SPECIAL LECTURE

The English Constitution, the British State, and the Scottish Anomaly

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THE UNION OF ENGLAND AND SCOTLAND has been much in the public mind of late, and will continue to be so. In the election campaign of 1997, Prime Minister Major made weighty appeal to what he was pleased to consider 'one thousand years of history'. This came as a mild surprise to those who thought the Union to have been of substantially more recent vintage. Indeed, during the past twelvemonth it became clear that the union is nowadays more praised than studied. A part of the task of this lecture is to contribute to remedying this situation—naturally, in the direction of more study and less praise. The perspective in which I examine it is that of constitutional theory and the philosophy of law. The aim is to conduct an analytical and critical, but also partially an historical, inquiry into the union constitution and the state it has established.

I start with my middle term, 'The British State', then in the second part am drawn inexorably back to 'the English Constitution', and come to my conclusion of a tripartite argument by pondering what I call 'the Scottish Anomaly'.

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1. The British State

In most parts of the world, though no longer in our own media and official discourse, the state in question is commonly referred to as 'England', 'Angleterre', 'Inghilterra', and the like, and we may in due course reflect why this should be so. But in Edinburgh, I can take it for granted that this 'England' is properly the British State, at present the United Kingdom of Great Britain and Northern Ireland. And if we look for origins, we do not look so far as a thousand years ago. Here are sonorous words culled from almost[1] the last Act of the Parliament of Scotland enacted in January 1707:

> Article 1: That the two kingdoms of Scotland and England shall upon the 1st day of May next ensuing the date hereof, and forever after, be united into one kingdom by the name of Great Britain. . . .
> Article 2: That the succession to the monarchy of the united Kingdom of Great Britain, and of the dominions thereunto belonging, after Her Most Sacred Majesty, and in default of the issue of her Majesty, be, remain, and continue to the Most Excellent Princess Sophia Electress and Duchess Dowager of Hanover, and the heirs of her body, being Protestants . . .
> Article 3: That the United Kingdom of Great Britain be represented by one and the same Parliament, to be styled the Parliament of Great Britain.

These opening clauses of the first three Articles of Union define and encapsulate the central of the three terms in the title of this lecture. Why is there a British state? When did it come into existence? How was it first constituted? Reciting the Articles takes you to the answer. But the Articles themselves are, as is obvious, only necessary, not sufficient in themselves to the explanation. They were agreed between Commissioners for Scotland and for England appointed by Queen Anne in 1706 pursuant to appropriate resolutions respectively of her Scottish and her English Parliaments. Mere agreement by the Commissioners on the Articles as terms of a possible Union did not put them into effect. For England to accept the Articles as terms of a Union, the English Parliament had to pass legislation giving effect to them as law; likewise, for Scotland, the Scottish Parliament had to enact them into law.

As is well known, the Scottish Parliament debated and legislated first. The debate was passionate, the sense of betrayal of a long independent history appears to have been palpable, the leader of the anti-

[1] Yet later was the Act of February 5, 1707, determining the mode of election of Scottish members to the two houses of the Parliament of Great Britain.

Union coalition, the Duke of Hamilton, conducted himself in such a way as to dissipate the strength of the opposition.[2] Otherwise, the opposition might well have defeated these Articles of Union as decisively as had previous similar proposals slipped into oblivion in the past. Certainly, opposition speakers, especially Fletcher of Saltoun, delivered the more telling speeches. The Government deployed as little eloquence as necessary and as little drama as possible. Like a veritable Major at Maastricht, it kept its head down and its patronage personnel at work, and ground systematically through the Articles, one at a time, winning the vote on each by a sufficient majority, and by use of all the forms of pressure and inducement available to it. Eventually, in January 1707, the ratification of the Articles was enacted into law, with an appended 'Act for Securing the Protestant Religion and Presbyterian Church Government'. The question then passed to the English Parliament. There was some unease and dissent over the issue of preserving 'in all time coming' a Presbyterian establishment in Scotland at odds with the Anglican establishment in England. But the opposition did not add up to much, and the English Ministers had an easier time of it than their Scottish counterparts had had. So the Act of Union with Scotland was enacted into law in good time to secure consummation of Union on 1 May 1707, with in due course the resultant summoning of the first Parliament of Great Britain.

Membership of that Parliament comprised the English Lords of Parliament and the Commons Representatives who had sat in the last Parliament of England, no new general election having been considered necessary. In accordance with Article 22, they were joined in the upper house by sixteen representative Peers elected from the peerage of Scotland, and in the lower by the forty-five MPs elected from the designated Scottish constituencies. By the method of calculating representation in Parliament that then prevailed, namely according to value for land-tax, Scotland was over-represented with forty-five members in the Commons. But this was done by reference to an argument that has continuing resonance. Since a whole country was being incorporated

[2] See, for example, A. V. Dicey and R. S. Rait, *Thoughts on the Union between England and Scotland* (1920), pp. 206–29; W. Ferguson, *Scotland 1689 to the Present* (Edinburgh, 1968), pp. 47–57; C. H. Dand, *The Mighty Affair* (Edinburgh, 1972), pp. 144–69; P. H. Scott, *1707: The Union of Scotland and England* (Edinburgh, 1979), pp. 55–65; Paul H. Scott, *Andrew Fletcher and the Treaty of Union* (Edinburgh, 1992); G. Lockhart of Carnwath, *Scotland's Ruine: Lockhart of Carnwath's Memoirs of the Union*, ed. D. Szechi, foreword P. Scott, (Aberdeen), Annual Vol. No. 25.

into a larger, there was special reason to secure that its interests could not be ignored or belittled. There was also concern about unfair discrimination against the interests of a minority with a long prior history of conflict with the new majority. On both accounts, but particularly the former, it was agreed that Scottish representation should by a reasonable amount exceed that which would be properly proportional given the prevailing rationale of representation, forty-five rather than the thirty-eight originally proposed by the English Commissioners.[3]

The subsequent transition to a democratic principle of representation was a drawn-out affair, universal and equal adult franchise coming only after the Second World War (when finally the abolition of the university constituencies reduced all persons to having a single vote). Under the Representation of the People Acts, Scottish (and indeed Welsh) representation has been subject to a required minimum number of seats, and this has produced a level of representation that is higher than strict proportionality by reference to the democratic principle of representation that now prevails. It is a common saying that this scale of Scottish representation is arbitrary and unprecedented.[4] The common saying is ill informed. There is a precedent from 1707, and it establishes a principle that justifies departure from strict proportionality judged solely by the main prevailing rationale for representation. There is a subsidiary principle of reasonable assurance for minority countries. Perhaps this will be cancelled in the circumstances of devolution, but the point should be argued, not merely assumed. For myself, I think it has been legitimately argued, and well taken.

The Articles of Union can be summarised around three themes: what was to be common to the whole of Great Britain? what was to remain distinct in the formerly separate parts? and what were to be the transitional arrangements? Common were to be, of course, the Crown (and thus the Executive) and the single bicameral Parliament. So were to be the flag and other public insignia, and currency and coinage.

[3] Compare Dand, *Mighty Affair*, pp. 124–5, Scott, *Andrew Fletcher* pp. 156–7, citing Bishop Burnet; cf. Lockhart, *Ruine*, p. 132, suggesting the Scots could have got even more if they had really tried. Whether there really was an attempt to make an in-principle fair provision for a national minority, or just a stitch-up among leading Commissioners is a point on which one should not be over-confident.

[4] But note that Iain McLean has shown that the introduction of the modern disproportionality through the number fixed for Scotland seems to have had no explicit rationale such as might have been derived from the 1707 compromise, and was to that extent arbitrary, albeit not unprecedented after all. See I. McLean, 46. 'Are Scotland and Wales overrepresented in the House of Commons?', *Political Quarterly*, 66 (1995), 250–68.

Taxation, and customs and excise and other impositions and drawbacks on trade and commerce were to be equalised, so as to realise the conditions of free trade throughout the new Kingdom and with 'the dominions thereunto belonging'. This was to be a customs union with a common market and single currency, administered by a single executive branch under a single legislature. It was incomparably the largest such customs union in the world at that time, when, even within a powerful and centralised monarchy such as France, inter-regional customs barriers were extensively in existence.

The continuing separate identities that were to survive Union lie in civic institutions, in courts and common law, in churches. For the system of local government, specifically the Royal Burghs, was to remain unaltered. (It has been altered, but Scottish local government retains a distinctive pattern and its own legislative framework.) The Scottish Courts, and also all heritable jurisdictions were to remain in being, with no appeal from the former to 'any . . . court in Westminster Hall'. (The heritable jurisdictions have gone, and their going was integral to the trauma of the Highland clearances; but the Court of Session and the High Court remain undiminished.) The whole of the public and private law were to continue except for whatever was inconsistent with the union. In future, the Parliament of Great Britain was to have power to amend the law in Scotland. But this was subject to an important limitation:

> with this difference betwixt the laws concerning public right, policy, and civil government, and those which concern private right, that the laws which concern public right, policy, and civil government may be made the same throughout the United Kingdom, but that no alteration can be made in laws which concern private right, except for evident utility of the subjects within Scotland. [This arrangement has been pretty well respected.]

Finally, there was the already noted provision for securing the Presbyterian church establishment in Scotland, and along with that protection of the system of education both at university and at school level. None of these remains exactly as originally foreseen, but distinctiveness, and even a measure of distinction, survive.

The transitional provisions related to phasing in new systems of taxation and to compensation for Scotland's incurring share of the English national debt. They also made provision to compensate for losses to investors in the Company of Scotland whose disastrous failure in attempting to establish a colony on the Darien Isthmus was held

substantially imputable to the hostility of the late King William and his English ministers. When Burns said that the 'Parcel o' Rogues in a Nation' had been 'bought and sold for English Gold', this was what he had in mind. Fletcher had earlier remarked in even more pointed terms that the Scots of 1707 were not being bought with English money, but with their own.

Given all that, it was natural to conclude the Articles by insisting on their overriding status as the basis of the new union. This was done in Article 25:

> . . . [A]ll laws and statutes in either kingdom, so far as they are contrary to or inconsistent with the terms of these articles, or any one of them, shall, from and after the Union, cease and become void, and shall be so declared to be by the respective parliaments of the said kingdoms.

This is a provision so obvious in its sense and context as almost to go without saying. The terms of a new union must prevail if the union is to come effectively into being. These new provisions must be fundamental, and prior laws different in tenor cannot stand up against them.

The opponents of Union argued that those terms in the Union that aimed to protect their distinctive Scottish institutions were mere paper guarantees, for in the necessary logic of things the new parliament could by majority vote change them at any time. In due course, indeed, the greatest of English constitutional lawyers, A. V. Dicey, was to argue that in point of law the most solemn and expressedly unalterable provisions of the union had no greater constitutional sanctity than the Dentists' Act.[5] In like vein, F. W. Maitland, prince among legal historians, was to insist that 'we have no irrepealable laws'.[6] But this was not the only way to look at it. Daniel Defoe, as pamphleteer (and spy) for the pro-Union side in 1707 argued that the Articles of Union being the foundation of union would have to be accepted as fundamental law in it.

> [N]othing is more plain than that the articles of the Treaty . . . cannot be touched by the Parliament of Britain; and that the moment they attempt it, they dissolve their own Constitution; so it is a Union upon no other terms,

[5] See A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th edn. (1964), p. 145: 'There are indeed important statutes, such as the Act embodying the Treaty of Union with Scotland, with which it would be political madness to tamper gratuitously; there are utterly unimportant statutes, such, for example, as the Dentists' Act, 1878, which may be repealed or modified at the pleasure or caprice of Parliament; but neither the Act of Union with Scotland nor the Dentists' Act 1878, has more claim than the other to be considered a supreme law.'

[6] See F. W. Maitland, *The Constitutional History of England* (Cambridge, 1908), p. 332.

> 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.[7]

This is an argument which has been repeated by many persons on many occasions since 1707. The high water mark, so far as concerns judicial pronouncements, came in 1953 with Lord President Cooper's opinion in the case of *MacCormick v Lord Advocate*[8] where he held that the Union of 1707 did constitute fundamental law. The petitioners in the case had argued that the Queen's Ministers, in advising her to assume the title of Elizabeth 'the Second', had violated the basic provision of the Treaty of Union whereby a new kingdom had been constituted. Since monarchs of the prior separate kingdoms had been monarchs of distinct states, her Majesty was the first Elizabeth of the United Kingdom, and to entitle her otherwise was unwarrantable. The First Division held that the choice of royal style and title was a matter of prerogative power, not controllable by the courts. Further, even if the Treaty constituted fundamental law, it was unenforceable in face of an Act of Parliament, though if it ever came to legislation trenching upon the existence or powers of the Court of Session itself, the position would have to be reconsidered. Hence the petitioners' case was rejected, though without award of expenses to the Crown. But the *dicta* of the Court made clear that the provisions of the Articles of Union could not legitimately be assimilated to ordinary Acts of Parliament, and should be interpreted with special regard to the provisions expressed to be permanent in all time coming.

The Scottish Courts have been on the whole cool towards arguments challenging contemporary governmental policies by reference to the Articles, especially when recent legislation is in issue.[9] Last century, in

[7] See Paul Scott, *1707: the Union of Scotland and England* (Edinburgh, 1979), p. 62, quoting D. Defoe, *The History of the Union Between England and Scotland* (1786), p. 246. In this and at many other points of the argument I am very particularly indebted to Paul Scott for his deep scholarship in matters concerning the union, its origins, and continuing utility. See also his splendid *Andrew Fletcher and the Treaty of Union.*

[8] 1953 S.C. 396.

[9] See Colin R. Munro, 'The Union of 1707 and the British Constitution', in *Scotland and the Union*, ed. Patrick Hodge, *Hume Papers on Public Policy*, 2 (Edinburgh, 1994), pp. 87–109.

the litigation on the powers and liberties of the Kirk that led to the Disruption of 1843, Lord President Hope took indeed a high Austinian view on the indivisibility of sovereignty and the illimitable legal authority of a sovereign parliament.[10] So it must be said that Defoe's argument, however sincerely stated in its time, has not been borne out by the main course of history. According to Dicey, its critical weakness lay in this fact: the Parliaments that delegated power to the new Parliament wholly abolished themselves in the very act of constituting that new Parliament. Had they remained in being for the one purpose of authorising changes to the terms of union, they would have retained sovereignty. As it was, they had necessarily passed it in its totality to the successor.

Analytically, I think the problem can be stated in terms of a pair of possible distinct interpretations of Article 25. Either the Union effectively overrode all prior constitutional law in both countries, and constituted a completely fresh start incorporating only such elements from the past as would fill out its own rather skeletal framework—call this the 'Defoe View'; or the Union was simply an adaptation and modification of a pre-existing constitution that continued subject to the express amendments and implied repeals to be spelt out from the text of the Articles—call this the 'Dicey View'. This contrast announces the second section of the lecture.

2. The English Constitution

Very well, then. How much of the pre-existing laws of Scotland and England prior to 1707 must be deemed abolished as inconsistent with it? Obviously, all particular laws concerning special provisions for one or other country, and laws concerning the descent of the Crown, and such like. But the key question concerns constitutional laws themselves. Notoriously, the old English constitution was an unwritten one, deriving from custom, convention, and common law, and from the royal prerogative within the spheres of its existence as acknowledged by common law. The authority of Parliament, that is, of the monarch in Parliament, was an authority absolute and sovereign in kind. For it derived from the powers held by conquering monarchs who gradually over several centuries were forced to, or agreed to, exercise their powers

[10] See the *Auchterarder* case (1838) 16 S. 661 and Robertson's Report (2 vols.).

only by and with the consent of Parliament, while delegating others to their judges. And that was a matter of English common law, pretty clearly established by at least 1688.

The old Scottish constitution, as Scots authorities like George Buchanan were very insistent, was never a constitution based on conquest. Hence the *Ius Regni*, the law of the kingdom, could never be interpreted as constituting an absolute monarchy whether in or out of Parliament, but only as authorising a limited one dependent on popular assent. From this, and from such other iconic texts as the Declaration of Arbroath, has derived the thesis that in Scottish constitutional tradition, sovereignty belonged to the people, to the community of the realm, rather than to Parliament, or, strictly, King or Queen in Parliament.[11]

One view of the meaning of the 1707 Union is that it must have been fundamental and hence overrode the customary constitution of England as well as that of Scotland, setting the whole on a new footing. That view, the Defoe view, if it prevailed, would of course entail that the UK did start with a written constitution, admittedly a somewhat sketchy one. I have suggested elsewhere that this is both the fairer and a possible reading of the case.[12] But I am under no illusion that this is the prevailing view. The other view, the Dicey view, is the one that lays stress on the very concept of an 'incorporating Union'. The phrase 'incorporating union' is a telling one. In the early 1700s, and in the

[11] Compare O. D. Edwards (ed.), *A Claim of Right for Scotland* (Edinburgh, 1989), pp. 13–15.

[12] See MacCormick, 'Does the United Kingdom have a Constitution? Reflections on *MacCormick v Lord Advocate*', *Northern Ireland Legal Quarterly*, 29 (1978), 1–19. This paper has recently been criticised on historical grounds by Michael K. Addo and Veronica Smith in their 'The Relevance of Historical Fact to Certain Arguments Relating to the Legal Significance of the Acts of Union', *Juridical Review* (1998), 37–65. As the present lecture indicates, I do not in fact disagree with the authors on the matters of history that they recount, and yet on the other hand I think, with respect, that their argument is vitiated by a refusal or inability to enter into discussion of the issues of legal theory raised in my earlier paper. There are two issues: (i) were the Articles of Union initially constitutive of the united Kingdom of Great Britain? and (ii) if so, are any of their provisions to be deemed fundamental and in any way entrenched? The answer to the former question ought to be an indisputable 'Yes', to the latter, probably 'No', but that would not justify Parliament in treating the Acts and Articles of Union as on all fours with the Dentists' Act, and there is a significant question outstanding about the Articles protecting the Scottish Courts themselves, in relation to which Addo and Smith do not seem to me to have themselves scrutinised the whole historical record. Like them, however, I think that the recent spate of cases challenging Skye Bridge tolls on the basis of the Articles of Union, and similar matters, are founded on untenable theses about the Union, however sympathetic on other grounds one might be to the political protest mounted by those who regard the tolls as an unjust and disproportional imposition.

parliamentary debates of 1703–5, most Scots appear to have wanted a better Union with England, or none at all. As of that date, the union was only a union of the crowns, not of the countries or their parliaments. Kings and Queens were still in a real way heads of government as well as heads of state, and ministers were 'their' ministers in much more than a merely formal or ceremonial sense. Hence the smaller of the pair within this regnal union was particularly exposed to the risk of government through a ministry hostile or indifferent to the opinion and popular will of the country at large. In effect, the King's or Queen's English Ministers had the key part to play in determining policies of state; then the King's Scottish Ministers had the task of reconciling their own Parliament to the policy in question. This was unsatisfactory to say the least.

One idea for remedying the situation proposed 'union' in a sense different from the one that in the end prevailed. The idea is largely attributable to Fletcher of Saltoun. A continuing Union of the Crowns was possibly only given agreement on a treaty that would do several things. It would distinguish the sphere of required common action to be accomplished through a common head of state-and-government from the spheres of action of separate Scottish and English concern. In respect of these latter spheres, Parliaments would hold sway, and the responsibility of Ministers would be rather to the respective Parliaments than to the monarch. The treaty would also aim to secure peace by protecting each country against the risk of attack from or through the other, and should provide for freedom of trade and commerce.[13] Such a Union Fletcher and his associates dubbed a 'federal union', in a sense of the term derived from the concept 'treaty' hidden in the Latin root. It was their preferred option, but if it were unattainable, the option of a continuing Union of Crowns would have few attractions. The card that was played to try and draw England into such an agreement was refusal to confirm for Scotland the Hanoverian Succession already determined for England by the Act of Settlement of 1701. Playing that card led to tension and drama in the years 1703–5.[14]

The English riposte as it unfolded in the period prior to, and the period of, the Union negotiations, was that if the Scots wanted Union, they could have it. But they could have it only in the form of an entire or

[13] See A. Fletcher of Saltoun, *State of the Controversy betwixt united and Separate Parliaments*, ed. P. H. Scott (Edinburgh, 1982), pp. 14–17, and cf. Scott, *1707*, pp. 22–4.
[14] See Scott, *1707*, *passim*; Dicey and Rait, *Thoughts*, chapter 4.

incorporating union. Federal union was not an option. And moving back to a fully separate Scottish crown with succession different from that for the English crown would entail that Scots in England would revert to alien status, and that any threat to English security in the North would be met with overwhelming and pre-emptive force. It seems fair to say that the Scots had not a lot of room for manoeuvre, and that even leaders more skilful, public-spirited, and resolute than those they had would have had difficulty getting out of the corner into which history had painted them. As it was, all the leaders were anxious to ensure that if Union were inevitable, they and their families would do well out of it. The Duke of Hamilton's is here an instructive case. If he could have kept Scotland out and his skin and assets entire, there seems no doubt he would genuinely have preferred to. But the risk of ruin in an unsuccessful rearguard action stared him in the face. The result was his crippling attack of psychosomatic toothache the day he missed attending Parliament and the last die was cast.[15]

However that may be, the record as between federal and incorporating union is clear. The Scots Commissioners were mandated to put the proposal for federal union, and they made it their opening gambit, but knowing the reply it would receive. The English Commissioners rejected it with unconcealed contempt,[16] and indicated their own terms for an incorporating union. After the briefest of recesses, the Scots agreed to discuss these terms, and the rest of the time was spent working out the details of the deal, with the Scots squeezing any advantages they could along the way.

How are we to analyse the notion of incorporating union? In form, the Union constituted a new state with a new name. But in substance, the underlying assumption was that the larger partner was a continuing entity. Institutionally and in terms of personnel and procedure, the new Parliament of Great Britain was continuous with the predecessor English Parliament, save for the addition of a few Scottish peers elected from the whole peerage of Scotland, and two score and a quarter Scottish MPs. The Crown, the armed forces, the executive became one, and the preserved Scottish institutions got on with their work over the horizon of visibility in the North, with occasional legislative

[15] cf. Scott, *1707*, pp. 65–6.

[16] See Lockhart, *Ruine*, p. 130, 'the English commissioners telling them in a saucy manner that they did not incline so much as once to take it into consideration (their very words) [the Scots were content to] resile pittifully and meanly from it without one word to enforce it'.

interventions that strayed in some cases well beyond the spirit, let alone the letter, of the agreed limitations. In this context, it is easy to interpret the constitution as a continuing evolution of the old English customary constitution as a patchwork of convention, common law and statute. The Act of Union is a not insignificant statutory element in this patchwork constitution, in so far as it extended the authority of Parliament geographically and enhanced its membership in a matching way. But there was no disturbance of the prevalent balance of parliamentary forces, and no new constitutional doctrine, no development of popular or other powers attributable to it. Really, it was a completion and consolidation of the Revolution of 1688, not a new step in a new direction.

This view is strongly attested by the great majority of authors who have treated of British constitutional law and constitutional history from within the paradigm of English common law; and that means a very large majority indeed. This is as true of Scottish as of English writers within the dominant tradition. Sir David Lindsay Keir was Master of Balliol when I studied there, and a kindly senior friend when, shortly after he retired, I returned to Oxford to be a Fellow of Balliol. His *Constitutional History of Britain 1485–1937*,[17] in its own time highly regarded and still an enjoyable read, takes the long view of the development of parliamentary democracy in Britain from its beginnings in the growth of parliamentary rule in England. The Act of Union merits a couple of two line throwaway comments relating to the balance of power among Queen Anne's Ministers. Yet Keir was a Scotsman, a son of the manse and proud of it, so his taking the common law perspective on the constitution was by no means genetically or ethnically predetermined. Maitland a generation previously had a good deal more to say in his Lectures on *Constitutional History* about the creation, first of Great Britain and then, in 1801, of the United Kingdom of Great Britain and Ireland. He did see these as constitutionally momentous events. But his structural perspective on the driving forces of the constitution suggests that the extensions of the sway of the British State, however important geo-politically, were byways from the point of view of the evolution of an essentially unitary constitution.

A moment ago, and quite pointedly, I used the term 'the Act of Union'. From the standpoint of incorporating union in the common law interpretations, that is, in the Dicey view, this is the common and

[17] 3rd edn. (London, 1946).

probably the correct usage. There was one essential Act of Union that extended the sway of Parliament over Scotland on agreed terms. Agreement of the terms may indeed have necessitated legislation in Scotland also. But the continuing constitution, the continuing chapter by chapter chronological series of Acts of Parliament requires only the English Act as the bridge between the Parliament of England at the beginning of 1707 and the Parliament of Great Britain at the mid-year and thereafter. This was the self-same parliament enlarged and re-named.

Close observers of present day constitutional debates are well aware of the ideological resonance attaching to key phrases: 'the Act of Union', 'the Acts of Union', 'the Articles of Union', 'the Treaty of Union'. Only the casual users of the singular 'Act of Union' are unaware of their singularity, for holders of a majority ideology are usually indignant to discover that they have an ideology at all.[18] When it is drawn to their attention, their astonishment matches that of M. Jourdain when he discovered that prose was what he had been speaking all along.

The story has been a long one to this point. But our exploration of the British state has led us to understanding the strange survival of the English constitution. Even if there is a British state, and even if we can date its commencement exactly to 1 May 1707, its constitution can be and commonly is deemed to be the old English constitution continuing. The very provision that preserved a distinct body of Scottish common law necessarily preserved and continued the English common law as well. Hence issues of constitutional law arising before the English courts have assumed the very continuities that are implicit in the ideology of incorporating union. All in all, it need not surprise us that the workaday name of the British State in most of the world is now and always has been 'England' and its cognates. Here, an honourable exception must be made for that two generations of well-spirited people in public agencies of all kinds who have striven to use only the terms 'Britain', 'British' and 'the United Kingdom', not 'England' in its over-inclusive sense. In so doing, they have apparently given themselves a new headache. They are now not sure what is English as distinct from British where their predecessors had a weak grasp of what is British as distinct from English.

[18] Even Linda Colley, in her admirable and sensitive *Britons: forging the nation, 1707–1837* (new Haven and London, 1992), uses throughout her book the singular 'Act of Union', whereas though there was but one union it required two acts, except if we presuppose the Dicey view without further discussion.

You will then, I hope, grant me my 'English Constitution' and my 'British State', and agree that there is a logic of co-existence between them. This logic depends on a particular reading and interpretation of our constitution and constitutional history. This reading is neither uncontestable nor uncontested, as any friend of the late Sir Thomas B. Smith, sometime Professor of Scots Law here in the University of Edinburgh, can testify, all the more so one who is of the issue of the late John MacCormick, petitioner in the aforementioned Queen's title case.[19] But contested though it is, the incorporationist view is the majority view and the dominant one. We see it clearly asserted, and with vigour, in the recent White Paper *Scotland's Parliament*. There, the Government has insisted on the continuing and absolute sovereignty of the United Kingdom Parliament in respect of a new Scottish Parliament, one that will exercise only devolved powers (see paragraph 4.2). This mere delegation from the sovereign makes it in constitutional principle no different from any Parish Council in England, as Mr Blair said during the run-up to the election campaign which his party won so handsomely on 1 May 1997.

The very Government which produced the White Paper contains many signatories of the 'Claim of Right for Scotland' of 1989, the foundation document of the Scottish Constitutional Convention.[20] The Convention, in turn, was the body that worked out the proposals for a devolved Scottish Parliament that were adopted by the Labour and Liberal Parties in the elections of 1992 and 1997, and that formed the basis of the White Paper scheme put to the Scottish electorate in the Referendum of 11 September 1997. That 'Claim of Right' seems no less categorical than the White Paper on the issue of sovereignty, but in an apparently opposite sense. 'We, gathered as the Scottish Constitutional Convention, do hereby acknowledge the sovereign right of the Scottish people to determine the form of Government suited to their needs . . . .'

The Secretary of State for Scotland, the Chancellor of the Exchequer, the Foreign Secretary and many other senior members of the Government are signatories of this Claim of Right. If not a contradiction, there is at least something of an apparent antinomy here. Exactly here also lies the 'Scottish anomaly' of this lecture's title. The Union encompasses both an English constitution and a special dispensation for Scots law,

[19] Compare MacCormick, 'Does the United Kingdom have a Constitution? Reflections on *MacCormick v Lord Advocate*', *Northern Ireland Legal Quarterly*, 29 (1978), 1–20.
[20] See Edwards, *Claim*.

Scots Courts, Scottish education and Scottish local government. It also provides for a separate church establishment, and this has been matched by separate hierarchies in Catholic and Episcopal churches. All this has meant the continuing existence within union of a strong civic identity alongside a continuing if often kailyairdy popular culture. It has made possible a strong Scottish identity among many internal diversities, of highland and lowland, Gaelic and Scots, country and town, East and West, North and South. And a strong Scottish sense of identity has indeed survived three centuries of Union, growing more, not less, evident, as we approach the three hundredth anniversary year of 2007. This congeries of circumstances has made possible just such appeals to a continuing background constitutional tradition of popular sovereignty rather than Parliamentary sovereignty as that which the convention recited in its 'Claim of Right'. Here is my concluding anomaly. Scotland was incorporated, but Scotland stayed different.

3. The Scottish Anomaly

Scotland has been the anomaly that has made an ostensibly unitary state, an archetype of 'nation state' in certain political-theoretical terms, function internally in a markedly federal way. This has been hitherto a federalism of political management and judicial separation rather than a federalism of constitutional form. Indeed, according to the incorporationist view of the constitution, as we have noted, nothing that protects the Scottish institutions has the least force as a legal guarantee or entrenchment. The 'Autonomy of Modern Scotland', as Lindsay Paterson has observed,[21] is quite a remarkable phenomenon judged by the fate of most submerged small nations in Europe. It is an autonomy that has made possible the continuing assertion of a submerged constitutional tradition of a distinct Scottish stamp. The continuing claim to a historically attested sovereignty of the people is part and parcel of that. It includes the implication that assent to the union involves a continuing '*plébiscite de tous les jours*'. So long as the will of the majority sustains it, it will continue. If it ceases to do so, it will cease.

For whatever reason, though, managed federalism, or quasi federalism, has ceased to be acceptable. Not a single candidate representing

[21] See L. Paterson, *The Autonomy of Modern Scotland* (Edinburgh, 1994).

the unreformed union was returned for a Scottish constituency in the 1997 General Election, and the September referendum was even more decisive. The democratic deficit is perhaps too glaring for contemporary sensibilities. Linda Colley in her remarkable book *Britons* has suggested that the union succeeded in the eighteenth century because it gave insular Protestants a sense of unity against the threat from continental Catholicism, represented in particular by France, and because it created a shared pride in the massive common enterprise that was the British Empire, largely won during the conflict with France. The empire was, perhaps, the 'British thing' *par excellence*. Now it has gone, and now Europe is, as once before for Scots, far more a theatre of opportunity than a threat to identity. These deep-running secular changes must also have a part to play in the explanation of change in electoral preferences. In this, the rise and solid continuance of support for the Scottish National Party is significant. It must be ranked as one among the causes of change;[22] yet it cannot be denied that it has also been in important measure one of its consequences.

However that may be, a time of great and to me wholly welcome change is to come. We still (10 December 1997) await the Bill to give full body to the scheme in the White Paper. One thing is clear: the upshot will clearly be to substitute one anomaly for another, in the short run anyway. The outlines of the scheme the Bill will contain are clear enough. Subject to reservation of what are seen as essential UK powers to Westminster, we shall have again a Parliament empowered to make laws for the peace, order and good government of Scotland. Yet Scotland will continue to return to the Westminster Parliament a full complement of MPs, with some reduction intended in due course. In place of managed quasi-federalism, there will be democratic quasi-federalism. England's only Parliament will also be the United Kingdom Parliament. The government of England will be determined by whatever is the largest party UK-wide in that parliament, while for Scotland there will be both a domestic parliament and government and also the

[22] Professor Vernon Bogdanor has protested to me that I overstate the impact of the SNP, and it is possible indeed that I am guilty of partiality. But, although little rewarded in terms of Parliamentary seats won, the SNP remained after 1979 a substantial electoral force in Scottish politics, relatively unseen and ignored from the South, and this was what imposed the political necessity on the Labour Party to uphold a commitment to Scottish devolution towards which its London-based leadership frequently seemed at best tepid in enthusiasm. I am, as all scholars in this field, indebted to Bogdanor's scholarship, as witnessed by his *Devolution* (Oxford, 1979), and I am grateful to have had pre-publication sight of his forthcoming paper 'Devolution: the Constitutional Aspects'.

opportunity to participate in UK institutions. Scottish MPs will necessarily and properly share in performing Parliament's UK functions, but parliamentary arithmetic will sometimes make it necessary for them also to play a decisive role in purely English matters, if a government is in power without a majority among the representatives of English constituencies.

The old anomaly was an invisible one. The point was that, under the managers of the day, Scotland went its own way, block-funded according to the Goschen proportion or the Barnett formula or whatever, with nobody in other parts of the UK paying much serious attention. The new anomaly will be a highly visible one, and on that account it seems unlikely to endure long as originally designed. The incorporating union has finally run out of steam. The question now, as in 1706, is whether federal union in either the older or the newer sense is available in the alternative.

The nearest equivalent to what Fletcher envisaged in the way of federal union involves the European Union. The kind of relationship between the countries of these islands that would exist if they were all fellow members of the European Union, especially one with a common currency, would broadly satisfy the criteria that he expounded or assumed. This prospect finds favour with some, myself included. Others suggest that a form of federal constitution internal to the United Kingdom may be devised. If all parts have Parliaments or assemblies, and the UK parliament would deal only with common questions at the federal level, the new anomaly would disappear, since Scotland would not have the only sub-parliament, Wales not the only executive assembly.

But how to deal with England? As one federal state, or as a patchwork of federal regions? Each solution has its own problems, and both are bedevilled by the absence of any apparent popular wish to create new units and new assemblies. Increasingly, however, there seems to be a growth of opinion in Tyneside and the North East of England in favour of emulating the Scots and Welsh, and of securing a similar budgetary settlement. Yet if developments along these lines do take off, and subsequently spread to other regions of England, there will remain important differences with Scotland. We have our own law, but no one is seriously suggesting a regional sub-division of the English common law; so a provincial devolution of general legislative powers is unlikely to extend further than to Scotland. If the UK Parliament remains the sole legislature in respect of the general law in force in

England and Wales, Scottish MPs will still have at least a technically disproportional voice in relation to it. Yet again, many in Scotland would deplore any development that apparently reduced Scotland in status to equivalence with a region of England, rather than recognising its status as one of the two kingdoms that were founder nations of the first United Kingdom. Scotland's status as an anomaly is one she might be loath to yield up.

Prediction is hazardous at a time like the present. We are in the process of switching from inconspicuous anomaly to highly visible anomaly in Scotland's constitutional position. The admirable and seemingly inexhaustible pragmatism of English public life may swallow this anomaly, Barnett formula and all, as it has so many others in the past. It is not inconceivable that the curious troika of English Constitution, British State, and Scottish anomaly will rattle along in a new form, with the sledge ever under repair as it crosses and re-crosses the frozen wastes. (At least, this metaphor varies that of Von Neurath's ship under reconstruction while at sea.) But there are two other possibilities in the way of a new look at the federative idea, neither unproblematic. One would involve the deliberate, if piecemeal, construction of a genuinely British constitution, the other involves abandonment of that in favour of confederation on the European level. Under this, though the Scots would indeed reclaim the right to determine their own constitutional structures, they would desist from claiming an apparent unilateral right to rewrite England's constitution as a by-blow. Such an abstention is, I think, a more reasonable posture. There is every reason to let the English unwritten constitution continue to evolve as it has for so long, but there is a real question whether Scotland should continue to be wedged into a northern corner of it in the shape of a somewhat uncomfortable anomaly. A lecture such as this is no occasion for partisan advocacy of one among available alternatives. It is sufficient unto the day to survey the alternatives, and to acknowledge that each is reasonable in its own terms. Democracy well conducted is a perpetual process of public deliberation and choice among incompatible alternatives that are reasonable in themselves.