THE DECLARATION OF ARBROATH AND SCOTS LAW

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The Declaration of Arbroath: Scotland's *Magna Carta*?

According to Roger A Mason, the Declaration of Arbroath "has come to be seen as Scotland's *Magna Carta*, the ur-text of a tradition of Scottish political thought and practice that in turn defines Scotland's unique constitutional – and cultural – identity."[1] Whereas *Magna Carta*, first issued in 1215, symbolises England's ancient commitment to the Rule of Law and individual liberty, the Declaration of Arbroath is frequently cited as evidence of an almost-as-ancient Scottish constitutional model involving a limited, contractually-based monarchy and the location of sovereignty in the people rather than the Crown.[2]

There the similarity ends, however.[3] In the first place, *Magna Carta* is a legal text, agreed to by the King, and confirmed as part of England's statute law when it was reissued in 1297. By contrast, the Declaration of Arbroath takes the form of a letter to the Pope, signed by various barons on behalf of "the whole community of the realm of Scotland", but not emanating from any formal law-making body such as the Parliament or King's Council. Although it asserted the independence of Scotland and King Robert's right to rule in accordance with "our laws and customs", it did not seek to create new law, nor to secure from the Pope an authoritative ruling on the legal validity of those claims. The lack of a strict legal provenance is not an absolute barrier to regarding the Declaration as having constitutional significance –indeed, constitutional documents often gain their status as such by subsequent legal recognition, rather than from their source. Nevertheless, there is no suggestion that it was intended to have, or has been accorded such status. At best, therefore, it can be seen as evidence of what its drafters believed the law to be or – perhaps more likely – what it ought to be. Secondly, while *Magna Carta* enumerated specific rights and duties, some of which remain in force, the Declaration of Arbroath asserts only a general right to freedom – understood in national rather than individual terms – along with the duty of the King to maintain that freedom on pain of being overthrown.

Perhaps unsurprisingly, references to the Declaration of Arbroath in legal sources are rather scarce. According to Mason, there is no evidence of reliance upon it in mediaeval disputes,[4] while online case databases reveal only two judicial references to it in reported cases – both of fairly recent date, and both brought by litigants in person of a more-than-usually eccentric character. In *Robbie the Pict v Her Majesty's Advocate*, in 2003, the Declaration was relied upon, alongside the Act of Union and various other mediaeval treaties, to argue that the judicial oath sworn by the judges hearing Mr Pict's appeal against his conviction for refusing to pay Skye Bridge tolls was invalid because it had been sworn only to the Queen and not to the sovereign people of Scotland.[5] In 2016, in the *Scottish Parliamentary Corporate Body v the Sovereign Indigenous Peoples of Scotland,* the Declaration was

[1] RA Mason, 'Beyond the Declaration of Arbroath: Kingship, Counsel and Consent in Late Mediaeval and Early Modern Scotland', in S Boardman and J Goodare (eds), *Kings, Lords and Men in Scotland and Britain, 1300 – 1625: Essays in Honour of Jenny Wormald* (Edinburgh University Press, 2014) 266.

[2] See, e.g., N MacCormick, 'Stands Scotland Where She Did? New Unions for Old in These Islands' (2000) 35 *Irish Jurist* 1 at 10; The Scottish Government, *The Scottish Independence Bill: A Consultation on an Interim Constitution for Scotland* (2014) 27; WE Bulmer*, Constituting Scotland: the Scottish National Movement and the Westminster Model* (Edinburgh University Press, revised edn, 2018) 86.

[3] See HL MacQueen, '*Magna Carta*, Scotland and Scots Law' (2018) 134 *Law Quarterly Review* 94 at 106 -7.

[4] Above n 1 at 267.

[5] 2003 JC 79 at paras 10 – 11.

again invoked by independence campaigners resisting attempts to remove their so-called "indycamp" from the grounds of the Scottish Parliament as authority for their claim that the case ought to be heard by a jury.[6] In neither case did the Declaration provide any explicit textual support for the legal claims being made, and they were, unsurprisingly, swiftly rejected by the judges.

The Declaration also receives scant treatment in the secondary legal literature. The document itself had effectively disappeared from view until an English translation appeared in 1689,[7] so although similar themes appear in 16th and 17th century texts such as George Buchanan's *De Jure Regni Apud Scotos*, published in 1579, and the 1689 Claim of Right, the Declaration of Arbroath is not referred to. It is ignored too by the so-called institutional writers of the 17th and 18th centuries, the great systematisers of Scots Law. They were in any case more focused on private law than public law, a tendency reinforced by the widespread (albeit erroneous) assumption that Scots public law had been assimilated to English public law as a consequence of the Union of 1707.[8] This attitude persisted well into the 20th century. For instance, in their chapter on Constitutional Law in the *Encyclopaedia of the Laws of Scotland* published between 1926 and 1935, Dykes and Philip stated that

> "the constitutional law of the United Kingdom represents in unbroken historical continuity the constitutional law of England; for upon the union of Scotland and England in 1707, the political institutions of the United Kingdom of Great Britain carried on with little or no change the practices and traditions of those of the larger kingdom."[9]

Similarly, in *MacGregor v Lord Advocate*, decided in 1921, Lord Anderson claimed that "the constitution of Scotland has been the same as that of England since 1707 [and] there is a presumption that the same constitutional principles apply."[10] Even when a specifically Scottish constitutional law textbook did eventually appear in 1938 – WIR Fraser's *An Outline of Constitutional Law*[11] - it was resolutely orthodox in its treatment of the fundamental principles of the (United Kingdom) constitution, albeit recognising some differences in the details applicable in Scotland.

This situation only began to change after the Second World War, with the growth of legal nationalism under the influence of Lord President Cooper and Professor TB Smith.[12] Of particular importance was Lord Cooper's famous *obiter dictum* in *MacCormick v Lord Advocate* in 1953 that "The principle of the unlimited sovereignty of Parliament is a distinctively English principle which has no counterpart in Scottish constitutional law…."[13] Although Lord Cooper did not say what principle of sovereignty was recognised in Scots law, the fact that his 1949 Presidential Address to the Scottish History Society had

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[6] 2016 SLT 1307 at paras 11 – 12.

[7] LS Harrison, "'That Famous Manifesto": The Declaration of Arbroath, Declaration of Independence and the Power of Language' (2017) 26 *Scottish Affairs* 435 at 436.

[8] This is erroneous because Article XVIII of the Acts of Union permitted, but did not require, "the Laws which concern publick Right Policy and Civil Government" to be "made the same throughout the whole United Kingdom", and in fact substantial differences in both governmental institutions and legal rules remained – see A McHarg, 'Public Law in Scotland: Difference and Distinction', in A McHarg and T Mullen (eds), *Public Law in Scotland* (Avizandum Publishing Ltd, 2006).

[9] JL Wark and AC Black (eds), *Encyclopaedia of the Laws of Scotland* (W Green & Son Ltd, 1926 – 35) para 944.

[10] 1921 SC 847 at 848.

[11] William Hodge & Company Limited, 1938.

[12] See ID Willock, 'The Scottish Legal Heritage Revisited', in JP Grant (ed), *Independence and Devolution: the Legal Implications for Scotland* (W Green & Son Ltd, 1976); HL MacQueen, 'Two Toms and an Ideology for Scots Law: TB Smith and Lord Cooper of Culross', in E Reid and D Carey Miller (eds), *A Mixed Legal System in Transition: TB Smith and the Progress of Scots Law* (Edinburgh University Press, 2005); C Kidd, *Union and Unionisms: Political Thought in Scotland 1500 – 2000* (Cambridge University Press, 2008) ch 5.

[13] 1953 SC 396 at 411.

been on the theme of "The Declaration of Arbroath Revisited"[14] meant that he was widely assumed to be referring to popular sovereignty. Three years after *MacCormick*, in *Glasgow Corporation v Central Land Board*,[15] the House of Lords also confirmed, contrary to previous assumptions,[16] that the laws governing the Crown need not be the same in Scotland as in England.

These cases sparked a revival of interest in the Scottish constitutional tradition and the impact of the Union upon it.[17] Of greatest significance was the publication in 1964 of JDB Mitchell's *Constitutional Law*,[18] which was the first textbook to engage seriously with the idea of a distinctive Scottish approach to constitutional law deriving from before the 1707 Union but in certain respects surviving its assimilationist tendencies. Mitchell's book opened on the title page with a quotation from the Declaration of Arbroath, and emphasised in the Preface that "The enduring object of the rules – liberty – so forcefully emphasised by the Declaration of Arbroath should not … be lost to sight."[19] However, there was no engagement with the Declaration in the text of the book itself. This set a pattern for subsequent writing on Scots constitutional law which contained more frequent reference to the Declaration but essentially as a grace note, rather than something to be examined in detail as an historical source of, or contemporary inspiration for, the development of legal doctrine.

The Indirect Effect of the Declaration of Arbroath?

The significance of the Declaration of Arbroath, then, is, as Lord Cooper put it, as a masterpiece of political rhetoric,[20] rather than as a legal text. Hence, its influence on Scots law is at best indirect and highly uncertain. Nevertheless, we can posit three ways – one general and two more specific – in which the Declaration and the ideas contained within it might be said that have had an enduring impact on Scots law and Scotland's constitution.

The Survival of the Scottish Legal System

In general terms, it may be argued that, insofar as the Declaration of Arbroath contributed to the securing of Scotland's independence from England in the early 14th century, it helped to create the conditions for the flourishing of Scotland's distinct legal system. Maintaining the distinctiveness of that system was regarded as sufficiently important in 1707 to merit special protection in the Acts of Union,[21] and the separate legal system, along with the Kirk and the Scottish education system, is widely regarded as one of the pillars of the survival of Scotland's national identity within the Union. In modern times, this has led to further constitutional change in the form of devolution for Scotland, both generally in that Scottish national identity was, by the late 20th century, thought to demand separate political expression through the creation of a Scottish Parliament, and more particularly

[14] Published in TM Cooper, *Supra Crepidam* (Thomas Nelson and Sons Ltd, 1951).
[15] 1956 SC (HL) 1.
[16] Eg Fraser recognised differences in Crown prerogatives in the realm of private law, but considered that those concerning the public rights and position of the Crown were probably identical in England and Scotland – above n11, at 109.
[17] See eg TB Smith, 'The Union of 1707 as Fundamental Law' [1957] *Public Law* 99; JDB Mitchell, 'The Royal Prerogative in Modern Scots Law' [1957] *Public Law* 304.
[18] W Green & Son Ltd.
[19] Ibid at ix.
[20] Above n14 at 58-9.
[21] See the protections for Scots private law in Article XVIII and for the Scottish courts in Article XVIX of the Union with Scotland Act 1706 and Union with England Act 1707.

because the unsatisfactory nature of having a legal system without its own legislature formed a specific argument for devolution.[22]

It is clear that legal independence was seen as an important aspect of Scotland's political independence from England.[23] In the course of the 12th and 13th centuries, a distinctively Scottish common law had emerged alongside the forging of Scotland's national identity.[24] Moreover, kingship had come to be understood, not merely as a matter of power and prestige, but in jurisdictional terms; in other words, as requiring the ability to secure the application of a uniform set of laws and customs, and a common judicial system, as the highest secular authority within a particular territory.[25] Part of Edward I's claim to overlordship of Scotland was therefore the assertion of legal jurisdiction, both through the hearing of appeals from the Scottish courts from 1292 and, in 1305, through the assertion of a right to legislate to amend or abolish Scots laws where they were "contrary to God and reason".[26] According to William Ferguson, had Scotland not secured her independence, "the evolving English common law must inevitably have triumphed",[27] as it did in Wales and Ireland. Thus, for Lord Cooper, the Wars of Independence represented:

> "the greatest line of cleavage in all Scottish history, and the initial phase of Scottish legal development came to an abrupt end…. For four hundred years Scots lawyers resolutely turned their backs upon England and English law, and the law students from Scotland who had begun to flock to the University of Oxford later found in Bologna and Pisa, then in Paris and Orleans, and finally in Leiden, a more congenial atmosphere for study and a powerful source of inspiration for constructive work."[28]

Nevertheless, the equation of Scottish legal independence and Scots national identity is questionable in a number of respects. In the first place, in terms of the *content* of Scots law, the Wars of Independence do not appear to have been a major turning point. Scots law in the early 14th century was very similar to English law, thanks to a common reception of Norman feudal law.[29] In fact, although the first major treatise on Scots Law – *Regiam Majestatem*, published sometime after 1318 – was arguably intended to serve an ideological function in terms of sustaining an image of the Scottish people under their king at a time when their national identity was under threat,[30] it was almost wholly derived from an earlier English work by Glanvill.[31] In addition, according to Sellar, there does not appear to have been any conscious rejection of Anglo-Norman law during or after the Wars of Independence.[32] It was only much later, following the reception of Roman law in Scotland, that the mediaeval inheritance was repudiated.[33] Moreover, it is most often this civilian influence, rather its

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[22] See, e.g., *Report of the Royal Commission on the Constitution 1969-73* (Kilbrandon Report), Cmnd 5460 (1973), para 1101.

[23] See HL MacQueen, '"*Regiam Majestatem*", Scots Law and National Identity' (1995) 74 *Scottish Historical Review* 1 at 2.

[24] WDH Sellar, 'A Historical Perspective', in SC Styles (ed), *The Scottish Legal Tradition* (New Enlarged Edn, 1991) 33.

[25] MacQueen, above n 22, at 7; D Broun, *Scottish Independence and the Idea of Britain: From the Picts to Alexander III* (Edinburgh University Press, 2007) 10, 62, 277-8.

[26] See MacQueen, above n 22, at 4 – 5.

[27] W Ferguson, 'James Anderson's Historical Essay on the Crown of Scotland' (1992) *Stair Society Miscellany III* 1 at 6.

[28] Lord Cooper, 'The Scottish Legal Tradition', in Styles (ed), above n23, at 68.

[29] Sellar, above n23, at 35-6.

[30] A Harding, '*Regiam Majestatem* Amongst Mediaeval Law Books' (1984) *JR new series* xxix.

[31] See MacQueen, above n22, at 3.

[32] Above n23, at 39.

[33] MacQueen, above n22, at 18-9.

mediaeval origins, which has subsequently been regarded as giving Scots law its valuably distinctive character.[34]

As regards the protection for Scots law in the Articles of Union, MacQueen suggests that this may have owed more to pragmatic considerations – the practical impossibility of creating a unified legal system in 1707[35] – as well as a long-standing perception that Scots needed to be protected against what was seen as a more aggressive and burdensome style of governance south of the border,[36] than from pride in the Scottish legal system for its own stake. Certainly, in the 18th century, there was no clear relationship between legal identity and national identity. Kidd argues that:

> "Eighteenth-century Scots did not think of their legal system as impeccably Scottish in pedigree and character; rather they acknowledged that they participated – by way of their share in the pan-European inheritance of civil, canon and feudal law – in a supra-national *ius commune.*"[37]

Thus, "Modernisation mattered more to eighteenth-century Scots jurists than the preservation of traditional Scots legal forms and institutions in aspic as symbols of an historic nationhood."[38] Indeed, Kidd claims that it is difficult to detect many traces of legal nationalism - that is, the desire to protect the distinctiveness of the Scottish legal system against external (specifically English) influence – prior to the second half of the 20th century.[39]

Legal nationalism is itself a strange beast. 20th-century legal nationalists were largely unionist in political orientation,[40] and as an ideology it is by no means universally accepted amongst Scots lawyers.[41] There is justifiable scepticism about the nature of the relationship between legal identity and national identity, both in terms of claims such as that of Lord Cooper that "law is the reflection of the spirit of the people",[42] and in terms of the importance of particular legal rules or institutions in constructing national identity. Nevertheless, it is hard to dispute the general thesis that the separate legal system is one of the markers of the continuing distinctiveness of Scotland within the Union; as MacQueen points out "in a very literal, even physical, sense, law and jurisdiction do indeed define what is Scotland. Scotland is that area of territory which is subject to Scots law and to the jurisdiction of the Scottish courts."[43]

Crown Prerogative in Scots Law

We can find more specific echoes of the ideas contained in the Declaration of Arbroath in elements of Scots public law, where the influence of civil law was less clearly felt,[44] and hence where we might find greater continuity with mediaeval legal thought. The first relates to the subjection of the Crown to

[34] Particularly in the work of TB Smith – see Kidd, above n12, at 203-9; MacQueen, above n22, at 25.
[35] Above n22, at 19.
[36] Above n3, at 108.
[37] Above n12, at 177.
[38] Ibid, at 176.
[39] Ibid, at 176, 198-210.
[40] Kidd, above n12, 201-4.
[41] See, e.g., Willock, above n12; L. Farmer, 'Under the Shadow of Parliament House: the Strange Case of Legal Nationalism', in L Farmer and S Veitch (eds), *The State of Scots Law: Law and Government after the Devolution Settlement* (Butterworths, 2001).
[42] Above n27, at 88.
[43] Above n22, at 1.
[44] Mitchell, above n18, at 14.

legal control – an issue of enduring constitutional significance because central government (at both UK and devolved Scottish levels) is still carried on in the name of the Crown.

Although, as already noted, there is no evidence of the Declaration itself having direct legal relevance, Mason argues that "there *were* traditions of political discourse of broadly constitutionalist bent that informed political practice in late mediaeval and early modern Scotland."[45] The most famous statement of the limited nature of the Scottish Crown is Buchanan's *De Jure Regni Apud Scotos*. Buchanan is best known for his broader argument (discussed further below) that the right of Scots monarchs to rule rested on popular consent, and that the people therefore retained the right of armed rebellion against an oppressive prince. Nevertheless, it is clear that he regarded rebellion as the last resort, instead placing special emphasis on the power of judicial review as the ordinary remedy for breach of the law.[46] While there are no Scottish equivalents of the famous 17th century English cases testing the limits of the Crown's legal powers,[47] TB Smith nevertheless notes that there is a record of legal action being brought against the Crown in Scotland as early as 1261, while an Act of Sederunt of 1542 provided for the summoning of the King's Comptroller or the Lord Advocate to answer for actions brought against the Crown in the Court of Session.[48] The idea of the legal subjection of the Scottish Crown also appears to be supported by the 1689 Claim of Right, which asserted that James VII:

> "Did By the advice of wicked and evill Counsellers Invade the fundamentall Constitution of this Kingdome And altered it from a legall limited monarchy to ane Arbitrary Despotick power and in a publick proclamation asserted ane absolute power to cass annul and disable all the lawes particularly arraigning the lawes Establishing the protestant religion and did Exerce that power to the subversion of the protestant Religion and to the violation of the lawes and liberties of the Kingdome."

However, two important caveats must be entered before proclaiming an ancient Scottish tradition of limited government. In the first place, the theories current in Scotland during the late mediaeval and early modern period were not exclusively Scottish.[49] For instance, Buchanan – though writing about the law of kingship *amongst the Scots* – was clearly influenced by, and contributing to, debates about the limited or absolute nature of royal authority found throughout Europe,[50] and indeed traceable back to Roman law.[51] Buchanan's ideas were in turn influential on equivalent debates about royal authority in 17th century England via the works of Milton, Sidney, Coke and Locke.[52]

Secondly, these ideas were also controversial within Scotland.[53] Buchanan's views were explicitly countered by James VI in *The True Law of Free Monarchies*, published in 1598, and by Sir George Mackenzie's *Jus Regium*, published in 1684, who argued that the king was the fount of, and hence not subject to, legal authority. *De Jure Regni Apud Scotos* was itself banned by Act of Parliament in 1584, and again by the Privy Council in 1664 and 1688. Thus, the Claim of Right – along with the English Bill

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[45] Above n1, at 268. See also CF Arrowood, 'George Buchanan and the "*De Jure Regni Apud Scotos*"', *The Powers of the Crown in Scotland* (University of Texas Press, 1949) ch 3.
[46] Arrowood, ibid, at 30-1.
[47] Mitchell, above n17, at 307.
[48] *British Justice: the Scottish Contribution* (Hamlyn Lectures, 13th Series, Stevens & Sons Ltd, 1961) 198. It is still the position today that the Lord Advocate (in relation to devolved matters) or the Advocate General for Scotland (in relation to reserved matters) litigates on behalf of the Crown in Scotland.
[49] Mason, above n1, at 268.
[50] See Arrowood, above n45, ch3.
[51] See D Lee, *Popular Sovereignty in Early Modern Constitutional Thought* (Oxford University Press, 2016).
[52] Arrowood, above n45, at 15-6.
[53] Mason, above n1, at 268.

of Rights – must be seen as essentially a *political* victory for ideas of limited government, rather than as a straightforward vindication of longstanding constitutional principle. Moreover, the Glorious Revolution constituted only a partial victory in terms of subjecting the Crown to the Rule of Law. It retained – and still retains – a number of exclusive prerogative powers, as well as legal privileges and immunities, in both Scots and English law.

Nevertheless, there is some support for the idea that Scots law was historically less respectful of claims to royal authority than English law, not least in the terms of the Claim of Right and Bill of Rights themselves. Whereas the latter resorted to the legal fiction that James II (of England) had abdicated, because there was still no clear answer as to where ultimate legal authority law in the relationship between the king and the English Parliament, and hence a revolt against the Crown would have been unlawful, in Scotland there were no such qualms; the Claim of Right unequivocally stated that James VII had "forfaulted the right to the Croune."[54] Mitchell also argues that the historical evidence – though limited and inconsistent – makes statements of the limited view of the prerogative more acceptable as embodying the predominant legal opinion in Scotland.[55] He claims that there was a reluctance to concede claims of prerogative rights, and in particular a tendency to separate the legal position of the monarch personally from that of the Crown in its governmental capacity, emphasising that rights enjoyed in the latter capacity were for the benefit of the public.[56] Thus, the Crown in Scotland appears to have enjoyed fewer substantive prerogatives than in England. For instance, there is evidence of the Scottish Parliament asserting rights over foreign affairs that would have been unthinkable in England;[57] similarly, the Scottish Crown, unlike the English, enjoyed no immunity from the application of statute, nor from taxation.[58] And there was certainly no acceptance, as there was in England, of the doctrine that the King could do no wrong, thus insulating the Crown and Crown servants from legal actions.

Since the Union of 1707, however, such historic differences as there may have been between Scots and English law on the Crown have largely been eroded, initially as more liberal Scottish attitudes were supplanted by English precedents, and later, in the 20th and 21st centuries, as Crown prerogatives, immunities and privileges have been eroded both by statute and by the development of the common law.[59] In the recent challenge to use of the royal prerogative to prorogue the UK Parliament for five weeks in order to curtail parliamentary debate on Brexit, there was an attempt to argue that Scots law still takes a stricter view of the legitimate extent of prerogative power than English law. However, this claim was met with scepticism by the judges hearing the case in the Inner House of the Court of Session.[60] Although the Inner House was prepared to strike down the prerogative decision when the English Divisional Court was not,[61] it was the former decision that was subsequently upheld by the (English judge-dominated) UK Supreme Court.[62]

[54] S Tierney, 'Scotland and the Union State', in McHarg and Mullen (eds), above n8, at 29.
[55] Above n17, at 307.
[56] Ibid, at 319.
[57] Smith, above n17, at 102-3.
[58] Mitchell, above n18, at 151-2.
[59] See A Tomkins, 'The Crown in Scots Law', in McHarg and Mullen (eds), above n8.
[60] *Cherry et al v Advocate General for Scotland* [2019] CSIH 49, per Lord Carloway at para 51 and per Lord Brodie at para 81.
[61] *R (Miller) v Prime Minister* [2019] EWHC 2381 (QB).
[62] [2019] UKSC 41.

Accordingly, while differences of detail may still remain in relation to legal control of the Crown in Scots and English law, it is hard to detect any remaining traces of fundamentally distinct constitutional doctrines.

Popular Sovereignty and Fundamental Law

The other key way in which the Declaration of Arbroath might be said to be indicative of an enduring Scottish constitutional tradition is the idea that sovereignty in Scotland rests in the people, not in Parliament. Again, though, the idea of popular sovereignty cannot be regarded as exclusively Scottish.[63] In fact, Neil MacCormick points to two ideal types of sovereignty in European thought.[64] The first regards sovereignty as belonging exclusively to kings through conquest. If the king evolves into a king-in-parliament, then the parliament acquires the sovereignty originally possessed by the king, and legal sovereignty remains vested in parliament as an institution, even after the franchise is extended such that the people acquire political or *de facto* sovereignty. This is the orthodox, Diceyan model of sovereignty that prevails in English constitutional thought. The second ideal type says that sovereignty belongs to the people:

> "Government subsists by their consent and, in a deep sense, kingship or other magistracy is by the election of the people, even if that election is through acknowledgement of a right of hereditary descent. In this type, the growth of democratic institutions can be readily represented as the flowering of a more authentic version of what has all along been underlyingly present. There is and has been a right of self-rule among people who have exercised their right through whatever institutions may have best suited the context and circumstances of time and place."

This second understanding of sovereignty has a powerful grip on contemporary Scottish constitutional thinking. For instance, the 1989 Claim of Right, endorsed by the Scottish Constitutional Convention which led directly to the establishment of the Scottish Parliament and which has been repeatedly reaffirmed since by Scottish politicians,[65] acknowledged "the sovereign right of the Scottish people to determine the form of Government best suited to their needs." This sovereign right can be seen as having been exercised via the devolution referendums of 1979 and 1997, and even more powerfully in the independence referendum of 2014.[66] Had the 2014 referendum resulted in a vote for independence, Scotland's interim constitution would have placed at its heart the principle that "In Scotland, the people are sovereign."[67] This was, according to the then Deputy First Minister, Nicola Sturgeon, a "core truth [which] resonates throughout Scotland's history and will be the foundation stone for Scotland as an independent country."[68]

But in fact the idea of a separate Scottish sovereignty tradition which has survived the Union with England has only relatively recently been taken seriously by Scots constitutional lawyers – as already noted, only since Lord Cooper's claim in *MacCormick v Lord Advocate* that parliamentary sovereignty is a peculiarly English principle. It should also be emphasised that the *MacCormick* case was not about popular sovereignty *per se*, but rather about the constitutional status of the Acts of Union. Although

[63] See Lee, above n51.
[64] Above n2, at 11.
[65] Most recently by a vote in the UK House of Commons – H.C. Deb., Vol 644, cols 406-56, 4 July 2018.
[66] See A McHarg, 'The Independence Referendum, the Contested Constitution, and the Authorship of Constitutional Change', in KP Müller (ed), *Scotland 2014 and Beyond – Coming of Age and Loss of Innocence?* (Peter Lang GmbH, 2015).
[67] Scottish Government, above n2, s2.
[68] Ibid, at 4.

arguments about the fundamental and binding nature of the Acts of Union had been made – and sometimes accepted by judges – before, particularly during the period leading up to the Disruption of 1843,[69] it was only after 1953 that serious legal academic arguments about the status of the Acts of Union as a limitation on the sovereignty of the UK Parliament began to emerge.[70] Since *MacCormick*, this alternative view of sovereignty has been cautiously endorsed in several other cases.[71] However, it clearly remains an unorthodox account of the constitution. It is explicitly rejected by other writers,[72] and even its supporters acknowledge the practical difficulties involved in enforcing the guarantees contained in the Union legislation and uncertainty as to whether the courts have the power to strike down Acts of Parliament. Thus, the Diceyan view remains the dominant one – i.e., that, while the Acts of Union are politically important, they have no greater legal status than any other Act of Parliament and hence are freely open to amendment or repeal.[73]

There is, in any case, an ambiguity in the way that arguments for the constitutional relevance of the Acts of Union are made, and hence whether, assuming that they do have some special status, this is indicative of a distinctively Scottish constitutional tradition.

The argument for fundamental status is most often made on the basis that the terms of the Union constitute a constituent act for a new state (Great Britain), and hence are binding upon the parliament of that new state, itself created by the Union legislation. On this approach, Scottish constitutional history is relevant only insofar as the independence of Scotland before 1707 is crucial to the status of the Union as an agreement between equals, rather than a takeover by England. (Arguments about the superior status of the English Crown were still being made in the years prior to the Union, and were vigorously contested by the Scots.)[74] On this view, guarantees for Scots law and institutions were essentially protections for the interests of what would become a permanent minority within the Union,[75] rather than necessarily indicative of the sovereignty of the Scottish people. Moreover, as the foundation for a new state, the Acts of Union ought logically to be regarded as part of the constitutional law of the whole state, not a peculiar feature of Scots law, and a similar status should be accorded to the terms of the 1800 Union with Ireland.[76]

At other times, however, the argument against the unlimited sovereignty of the parliament created by the Acts of Union is couched in terms of legal inheritance. As Lord Cooper put it in *MacCormick v Lord Advocate*, "I have difficulty in seeing why it should have been supposed that the new Parliament of Great Britain must inherit all the peculiar characteristics of the English Parliament but none of the

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[69] See Kidd, above n12, at 103-8; Lord Rodger of Earlsferry, *The Courts, the Church and the Constitution: Aspects of the Disruption of 1843* (Edinburgh University Press, 2008).

[70] See, in particular, TB Smith, above n17; Mitchell, above n18, ch 4; N MacCormick, 'Does the United Kingdom Have a Constitution?' (1978) 29 *Northern Ireland Legal Quarterly* 1; MJG Upton, 'Marriage Vows of the Elephant: the Constitution of 1707' (1989) 105 *Law Quarterly Review* 79; D Edwards, 'The Treaty of Union: More Hints of Constitutionalism' (1992) 12 *Legal Studies* 34.

[71] *Gibson v Lord Advocate* 1975 SC 136; *Pringle, Petitioner* 1991 SLT 330; *Sillars v Smith* 1982 SLT 539; *Jackson v Attorney General* [2006] 1 AC 262, per Lord Hope of Craighead.

[72] E.g., C Munro, *Studies in Constitutional Law* (Butterworths, 2nd edn, 1999) at 137-42; J Robertson, 'The Idea of Sovereignty and the Act of Union', in HT Dickinson and M Lynch (eds), *The Challenge to Westminster: Sovereignty, Devolution, and Independence* (Tuckwell Press, 2000); A Tomkins, 'The Constitutional Law in *MacCormick v Lord Advocate*' 2004 *Juridical Review* 213.

[73] See AV Dicey and RS Rait, *Thoughts on the Union between England and Scotland* (Macmillan and Co Ltd, 1920).

[74] See Ferguson, above n27.

[75] Smith, above n48, at 202.

[76] In fact, this argument has been made by Harry Calvert, *Constitutional Law in Northern Ireland: A Study in Regional Government* (Stevens and Sons Ltd, 1968).

Scottish Parliament."[77] In other words, if the pre-1707 Scottish Parliament did not itself enjoy unlimited sovereignty, it could not confer such authority on the new Parliament of Great Britain.[78] On this approach, it *is* crucial to understand how sovereignty was understood in pre-Union Scotland, and it is also conceivable, given the preservation by the Union of the separate Scottish and English legal systems, that different legal understandings of sovereignty could be carried forward into the new Union settlement.[79]

To some extent, though, the two approaches merge. Given that there is no explicit mechanism in the Acts of Union for their amendment, both Smith and Mitchell argue for a principle of amendment by consent. Addressing the question whether the terms of the Union legislation have been respected in practice, both seek to explain away certain apparent breaches as being justified by their popular acceptance; acceptance which could not be guaranteed in all circumstances.[80] Albeit not a strictly legal doctrine, this effectively implies a notion of ongoing constituent power still vested in the Scottish people or their representatives.

How then was sovereignty understood in pre-Union Scotland? It has been argued that it is misconceived to try to extrapolate a claim to popular sovereignty from the Declaration of Arbroath because that is to misinterpret a historical document through a modern prism.[81] Dauvit Broun claims that, in the late Middle Ages, the idea of the Scots as a sovereign entity was fundamentally different from that of a modern nation; "the doctrine was that sovereign kingdoms constituted peoples" not *vice versa*.[82] Although, as has been seen, notions that kingship rested on consent were present, these were clearly not literally true. Moreover, they were contested both within Scotland – for instance, James VI insisted, contrary to Buchanan, that the mythical Fergus I had become king of Scots in 330 BCE not by consent but by conquest – and within wider European constitutional thinking, where it was disputed whether an original act of consent to princely rule could later be revoked.[83]

The extent to which older constitutional thinking survived the new constitutional dispensation after 1689 is also unclear. There were certainly debates at the time of the Union about whether the Scottish Parliament had the authority to effect a change as fundamental as dissolution of the state without recourse to the people, a point on which it was ultimately concluded that it could.[84] But the relatively brief period between the Glorious Revolution and the Union, as well as the fact that the main constitutional preoccupations were with different kinds of sovereignty questions – primarily Scotland's external sovereignty in relation to England, and the relative extent of secular and ecclesiastical authority – make it difficult to determine conclusively how questions of fundamental legal authority were understood.[85] There are some indications of the modern doctrine of Parliamentary sovereignty – for example, it seems to have been accepted that the Scottish Parliament

[77] Above n13 at 411.
[78] MacCormick, above n2, at 11-2.
[79] See, e.g., N MacCormick, 'Is There a Constitutional Path to Scottish Independence?' (2000) 53 *Parliamentary Affairs* 721 at 727.
[80] Smith, above n17, at 112-3; Mitchell, above n18, at 58.
[81] J MacDonald, 'Scottish Independence: a Constitutional and International Perspective' (2012) *Juridical Review* 25 at 36.
[82] Above n25, at 264.
[83] See Lee, above n51.
[84] See KWB Middleton, 'New Thoughts on the Union between England and Scotland' (1954) *Juridical Review* 37 at 40; C Kidd, 'Sovereignty and the Scottish Constitution Before 1707' (2004) *Juridical Review* 225 at 233-4.
[85] Kidd, ibid, at 227-8.

could not bind its successors,[86] and that judicial review of legislation was not possible.[87] However, Mitchell concludes:

> "It is not clear that in 1707 either that the English Parliament was accepted as 'sovereign' in the sense in which the word is now used or alternatively that the Scottish Parliament could not, in legal theory, be said to be as 'sovereign' as was the English one."[88]

On such scant material, it is hard to build a theory of popular sovereignty as the *legal* basis for the Scottish constitution. In any case, the uses made of such ideas in contemporary constitutional debates go far beyond the residual right of rebellion that may be found in the pre-1707 literature. These contemporary claims about the sovereignty of the Scottish people are essentially political rather than legal claims, which owe more to international law understandings of national self-determination, and to the need for protection of national minorities within a Union state. Indeed, we increasingly find similar claims to consent and self-determination being made on behalf of the peoples of Wales and Northern Ireland, notwithstanding the absence of equivalent historical underpinnings.[89]

Conclusion

Alan Page counsels that "We should be wary of accepting claims of a distinctive Scottish constitutional tradition at face value."[90] As this chapter has sought to show, the legal and constitutional significance of the Declaration of Arbroath and the ideas contained within it are indirect at best and uncertain in effect. Revival of interest in Scotland's constitutional history prior to 1707 is largely a 20th and 21st century phenomenon, bound up with broader nationalist movements of both the legal and political varieties. Appeal to a native Scottish constitutional tradition has played a part in rejecting the assimilation tendencies of the post-Union legal settlement, and helped to pave the way for greater Scottish autonomy within the Union. Nevertheless, placing the principles of popular sovereignty and limited government at the heart of the constitution of an independent Scotland would in an important sense involve the beginning of a new constitutional chapter rather than the continuation of an existing one or the revival of an old one. Much work would be required to understand what practical implications these principles should have in contemporary constitutional conditions, in which endeavour the Declaration of Arbroath would be of little assistance.

[86] Mitchell, above n18, at 59-60.
[87] Smith, above n17, at 113-4. Although Mitchell argues that judicial strike down of *private* legislation was possible – above n18, at 66-7.
[88] Above n18, at 54.
[89] See A McHarg, 'Unity and Diversity in the United Kingdom's Territorial Constitution', in M Elliott, JNE Varuhas and S Wilson Stark (eds), *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives* (Hart Publishing, 2018) 287-9.
[90] *Constitutional Law of Scotland* (W Green, 2015) 1.