Diceyan orthodoxy and the *de rigueur* school of constitutional pluralism discussed in Chapter III fail to appreciate that the arrangements instituted by the Scotland Act 1998 were in fact capable of constituting a new scheme of intelligibility in Scotland; a Scottish public sphere, or state, where the power generated and expressed depends solely on the inherent precepts of an autonomous Scottish political world and one which is capable, by the operation of those same precepts, of strengthening itself. Rather than containing and neutralising the aspirations forcefully set out by the constitutional convention, as the promoters of devolution argued it would, the reintroduction of a Scottish Parliament in fact filled a gap in the Scottish state - or more precisely, a gap in the Scottish *Staatsgewalt* - which emerged in 1707 and which meanwhile precluded any possibility of a coherent Scottish scheme of intelligibility. The new, democratically-elected assembly and government composed from its membership, which exercised public power through the medium of law, was uniquely capable of knitting together the fragments of the old Scottish state into a new public sphere. The institution performed the crucial function of representation which allowed a distinctly Scottish *Staatsvolk* to emerge concurrently with a distinctly Scottish *Staatsgewalt*, engaging the dialectic between *potentia* and *potestas* which sovereignty

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<sup>72</sup> See Chapter II n49

<sup>73</sup> It should be noted that for all the intrigue held out by this statement, it was made by way of an aside in a footnote in IPL at p95. The specific position of Scotland is left underdeveloped in Loughlin, and he even seems to contradict himself in this regard when replying to Tierney’s commentary, stating that the devolved arrangements “generally do not affect sovereignty”. Loughlin, M, ‘Reflections on the Idea of Public Law’ in Christodoulidis, E and Tierney, S (Eds) *Public Law and Politics* p56

expresses and enabling the formation of a Scottish scheme of intelligibility - an alternative “way of being that is revealed in its logic of action and singular expression of power”<sup>74</sup>.

It is not being argued that *any* additional institution of government in Scotland would have produced circumstances capable of supporting a distinctly Scottish sovereignty relationship. In John Locke’s *Two Treatise of Government* “commanding means law-making”<sup>75</sup>, and it has long since been a constitutional commonplace in Britain that the legislative power stands “supreme” above all others in the hierarchy of constituted power<sup>76</sup>. A parliament is the institution in modern forms of government which makes law and thereby performs the power-distributive or legal function of sovereignty; even strong executives with a grip of the legislative initiative must keep an eye on their parliamentary majority, and despotic governments which have no need of them to formulate rules pay lip-service to the principle by maintaining sham assemblies.

A parliament is also essential given its capacity for representation, and parliaments perform a dual function with respect to representation. The first and simpler function uses the more commonly-encountered definition of the term; it deals with the concept of the representation of the people by their agents in the processes of government, agents who are presumed to act in the interests of their electors or at least for the common good of the whole. This form of representation is usually expressed, in oversimplified terms, as the method by which the people ‘rule themselves’<sup>77</sup>. In Loughlin, free elections to public offices, the differentiation of powers and limitation of terms lead to a situation in which the constitution of the public sphere “is based on the concepts of representative, responsible and accountable government”<sup>78</sup>. This is the basis of the devolved Scottish government; indeed, it was at least partly envisaged as an answer to a perceived ‘democratic deficit’ in late 20<sup>th</sup> century Scotland. It was noted in Chapter II that this era, particularly in relation to the Conservative governments led by Margaret Thatcher, was often characterised as a period of rule in which hostile administrations, often ideologically opposed to Scottish interests, imposed controversial policies without a popular mandate.

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<sup>74</sup> Loughlin, M, ‘On Constituent Power’ in Dowdle, MW and Wilkinson, M (Eds) *Constitutionalism Beyond Liberalism* p155

<sup>75</sup> Gencer, B, ‘Sovereignty and the Separation of Powers in John Locke’ (2010) *The European Legacy* 15 (3) 323-339, 332

<sup>76</sup> “For, what can give laws to another must needs be superior to him, and since the legislative is no otherwise legislative of the society but by the right it has to make laws for all the parts, and every member of the society prescribing rules to their actions, they are transgressed, the legislative must needs be the supreme, and all other powers in any members or parts of the society derived from and subordinate to it’.<sup>77</sup> *Ibid*

<sup>77</sup> IPL p53

<sup>78</sup> Loughlin seems to consider that this basis is not necessarily guaranteed by the precepts of political right: it is simply the flavour of the month: “It is, of course conceivable that the arrangements establish authority on some monarchical figure in whom the powers of government are entrusted, but in the modern world this is an unlikely form of government.” FOPL p229

In terms of Loughlin's theory we can view that period as one in which the *potentia* exercised by the UK government was undermined by a lack of complementary *potestas*, given that the sense of allegiance which forms the basis for *potestas* was in notable absence in the Scotland of the time<sup>79</sup>. The inability of a distinct Scots political identity to find institutional expression in this period is at the root of the frustrations that eventually boiled over into the claims of the constitutional convention. On this view, devolution can be characterised as a plan for the accommodation of a distinct Scots political identity into the structures of the UK constitution in a non-threatening way; an attempt by the UK state to improve its depleted stores of *potestas* and thereby shore up its authority in relation to Scotland, whilst at the same time taking care not to disturb the underlying conceptual foundations of its constitution. It will be argued that devolution failed at this task, but it is at any rate clear that the Scottish Parliament that eventually emerged has at least as strong a claim to represent Scotland in the simpler sense as its Westminster equivalent.

The representation which takes place in this arrangement also has a more complex and arguably more important function; that is, as the representation which makes "the political world, which has been formed in thought and set to work in practice"<sup>80</sup> possible. To the extent that the Scottish people can have agency as a constituent power, or retain power over a constituted form of government, it is only by virtue of the "transcendent act of symbolic representation"<sup>81</sup> which took place when the devolved parliament was brought into existence. This is what Loughlin means by the "institutional expression of Scots political identity", and with regard to its importance Loughlin is categorical: "Without this dimension of symbolic representation, there is no constituent power."<sup>82</sup> It was noted in Chapter III the political power that sustains a governing order only comes into existence upon such an act of representation: neither the people as an identifiable unity ('*the people*') nor the legal form it agrees to submit to takes precedence<sup>83</sup>. Until their influence is mediated through the channels of law-bound institutions the people have no political agency; the Scottish people have "neither a will capable of decision nor a power capable of action"<sup>84</sup>. At this detailed level, the statements in Chapter I about Scotland's status as a nation require to be qualified somewhat<sup>85</sup>. Whilst it is true that Scotland is a nation in

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<sup>79</sup> Interestingly, a contemporary example from that era also suggests that the correlation between *potestas* and *potentia* is real; the poll tax was so unpopular it was basically unenforceable, suggesting that consent is indeed directly connected to the actual strength of governmental power. Billions of pounds in uncollected taxes had to be written off after a widespread campaign of civil disobedience in the form of non-payment.

<sup>80</sup> FOPL p228

<sup>81</sup> Loughlin, M: 'On Constituent Power' in Dowdle, MW and Wilkinson, M (Eds) *Constitutionalism Beyond Liberalism* p171

<sup>82</sup> *Ibid* p172

<sup>83</sup> See Chapter III C

<sup>84</sup> FOPL p228

<sup>85</sup> See Chapter I n12

almost all sociological and commonplace senses of the word, for Loughlin the cultural, historical or traditional senses of Scottish nationhood do not amount to nationhood in the juristic sense of *the* nation: he considers it is incorrect to suggest that the multitude of actual people possesses a concrete unity entitling them to institute their chosen form of government<sup>86</sup>. It must also be borne in mind that MacCormick's alternative, that there is no such thing as a people without them being designated as such by a legal order<sup>87</sup>, equally falls to be dismissed by Loughlin.

The instituting of a form of government, made conceptually complete by the Parliament, is the foundational moment, prior to which any discussion of sovereignty is premature. Sovereignty emerges out of this moment of symbolic representation as the unifying concept of the autonomous socially-constructed world of the political. It resides in the relationship between constituent and constituted power. It logically follows that the assertions of sovereignty made on behalf of 'the people' in pre-devolution Scotland did not speak to Loughlin's complex concept of sovereignty. Until the Scottish people could be retrospectively recognised as the objects and subjects of the legal order instituted by the Scotland Act 1998, an order whose structures were capable of generating a distinctly Scottish political authority and expressing the power produced through a complementary Scottish governmental apparatus, they could not for Loughlin have any juristic existence as a distinct Scottish *Staatsvolk*; the only constitutional place for the Scottish people was as a minority of a broader UK *Staatsvolk*, itself an essential part of the wider UK state.

Similarly, the surviving pre-union institutions of Scotland could never have amounted to a functional Scottish *Staatsgewalt* before devolution. Without a Parliament capable of representing the Scottish people and providing a democratically accountable means of exercising the lawmaking function on the Scottish level, a Scottish scheme of intelligibility could only ever be incomplete, irrespective of its independent governmental machinery. In the pre-devolution UK state, the *potestas* which powered the Scottish institutions had to be drawn from Westminster. However autonomous the old Scottish institutions might have appeared prior to devolution, the *potentia* they expressed remained inextricably and unavoidably linked to *potestas* generated in other parts of the UK. Scotland's governing arrangements could therefore only be coherently conceived of as part of a wider British state, a broader scheme of intelligibility which failed to make sense if Scotland's constitutional dynamics were considered in isolation. As Scots had no Parliament of their

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<sup>86</sup> "Contrary to the decisionist claim, it cannot be equated to the actual material power of a multitude. This is the (democratic) materialist fallacy, entailing the reduction of constituent power to fact." Loughlin, M, 'On Constituent Power' in Dowdle, MW and Wilkinson, M (Eds) *Constitutionalism Beyond Liberalism* p171

<sup>87</sup> See n29 above

own prior to devolution, there was no way for their political identity to form a distinct component of their constitution. Scots were represented in the constitution of the UK through the Westminster Parliament, and their status as a minority of its electorate inevitably broke the link between the Scottish people and the Scottish institutions.

It is submitted that the foundational moment brought about by devolution changed this by creating a new constitutional framework which brought a purely Scottish scheme of intelligibility into existence. The Scottish *Staatsvolk* and *Staatsgewalt* established their dynamic relation within the physical space of the country's long-established *Staatsgebiet*. In this way a state capable of being rendered as coherent conceptual whole *per* Loughlin came into existence in Scotland thanks to the institutional expression of Scots political identity made possible by the Scotland Act 1998. It has no need of any ongoing input from wider British structures for its maintenance. A Scottish government exercises *potentia* by making laws which have territorial effect to the extent of Scotland's borders, powered by the *potestas* created by the association of a formally equal Scottish citizenry in its political system. The power which fuels a state - its *potestas* - began to be generated as soon as the Scottish people were differentiated and represented in their own distinct form of government. It is this power, generated by Scottish political association<sup>88</sup>, which is the basis for the authority of the devolved Scottish state, not a Westminster Act of Parliament. The amount of political power available to the Scottish *Staatsgewalt* is variable, but its level is dependent on the allegiance of the Scottish population to their constituted governing arrangements, not on its supply by the UK state. The political power generated in this way finds its outlet in the lawmaking capacity of the Scottish state, and the dialectic represented by sovereignty is made complete and coherent. The consequence of crucial function of the Parliament is therefore that it makes possible a scheme of intelligibility in Scotland which can produce its own *potestas*, derived from the specific political association required by virtue of its existence as an elected assembly.

This presents a major problem for the UK state. If it is accepted that the devolved arrangements are capable, as has been argued, of engaging the principles of *droit politique* to create and maintain a Scottish scheme of intelligibility, then that scheme currently exists alongside the UK state, but is in no way dependent upon it. Because it is possessed of both the power-generative and power-distributive capacities of sovereignty, it is self-sustaining. It will be recalled from Chapter III that the dialectic of sovereignty, once established, relates *potentia* to *potestas* in a feedback loop that makes the authoritative concrete power available to a state directly proportional to the allegiance of

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<sup>88</sup> See Chapter III n6

its population. On this view, the more the Scottish state claims the allegiance of its citizens the stronger it becomes. From within the UK state, an alternative Scottish way of constructing political reality can grow itself in stature and influence if it is able to effectively engender the allegiance of those ruled by the laws which shape it. This is the same intricate interplay between *potestas* and *potentia* that is taking place concurrently at the level of the UK state, in ways which can similarly either weaken or strengthen its power and authority. If constitutional pluralism, *pace* Walker, means the coexistence of more than one concurrent plausible constitutional claim in the same state, then surely Scotland in this way provides a more realistic example than the EU? Despite Walker's bold assertion that it makes constitutional claims which rank equally with those made by its member states<sup>89</sup>, the EU has so far failed to adopt a constitution. If Loughlin is correct that only a state can have a constitution then perhaps this is unsurprising; even MacCormick accepted that the EU did not amount to a state. Scotland, on the other hand, was once a state, and it has its own long constitutional history, interlinked with but distinct from its English analogue, and the ways in which that tradition was tapped in the campaign for a devolved parliament were examined in Chapter II.

The competing states revealed are alternative schemes of intelligibility on offer to Scots who find themselves represented in two *Staatsvolk* at once. Those citizens can choose to be part of the UK state or Scottish state as they wish, but here we arrive at the heart of the problem presented by the concurrence of dual public spheres, and come up against the fundamental incompatibility of pluralism with Loughlin's sovereignty: in his model, the Scots cannot be citizens of two states at once. It has been argued that sovereignty is an expression of unity and its function is to form a closed system of understanding a political world. We saw in Chapter III how Tierney proposed that two sovereignty relationships might coexist in Scotland, but for Loughlin the illimitability and indivisibility of sovereignty precluded the possibility<sup>90</sup>.

Perhaps the background against which Scottish devolution took place meant that the dynamic represented by sovereignty took effect faster than might usually be expected. In the more familiar example of a foundational moment, an entirely novel state is forged when its constitution is enacted and new institutions of government come into existence, giving that constitution the "necessary embodiment" it requires<sup>91</sup>. The new scheme of intelligibility created in this example needs time to gain the allegiance of its citizenry, but

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<sup>89</sup> Loughlin, M, 'Constitutional Pluralism: An Oxymoron?' p20

<sup>90</sup> See Chapter IV A

<sup>91</sup> Chapter III n29



the time it required in Scotland might have been much shorter thanks to the endurance of the fragments of its pre-Union state, which Walker notes:

had its own political institutions and other social and cultural institutions typically associated with the civil society of an autonomous state, such as Church, education system, economic organisations and professional bodies... with the exception of the old Parliament, these forms and manifestations of autonomy survived the Union and supplied a distinctive juridical, governmental and societal vehicle to carry forward Scottish autonomy to the present day.<sup>92</sup>

The “civil society of an autonomous state” here is wider than the mere institutions of the ruling authority, and Walker’s broad description coincides with Bosanquet’s “entire hierarchy of institutions” which give expression to the political world. If one of the lessons of Loughlin’s theory of public law is that the idea of the state must be rescued from a reductive tendency to view it merely as the *Staatsgewalt*, then it is notable that Scotland possessed strong institutions with an unbroken history of the sort which continental theorists, such as Foucault and Hegel, argued should be included in the definition of the modern state<sup>93</sup>. The institutions in Scotland which operated largely free of the control of wider pan-British power structures included large swathes of its legal system in addition to the “manifestations” enumerated by Walker.

The new Scottish state was therefore off to a running start: it instantly had under its control a strong suite of modern governing institutions, kept warm by their embrace in the British state in the period between Scottish Parliaments, and there was consequently no need of the time required to build every institution from scratch. The people were used to the familiar forms in which the new state expressed its *potentia*, and in this way the disjointed pieces of an old Scottish state remained vital and available to be pressed into service in the *Staatsgewalt* of its new incarnation. Perhaps just as important was the faint trace of distinct Scottish constitutionalism which had remained submerged in British constitutional thought. This was the ideal Scottish constitution, and it was also capable of being constructively redirected into the new scheme of intelligibility. It could justify the existence of the new scheme of intelligibility in terms which appealed to a half-forgotten and regularly repurposed ideal of consensual government running from Buchanan to contemporary invocations of the right of the Scottish people to choose their governors, but it had to take the tangible shape of the Scotland Act 1998 and manifest itself in the

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<sup>92</sup> Walker, N, ‘Scottish Nationalism For and Against the Union State’ in Walker, N (Ed) *MacCormick’s Scotland* p180

<sup>93</sup> Chapter III n28

governmental forms that legislation created before it could “animate, guide and give meaning to the workings of the component material entities”<sup>94</sup> .

It must be conceded that the *potentia* exercised in the Scottish scheme of intelligibility is more constrained than it is in the competing wider UK scheme. The limitations on the power of the Scottish Parliament to make laws were described in Chapter II and the stark contrast with the untrammelled power of the Westminster legislature highlighted. However, Loughlin’s theory suggests that rather than being a hindrance to the development of the Scottish state, these constraints are actually capable of conditioning its power. Institutions, it will be recalled, are paradoxically strengthened by restrictions on their exercise of power<sup>95</sup>. If the notion of enabling constraints developed in Loughlin is correct then the positivist emphasis on the shortcomings of Holyrood’s legal competence fails to appreciate that the greater restraint of power taking place at the Scottish level may serve to ensure its more rapid growth. If power more readily wins allegiance when it is more restrained, and if that allegiance is what fosters *potestas*, then it has already been argued that the function of the relation expressed by sovereignty is to ensure that *potentia* grows in tandem with *potestas*. It follows that the more restrained power exercised on the Scottish level through the devolved institutions should more readily win the allegiance of Scots, and the necessary implication is that this will in turn manifest itself in a greater level of *potentia* being available to Holyrood. On this view not only can the Scottish state sustain itself with its own supply of *potestas*, it can also use its necessarily restrained exercise of *potentia* to grow its material power. Although Loughlin never himself expressly joins the notion of enabling constraints to the dialectic model of sovereignty, it is submitted that the intellectual heritage of the former, deriving from Bodin’s treatment of sovereignty, makes it clear that the concepts overlap. Constraints enable by promoting greater allegiance and allegiance is the province of *potestas*.

This thesis should not be read as the advocacy of the emergence of a breakaway Scottish state, nor an argument which asserts the inevitability of such a rupture. A central theme of Loughlin’s theory of sovereignty is that any constitutional settlement, however unique or hard-won, is only ever an incomplete and conditional achievement: sovereignty, by its representation of the power potential of the political, which can never be fully subsumed in legal form, “seeks constantly to irritate the institutionalised form of

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<sup>94</sup> Chapter III B n29

<sup>95</sup> “This follows from a nostrum bequeathed to us by Bodin, and repeated many times since: ‘[T]he less the power of the sovereignty is, (the true marks of majesty thereunto still reserved), the more it is assured Loughlin, M, ‘On Constituent Power’ in Dowdle, MW and Wilkinson, M (Eds) *Constitutionalism Beyond Liberalism* p171 Loughlin elsewhere develops this idea by drawing on Stephen Holmes’s work, which has compared the logic at work to rules of grammar, which rather than constraining language actually make it possible: IPL p137. See also FOPL p231.

constituted authority”<sup>96</sup>. And the associated logic of what Walker described as the “enduringly conditional quality of the Scottish consent to Union”<sup>97</sup> does not tend only in a separatist direction, and the loyalty of the Scottish populace to a pan-UK scheme of intelligibility seems to have so far been the main factor holding the polity together in spite of the opportunities for rupture. If Loughlin is correct, unless the emerging Scottish state proves capable of holding the allegiance of its citizens, support will be withdrawn and its authority will dissipate.<sup>98</sup> The result of the 2014 referendum on independence suggests that a Scottish scheme of intelligibility has yet to displace allegiance to the UK state, but this is difficult to reconcile with the persistence of nationalist government in Scotland and the permanence of constitutional issues on the political agenda. It accordingly appears unrealistic to consider the matter settled. The application of Loughlin advanced here suggests as long as the status quo obtains and Scotland possesses its own *Staatsvolk*, *Staatsgewalt* and *Staatsgebiet* it does indeed have its own sovereignty, and is capable of maintaining a claim to statehood, ensuring the unique threat it currently presents to the UK state persists.

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<sup>96</sup> Loughlin, M, ‘On Constituent Power’ in Dowdle, MW and Wilkinson, M (Eds) *Constitutionalism Beyond Liberalism* p169

<sup>97</sup> Walker, N, ‘Scottish Nationalism For and Against the Union State’ in Walker, N (Ed): *MacCormick’s Scotland* p183

<sup>98</sup> IPL p82; See also Chapter III n58

## CONCLUSION

Of the various approaches to sovereignty critically appraised in this thesis it is clear that Loughlin's is the most considered and detailed. By clearly identifying and then suitably specifying the crucial connection between law and politics his rich and nuanced theory is able to address questions that models dependent on more rudimentary definitions of sovereignty cannot even begin to approach. It has been argued that orthodox British jurisprudential authority has combined its positivist emphasis with an insistence on the separation of the legal and political strands of sovereignty and a reductive focus on power purely as *potentia*. These factors have led to a situation in which the political is considered off-limits to public lawyers, who themselves seem to prefer 'ordinary' public law to the more abstract, wider realm of public law which Loughlin considers the essential setting for an understanding of the subject in all its complexity. A refusal to acknowledge the interplay between the political and the legal has coloured attempts to conceptualise the constitutional dynamics currently at work in Scotland. The severance of disciplines this cleavage necessitates has meant that legal theories have failed to take political input seriously as a topic suitable for juristic inquiry.

The net effect of these individual problems is to have created perfect conditions for the antagonistic contest between the parliamentary sovereignty that British public lawyers assert as the only juristically coherent manifestation of the concept and the popular sovereignty that Scots political actors increasingly invoke as a shield against it. In terms of black-letter law the lawyers are technically correct. The doctrinal correctness of their position notwithstanding, assertions of the popular sovereignty which they shun as purely 'political' have had and, it is submitted, continue to have an effect on the legal structures of government through which public power is exercised in Scotland. To the extent that the topic has been addressed in legal theory the operation of political sovereignty, including its interaction with its legal counterpart, has taken place inside a conceptual black box, connected to legal form in indistinct and under-specified ways.

Rather than dodging these issues, Loughlin's theory faces them head on. He shows how the popular basis of government is a consequence of the principles which organise the modern state and how the allegiance expressed in the relation between citizen and government is turned into public power and expressed as law. By creating a coherent conceptual framework capable of describing how these political and legal aspects of the state influence its constitution and stability, he provides a powerful tool for understanding the forces at work in Scotland's contemporary public sphere. His treatment of sovereignty offers a convincing explanation in juristic terms for the primacy of constitutional issues in

Scottish political discourse and demonstrates that the concept's inherent logic is capable of instantiating and strengthening an alternative Scots political world. Most immediately, Loughlin's approach allows us to transcend the unproductive stand-off between parliamentary and popular sovereignty by showing that it resides in a relationship between the *Staatsgewalt* and *Staatsvolk* rather than existing in any one location.

The durability of both the pre-Union Scottish governing institutions and the traces of its own distinct constitutional tradition meant that sovereignty, with its "configuration of coding information [which] contains the basic elements of state formation"<sup>1</sup>, found fertile territory for its operation once the foundational moment of devolution completed the Scottish *Staatsgewalt* and simultaneously created a complementary *Staatsvolk*. In this context it may appear surprising that sovereignty does not seem to have been engaged in the same way by the elected assemblies of Wales or Northern Ireland, despite the inclusion of both sub-state UK nations in the same New Labour devolutionary programme that resulted in the Scotland Act 1998. It is however submitted that the differences between the three examples are significant enough to warrant distinguishing between them. Scotland's claim for the return of a parliament it had once enjoyed was supported by historical precedent and supported by almost three quarters of its population in 1997. The creation of Wales' devolved assembly, on the other hand, was backed by just 50.3 per cent of its electorate and it lacked the capacity to make laws for almost a decade. Wales was conquered by England in a pre-modern era and it therefore never had state institutions or a constitutional tradition to draw on. The story of devolved government in Northern Ireland stands in even starker contrast to the relative success of the Scottish example; the assembly there was devised as a solution to decades of bloody sectarian violence rather than claimed or offered in a referendum, and its current suspension for failure to form a government is one of five since its current incarnation opened its doors.

The potentially revolutionary implications of the autonomous Scottish public sphere discussed in the preceding chapter are clearly alarming for those who consider that Scotland's best interests are served by its remaining a party to the Treaty of Union. It is therefore worth repeating that it is not being contended that Scotland either should or should not become its own independent state. What is being argued is that in the instant case the lesson which should be taken from Loughlin is that Scotland could now conceivably become its own independent state in a way which was neither possible before devolution nor anticipated at its outset. If, however, a rupture does occur and in the process formalise the new Scottish scheme of intelligibility, then it is argued that the

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<sup>1</sup> Chapter III n63

application of Loughlin described here warns against considering the codification which creates that relative constitution the absolute outer limit of realistic juristic knowledge; rather, it will be a part of longer-term changes in the polity which have been brought about by the operation of immanent principles of political right that Loughlin argues can and should be used to better understand the method by which modern constitutional states are ordered. In other words, Loughlin's unique approach suggests that if a written constitution is formally adopted by a future independent Scottish state, then it will be an example of the law catching up with reality, rather than conjuring it anew - and in those circumstances it is submitted that an insistence on the positivist treatment routinely encountered in British jurisprudence can only serve to obscure much of the complexities involved in the transformation by reducing the constitution of the state to the constitution of the offices of government and ignoring the wider sense of public law as *droit politique*.

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