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Parliamentary Sovereignty: Constitutional Theory and Practice from a Scottish Perspective

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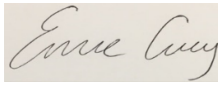
‘This thesis is the result of the author’s original research. It has been composed by the author and has not been previously submitted for examination which has led to the award of a degree.’

Signed: 

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Abstract

The classic account of parliamentary sovereignty, captured in the work of A.V Dicey, has long been regarded as the fundamental doctrine of the UK constitution. The orthodox view is that the UK Parliament has unrestricted law making power which no other body can invalidate. However, overtime the relevance of the traditional doctrine has faced challenge from within the political, legal and common law constitution. In this context, the focus of this thesis is to assess the impact that the Scottish constitutional trajectory has had on the orthodox understanding of sovereignty in the UK. This research has been prompted by the potential profound implications of the UK's pending exit from the European Union, which has intensified the debate around the understanding of sovereignty in the UK. Against this backdrop, the political and legal implications of the 2014 referendum on Scottish independence continue to develop, therefore this research will contribute to the sovereignty debate from a Scottish perspective.

Devolution in Scotland gives institutional expression to Scottish constitutional differences: differences that have existed within the Union since 1707. Arguably, the introduction and development of the settlement has entrenched constitutional distinctions between Scotland and UK. Indeed, the territorial dimensions of the UK constitution were fully tested when the question of Scottish independence was brought on to the political agenda. Although Scotland voted to remain within the UK, the political response to the 'No' vote initiated the devolution of further power to Scotland. Consequently, the Scotland Act 2016 has introduced changes of potential constitutional significance. All of the above will be examined in great detail throughout this research, to reveal the pressure that the Scottish constitutional trajectory has placed on the classic account of parliamentary sovereignty. It will be concluded that the challenges to the doctrine continue to intensify overtime as the UK constitution evolves.

Contents

1. Introduction

"UK constitutionalism has always been shaped, quite explicitly and to a significant extent, by a captivation with the concept of sovereignty"[1]

The orthodox understanding of the location of sovereign power within the UK constitution was famously articulated by constitutional theorist A.V. Dicey[2], as the Crown-in-Parliament with ultimate and unchallengeable legislative supremacy. However, the unqualified status of the doctrine has been placed under significant pressure as the UK constitution evolves. The incorporation of international law and the plurinational nature of the UK constitution continuously tests the Diceyan theory against its practical application. Arguably, the UK's interaction with Scotland - as a distinct political identity - exposes the gap between the theory of parliamentary sovereignty and its operation in practice. Scotland, as part of the plurinational state, is a particularly interesting case study because its constitutional accommodation within the UK has been subject to great debate: aspects of a separate body of public law in Scotland have continued ever since the Union with England in 1707.

From this perspective, this thesis will make three contentions: Firstly, Dicey's theory of parliamentary sovereignty claims that Parliament has unrestricted authority, from which four principles may be derived. These principles include the right to make and unmake any law; that all Acts of Parliament are equal; no Parliament is bound by another; and no other authority may question an Act of the UK Parliament. Secondly, it will be contended that notwithstanding the wider challenges to the doctrine from the political and legal constitution (which includes the accommodation of Scottish differences since the 1707) the Diceyan interpretation of parliamentary sovereignty continues to be interpreted as the "fundamental principle"[3] of the UK constitution. A

[1] Michael Gordon 'The UK's Sovereignty Situation: Brexit, Bewilderment and Beyond …' (2016) 24 Kings Law Journal 333.
[2] A V Dicey, *An Introduction to the Study of the Law of the Constitution* (First published 1885, 8th edn, Macmillan 1915).
[3] See the recent UK Supreme Court judgement *R. (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] A.C. 61.

contemporary read of section 28(7) of the Scotland Act 1998 confirms that devolving powers to Scotland does not "affect the power of the Parliament of the United Kingdom to make laws for Scotland", which would imply that the traditional doctrine still retains its status within Scotland. Nevertheless, the final contention within this thesis will be that in practice Scotland, as a distinct political identity, continuously places additional political and legal pressure on the doctrine of parliamentary sovereignty. It will be argued that the constitutional trajectory in Scotland is now challenging all four principles set out above, stretching the doctrine beyond the traditional theory as conveyed by Dicey.

As set out above, the theory of sovereignty in the UK constitution has always attracted great discussion, but as the UK is now set to exit the European Union the debate surrounding the legal and political dimensions of sovereignty in the UK has intensified. Depending on any final deal, the UK's exit from the EU will remove the EU as a separate source of law in the domestic constitution, and therefore, a key argument of those who support withdrawing from the EU is that it will restore the sovereignty of the UK Parliament[4]. However, on a domestic level it can be said that the matter is more complex. Membership of the EU has affected constitutional practices and principles within the UK impacting on the authority of UK courts[5] and the development of devolved government, ultimately influencing the operation and understanding of parliamentary sovereignty[6]. Thus, the implications of the European Union (Withdrawal) Act 2018 go further than removing the effect of EU law in the UK. Also, as both Northern Ireland and Scotland voted to remain within the EU the UK's exit from the EU (Brexit) will be very much political as well as legal. Consequently, the UK is in a period of constitutional flux which has created the space for a multi-layered debate about the limits of parliamentary sovereignty and this research aims contribute to this, from a Scottish perspective.

[4] See Sionaidh Douglas-Scott Brexit 'The Referendum and the UK Parliament: Some Questions about Sovereignty' (UK Constitutional Law Blog, June 2016) https://ukconstitutionallaw.org/2016/06/28/sionaidh-douglas-scott-brexit-the-referendum-and-the-uk-parliament-some-questions-about-sovereignty/ accessed June 2017.
[5] Case 6/64 *Costa v Enel* [1964] CMLR 425,455.
[6] Mark Elliot & Stephen Tierney, 'Political pragmatism and constitutional principle: the European Union (Withdrawal) Act 2018' [2019] Public Law 37, 38.

To develop this research key legislation and case law will be examined, as well as relevant critical analysis of Scotland's constitutional impact on the traditional doctrine of sovereignty. For example, Professor Bogdanor has asserted the doctrine of parliamentary sovereignty in Scotland bears an "attenuated meaning"[7]. Likewise, Martin Loughlin has argued that "the 'devolutionary' arrangements of the Scotland Act 1998" give "institutional expression to Scots political identity" potentially providing "the more radical challenge to the sovereignty of the United Kingdom state"[8]. Challenges to the orthodox understanding of sovereignty in Scotland can be said to pre-date devolution. Indeed, Neil MacCormick, has argued throughout his work that from a Scottish perspective there are "two possible interpretations"[9] of the UK constitution: the prevailing constitutional theory of parliamentary sovereignty and an alternative view that sovereignty belongs to the people of Scotland. According to MacCormick this tradition dates back to the Declaration of Arbroath 1320. While Scotland voted to remain in the UK in the 2014 referendum on independence, it is nevertheless important to consider the impact of the referendum, as Aileen McHarg states, its "ongoing effects… shook up Scottish political life in ways, and to a degree that few if anyone would have predicted"[10]. Since the referendum, some constitutional experts, such as Neil Walker, have contended that the increased autonomy of the Scottish Parliament through the Scotland Act 2016 offers "not only a guarantee of irreversibility but also the suggestion of constitutional finality - and with it abandonment of the ultimate goal of sovereignty."[11] This research will add to these arguments mapping it back to the four aspects of Diceyan sovereignty, set out at the beginning. To address each of the contentions detailed above this thesis will be spilt in to four chapters.

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[7] Vernon Bogdanor 'Devolution: Decentralisation or Disintegration' (1999) 70 The Political Quarterly 185.
[8] Martin Loughlin *The Idea of Public Law* (OUP 2003) 95.
[9] Neil MacCormick, 'Is there a constitutional path to Scottish independence?' (2000) 53 Parliamentary Affairs 721, 730
[10] Aileen McHarg, Manifesto Watch: The Constitutional Implications of the Rise of the SNP (UK Constitutional Law Blog, April 2015) https://ukconstitutionallaw.org/2015/04/29/manifesto-watch-aileen-mcharg-the-constitutional-implications-of-the-rise-of-the-snp/ accessed November 2016
[11] Neil Walker 'The Territorial Constitution and the Future of Scotland' in Aileen McHarg, Tom Mullen, Alan Page, and Neil Walker (eds) *The Scottish Independence Referendum: Political and Constitutional Implications* (Oxford University Press 2016) 261.

Chapter One will focus on the theory of the traditional doctrine as set out by Dicey, analysing the four principles that can be derived from his renowned definition. The Chapter will also consider the practical operation of the traditional doctrine in the political, legal and common law constitution. This will include an overview of the incorporation of EU Law and the European Convention on Human Rights, and the plurinational nature of the UK constitution. This Chapter will demonstrate that the traditional doctrine remains a fundamental aspect of the UK constitutional theory, but is continuously tested in practice.

Chapter Two will examine the constitutional accommodation of Scotland within the plurinational state since the Union in 1707. It will be argued that to some extent the UK Parliament has attempted to accommodate Scotland's constitutional differences. However, the enforcement of clearly unwanted legislation[12] on the Scottish people, perhaps revived the alternative tradition of popular sovereignty[13]. This tradition was channelled through the Scottish Constitutional Convention. The Scottish Constitutional Convention openly rejected the doctrine of parliamentary sovereignty and made demands for home rule. By virtue of parliamentary sovereignty the UK Parliament was not legally obliged to give effect to the SCC's request. However, it can be said that given the political legitimacy and normative force invested within the SCC, legislation was subsequently enacted to provide for Scottish devolution. Chapter 2 highlights the significant relationship between the political and legal constitution from a Scottish perspective, which also contributes to the wider challenge of the UK's political constitution.

It can be argued that devolving powers away from the sovereign UK Parliament placed pressure on its legislative authority from the outset. Westminster tried to mitigate potential challenges by reiterating in the Scotland Act 1998, that the UK Parliament will remain sovereign in all matters[14]. However, it can be debated that there is great political legitimacy invested within the Scottish Parliament which has,

[12] Abolition of Domestic Rates ect, (Scotland) Act 1987
[13] *Claim of Right for Scotland 1989*
[14] Scotland Act 1998, s 28(7)

to some extent, been recognised by the judiciary[15] and within the Sewel Convention. The Sewel Convention is a well-established agreement that the UK Parliament will not legislate in relation to Scottish matters without consent of the devolved legislator. Also, following demand[16] the UK Parliament has expanded the devolution settlement, which from a practical perspective, possibly reduces the relevance of its authority in relation to Scottish matters. In this context, Chapter Three will assess Scottish devolution within the political, legal and common law constitution to set out an argument that devolution has continuously placed pressure on the doctrine of parliamentary sovereignty.

In assessing the challenges to parliamentary sovereignty from a Scottish perspective it is necessary to examine the impact of the 2014 referendum on Scottish independence. While Scotland returned a vote to remain in the Union, the UK Government had pledged to enhance the devolution settlement in the event of a 'No' vote. Fulfilling this commitment led to the enactment of the Scotland Act 2016, which contained provisions of potential constitutional significance. The Act asserts that the Scottish Parliament is a permanent fixture[17] within the UK and gave recognition to the political understanding of the Sewel Convention[18]. Although the UK Parliament has the legislative authority to abolish this Act, the purpose of these provisions is to signify the commitment of the UK Parliament to the Scottish Parliament. Therefore in practice any attempts to repeal this may prove politically difficult. The aim of the Chapter Four is to examine the political events surrounding the 2014 referendum and the changes that followed, to demonstrate that Scottish devolution challenges all four aspects of the Diceyan doctrine within the political, legal and common law constitution.

[15] Lord Hope in *AXA General Insurance v Lord Advocate* [2011] UKSC 46 | [2012] 1 A.C. 868 [49].
[16] Commission on Scottish Devolution, Serving Scotland Better: Scotland and the United Kingdom in the 21st Century (2009).
[17] Scotland Act 1998, s 63A (as inserted by the Scotland Act 2016, s 1).
[18] Scotland Act 1998, s 28(8) (as inserted by the Scotland Act 2016, s 2). The provision was an attempt to place the Convention on a statutory footing, as proposed by the Smith Commission. However, the Supreme Court have subsequently held in the *Miller* (n 3) that Sewel is not a legal rule.

Ultimately this research will conclude that the Scottish constitutional trajectory has indeed placed pressure on the Diceyan doctrine of parliamentary sovereignty. These challenges have intensified over time as the political climate shifts. Looking forward, as the UK Parliament have enacted the European Union (Withdrawal) Act 2018 without the consent of the Scottish Parliament[19], the political impact of legislating for Brexit may stretch the traditional doctrine to breaking point, which will be reflected on in the conclusion.

[19] The Scottish Parliament voted 93-30 to withhold consent to the Withdrawal Bill. The UK Parliament unprecedentedly proceeded to enact the legislation.

2. Chapter 1 - Parliamentary Sovereignty: Constitutional Theory and Reality

The theory of Parliamentary Sovereignty commonly denotes that Parliament has "uncontrollable authority in the making of laws"[20]. The legislative supremacy of Parliament emerged as a constitutional principle during the Glorious Revolution in seventeenth-century England. During this era England faced a period of civil war, with Parliament and the monarchy competing for ultimate authority. As the revolution came to an end it was agreed that the monarchy would not try to assert constitutional supremacy, and a valid Act of Parliament would thereafter be recognised as the law of the land. The aim of this Chapter is to examine the theory of parliamentary sovereignty, against the constitutional reality.

2.1 A.V Dicey

The most influential interpretation of the doctrine of parliamentary sovereignty was conveyed in the 19th century by constitutional writer A.V Dicey. In his book the *Introduction to the Study of the Law of the Constitution,*[21] Dicey defines Parliament as having the:

"*right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament."*[22]

Dicey provides a straight-forward theoretical definition from which four basic principles can be derived. Firstly, Parliament is the ultimate law-making body and can legislate and enact any law it so chooses. This includes the power to 'abolish' and reconstitute itself as a different body - as it did with the Union with Scotland in 1707. Parliament can also grant independence to dependant states, devolve powers, legislate to alter its term in office[23] and legislate in retrospect[24]. This list is not

[20] Paul Craig 'Public law, political theory and legal theory' [2000] Public Law 205, 211.
[21] A V Dicey, *An Introduction to the Study of the Law of the Constitution* (First published 1885, 8th edn, Macmillan 1915).
[22] ibid 39 – 40.
[23] Fixed-term Parliaments Act 2011.
[24] *Burmah Oil Company v Lord Advocate* (1965) AC 75.

exhaustive. From a Diceyan perspective then all authority should flow through Parliament.

Secondly, in addition to Parliament's ultimate law-making power, Dicey was clear that all acts of Parliament are of equal measure:

"neither the Act of Union with Scotland nor the Dentists Act 1878 has more claim than the other to be considered a supreme law,"[25]

There is no distinction between what would be considered an ordinary Act of Parliament (e.g. Dentist Act 1878) and what could be considered a constitutional Act of Parliament (e.g. Act of Union 1707). Likewise, there is no distinction during the legislative process for ordinary and constitutional legislation. Unlike countries with a written constitution, the UK constitution does not stipulate a binding procedure to enact, repeal or amend legislation of 'constitutional significance'. All Acts of Parliament are passed upon receiving a majority in both Houses and Royal Assent.

The third principle maintains that no Parliament is bound by another; for Parliament to be the ultimate law-making body it must not be limited in anyway. It would be illogical for the preceding Parliament to restrict the present legislator, as William Wade states:

"*Sovereignty belongs to the Parliament of the day and that, if it could be fettered by earlier legislation, the Parliament of the day would cease to be sovereign*"[26].

If Parliament does introduce an Act that contradicts previous legislation, it will be the most recent statute that will prevail. Even if the previous conflicting legislation has not been expressly repealed, the judiciary will give effect to the most recent expression of the legislator, through the doctrine of implied repeal. Two similar

[25] Iain McLean and Alistair McMillan, 'Professor Dicey's contradictions' [2007] Public Law 435.
[26] Sir William Wade, 'Sovereignty: revolution or evolution?' (1996) 112 Law Quarterly Review 568.

cases, *Vauxhall Estates Ltd v Liverpool*[27] and *Ellen Street Estates Ltd v Minister*[28], together demonstrate the operation of this principle. The court ruled in both that the Housing Act 1925 Act repealed the contradictory provisions in the Acquisition of Land (Assessment and Compensation) Act 1919. In *Ellen Street Estates* Maugham L.J. stated that

"The Legislature cannot, according to our constitution, bind itself as to the form of subsequent legislation, and it is impossible for Parliament to enact that in a subsequent statute dealing with the same subject-matter there can be no implied repeal."[29]

Finally, *"what parliament doth, no authority on earth can undo*"[30]. No person or institution, including the judiciary, has the authority to question the will of the legislator. The principle of implied repeal demonstrates the significant role that the courts play in upholding the sovereignty of Parliament, however, according to Dicey the even courts do not have the power to question a valid Act of Parliament.

Consequently, the theoretical understanding of parliamentary sovereignty can present both positive and negative aspects of power: the positive being the power to enact any law 'whatever' and negative being the unrestricted and unchallengeable nature of this power.

2.2 Parliamentary Sovereignty: the "bedrock"[31] of the British constitution

Although Dicey set out to assess Victorian constitutional law, his analysis of parliamentary sovereignty has endured. Parliament legislates with ultimate authority, and the courts continue to assert the traditional doctrine. In the case *Jackson v Attorney General*[32], in which the appellants sought judicial review of an Act of Parliament,

[27] [1932] 1 KB 733.
[28] [1934] 1 KB 590.
[29] [1934] 1 KB 590 [597].
[30] William Blackstone, *Commentaries on the Laws of England I* (first published 1765, Routledge 2001).
[31] *R. (on the application of Jackson) v Attorney General* [2005] UKHL 56; [2006] 1 AC 262, [274].
[32] *Jackson* (n 31).

Lord Bingham and Lord Carswell adhered to the traditional doctrine in their judgments. The Lords were of the view that parliamentary sovereignty is the one of the "*pillars*"[33] of the constitution. Lord Bingham's reasoning relied on the principle set out in the *Pickin*[34] case - that the judiciary does not have the authority to declare that legislation is invalid. Endorsing the traditional doctrine, he maintains that legislative supremacy is the "*bedrock*"[35] of the constitution and the Crown in Parliament remains "*unconstrained*"[36]. Likewise, Lord Carswell asserts that the sovereignty of Parliament is "*fully accepted by the courts and described by so many writers on the constitution from Dicey onwards that it needs no further elaboration"*[37]. From the continued relevance of Dicey's articulation and its preservation by Parliament and the judiciary, it can be argued that the Diceyan doctrine is the contemporary understanding of sovereignty in the UK.

More recently, Parliament has expressly referred to its sovereignty within legislation that relates to the constitution. The statutes which devolve powers to Scotland, Wales and Northern Ireland explicitly maintain that Westminster will remain sovereign in all matters[38]. Similarly, Parliament inserted a declaratory provision under section 18 of the European Union Act 2011 to affirm that European Union law is recognised in the UK "only by virtue"[39] of European Communities Act 1972. This provision followed questions around the supremacy of EU Law and Regulations, should there be conflicting domestic legislation[40]. Therefore, its purpose was to reiterate that the continuation of EU law within the UK was dependent on the will of the sovereign Parliament. This provision reaffirms Dicey's traditional principles; firstly, it is clarifying that EU legislation does not "override" the supremacy of Parliament; also, that Parliament is not bound by its predecessors who enacted the 1972 Act; and finally, that Parliament has the power to "unmake" the 1972 Act in place of new

[33] *Jackson* (n 31) [320] (Lord Carswell).
[34] *British Railways v Pickin* [1974] AC 765 (HL).
[35] *Jackson* (n 31) [274].
[36] *Jackson* (n 31) [274].
[37] *Jackson* (n 31) [320].
[38] Scotland Act 1998, s 28(7); Northern Ireland Act, 1998 s 5(6); Government of Wales Act 2006, s 107(5).
[39] s 18.
[40] See Case 6/64 *Costa v Enel* [1964] CMLR 425,455; Case C-221/89 *R v Secretary of State for Transport, ex p Factortame Ltd* [1992] 1 QB 680.

legislation. Nevertheless, being sovereign, Parliament does not need expressly confirm its authority. Therefore, this may serve only as a symbolic, or a "useful"[41] reminder of the UK Parliament's sovereign power.

2.3 Parliamentary Sovereignty in Practice: The Challenges

To maintain that the legislator can enact any law whatsoever - completely unrestricted - is at first glance, as Elliot and Thomas state, "an extravagant claim"[42]. The famous example that "if a sovereign legislator decided that all blue-eyed babies should be murdered, the preservation of blue-eyed babies would be illegal"[43] is often cited to substantiate this assertion. In this context the following section will consider the orthodox doctrine in practice.

2.4 Political Constitutionalism

Legislating for the murder of all blue-eyed babies perhaps offers an extreme example, however, Elliot and Thomas highlight that denying one gender the right to vote or denying suspected terrorists the right to a fair trial are examples of legislation, not to far-fetched, that have previously been enacted in Western countries. Since there are strictly no legal factors to prevent the enactment of extreme legislation it can be argued that Parliament's legislative freedom is curbed by public opinion. Dicey himself recognised that *"sovereignty is limited on every side by the possibility of popular resistance"*[44], identifying the legal sovereign (Parliament) and the political sovereign (the people). Indeed, the legislators' desire to be re-elected will generally provide a safeguard against extremely unpopular legislation. On this view, distinction can be drawn between legal and political constitutionalism.

According to Keith Ewing, the political constitution is about enabling and constraining the legal constitution. Ewing adds that the purpose of the political constitution is more than holding government to account and that it "allows for the

[41] Michael Gordon: The European Union Act 2011(UK Constitutional Law Blog, January 2012) https://ukconstitutionallaw.org/2012/01/12/mike-gordon-the-european-union-act-2011/ accessed January 2019.
[42] Mark Elliot & Robert Thomas, *Public Law* (3rd edn, OUP 2017) 229.
[43] Stephen, *The Science of Ethics* (London 1882), 137.
[44] Dicey (n 21) 79.

wishes of citizens to be realized and for these wishes to be translated into law"[45]. Political constitutionalism can be viewed as both an internal and external limitation on the sovereignty of the legislator: the internal limitation is that the legislature must be mindful of the political climate when drafting policy and the external limitation relates to the "instinct of subordination"[46] to enforce legislation. From one perspective, the political sovereign sits behind the legal sovereign and may manifest itself when electing representatives and by acting as a check on any legislation they deem unacceptable. The political sovereign has no legal power and cannot invalidate legislation, but non-compliance may allow certain Acts of Parliament to lose influence, as Bogdanor explains:

"It is in constitutional theory alone that the supremacy of parliament is preserved. The formal assertion of Parliamentary supremacy will become empty when it is no longer accompanied by a real political supremacy."[47]

2.5 Self-Imposed Limitations

In systems based on a written constitution, supremacy is often bestowed on the constitutional text itself which sets out the legal parameters for government, parliament, and the judiciary -who generally have considerable power to interpret the constitution[48]. Thus, the UK constitution is unusual in that it confers supremacy on Acts of Parliament with no form of legal limitation. The judiciary do not have the power to strike down an Act of Parliament. The courts in the UK mostly accept the sovereignty of Parliament and give effect to it through the doctrine of implied repeal. As previously discussed, if Parliament has not expressly repealed previous conflicting legislation then the judiciary will give effect to the most recent expression of Parliament. Influential constitutional writer Wade was explicit in maintaining that the courts were constitutionally obliged by the doctrine, allowing no exceptions. On this view, Parliament cannot entrench legislation - either completely or conditionally

[45] K.D. Ewing, The Resilience of the Political Constitution (2013) 14 German Law Journal 2111, 2117.
[46] Hilaire Barnett, *Constitutional and Administrative Law* (9th edn, Routledge 2011) 121.
[47] Vernon Bogdanor 'Devolution: Decentralisation or Disintegration' (1999) 70 The Political Quarterly 185, 192.
[48] See *Roe v Wade* 410 US 113 (1973).

- beyond repeal[49]. Wade takes the view that Parliament has continuing sovereignty and cannot entrench legislation as it would bind future Parliaments. For Wade, Parliaments supreme authority is founded on an agreement reached between the monarchy, the courts and Parliament, during the Glorious Revolution 1688. Wade categorised this, not as a legal agreement, rather "the ultimate political fact upon which the whole system of legislation hangs"[50].

This political fact is what Hart later refers to as the 'rule of recognition'[51]. The rule of recognition according to Hart is not "expressly formulated"; instead it is deduced "in the way in which particular rules are identified"[52]. Therefore, legislation passed through the correct parliamentary procedures will always be upheld by the judiciary, and effect will be given to the most recent Act of Parliament. Viewed this way, the sovereignty of Parliament cannot be amended even by Parliament itself. Wade was open to the notion that the rule of recognition could be altered overtime, but only within the political constitution. Parliament could not legislate to that effect[53]. This creates a paradox in that there is a self-imposed, practical limit on enacting any law whatsoever.

On the other hand, Wade's work has been criticised. The theory that Parliament cannot impose limits on itself is at odds with what has occurred in practice. The UK's ascension into the European Union led to the enacted the European Communities Act 1972, incorporating community law into UK domestic law. Section 2(4) of the act directs the courts to interpret the law in accordance with the requirements of EU law - which remains in place until the UK officially exits the EU. Thus, contrary to Wade's theory it can be argued that Parliament has enacted self-imposed limits. It follows that proponents of this new view of parliamentary sovereignty maintain that it should be within Parliaments' power to set out binding

[49] Wade, 'The Basis of Legal Sovereignty' [1955] Cambridge Law Journal 172, 188.
[50] Hart, *The Concept of Law* (Oxford 1961).
[51] ibid ch 6.
[52] ibid 98.
[53] H.W.R .Wade, *Constitutional Fundamentals* (Stevens, 1980) 37.

conditions on the manner and form in which legislation should be enacted, amended or repealed[54].

2.6 Manner and Form

The new view is also referred to as manner and form entrenchment, and a clear example can be found within the Northern Ireland Act 1998. The 1998 Act provides that Northern Ireland will remain a part of the UK and shall not cease to be so unless the people in Northern Ireland consent to this by voting in a poll[55]. It can be said that manner and form entrenchment does not condone entrenching legislation absolutely beyond repeal: not only would this be an attempt to bind future Parliaments but, as Elliot and Thomas highlight[56], even systems based on a written constitution have in place provisions for the constitution to be amended. Supporters of the new view contend that manner and form entrenchment is consistent with parliamentary sovereignty, because Parliament can still enact any law whatsoever, but with additional provisions in place that should first be satisfied. Michael Gordon's analysis of the theory concludes that it is normatively attractive, offering "the best explanation of developments in *practice* in the contemporary UK constitution"[57].

If theory of manner and form is held to be consistent with the doctrine of parliamentary sovereignty, then consideration must be given to how it is viewed in the legal constitution. Central to the new view is the distinction between form and substance: courts have the authority to review the validity of an Act of Parliament on its form or procedure, but not on its substance[58]. Jennings' analysis relied on decisions made in Commonwealth cases such as *Attorney-General for New South Wales v Trethowan*[59] and *Harris v Minister for the Interior*[60]as they shared "general

[54] I. Jennings, *Constitutional Laws of the Commonwealth* (Oxford University Press, 1957) ch 4; Heuston, *Essays in Constitutional Law* (London 1964) ch 1.
[55] Northern Ireland Act 1998, s 1.
[56] Elliot & Thomas (n 42) 239.
[57] Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: process, politics and democracy* (Hart Publishing, 2015) 357.
[58] Heuston (n 54) 6–7.
[59] [1932] AC 526.
[60] [1965] AC 172.

principles" with English constitutional law as a "former dependent state"[61]. However, there are certain cases in the UK that suggest the judiciary do not support the new view. For example, in *Thoburn v Sutherland City Council*[62] Laws LJ was clear that parliament could not bind its successors by;

"stipulating against repeal" and "cannot stipulate against implied repeal any more than it can stipulate against express repeal": "Being sovereignty, it cannot abandon its sovereignty." [63]

The theory was also discussed by the judiciary in *Jackson*[64]. Interestingly, at Court of Appeal level the judiciary recognised that Parliament may alter its legislative power and procedures, and;

"Thereafter, further constitutional alterations may be validly enacted under and by means of the altered powers and procedures"[65].

Supporting the manner and form was a first for an English appellate court[66]. When the case reached the House of Lords, some of the Law Lords likewise accepted the theory. Baroness Hale took the view;

"If Parliament is required to pass legislation on particular matters in a particular way, then Parliament is not permitted to ignore those requirements when passing legislation on those matters."[67]

Lord Steyn was more explicit, referring to writers who support the new view, he stated that;

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[61] I. Jennings, *Constitutional Laws of the Commonwealth* (Oxford University Press, 1957), 43.
[62] [2002] EWHC 195, [2003] QB 151.
[63] ibid [59].
[64] *Jackson* (n 31) [32].
[65] [2005] EWCA Civ 126, Q.B 579, [598].
[66] Discussed in Han-Ru Zhou, '"Revisiting the 'Manner and Form' Theory of Parliamentary Sovereignty"' (2013) 129 London Quarterly Review 610.
[67] *Jackson* (n 31) [163].

"Parliament could for specific purposes provide for a two thirds majority in the House of Commons and in the House of Lords"[68]

On the other hand, it can be said that *Jackson* does not offer conclusive authority on the theory of manner and form in the UK. The comments made were *obiter* and there was no consensus among the judiciary: while Lord Steyn and Baroness Hale supported the theory, Lord Bingham, Lord Carswell and Lord Brown did not. Lord Hope was completely unreceptive stating that:

"it is a fundamental aspect of the rule of sovereignty that no Parliament can bind its successors. There are no means by whereby, even with the assistance of the most skilful draftsman, it can entrench an Act of Parliament"[69]

Thus far, the theory of continuing sovereignty and the new view vary on whether Parliaments sovereignty is restricted by any self-imposed constraints. Nonetheless, both concepts are clear that Parliament is sovereign and can make any law whatsoever.

2.7 Legal Constraints: Common Law Challenges

The political limitation, and potential self-imposed limitations on the sovereignty of Parliament have so far been discussed, now it is important to consider any potential legal constraints. As previously outlined, there is no written constitution in the UK specifying legal constraints on the legislative power of Parliament; and as Dicey states *"what parliament doth, no authority on earth can undo*"[70]. However, some writers and members of the judiciary have argued that there are fundamental principles imbedded within the unwritten constitution that cannot be altered, even by Parliament. According to Lord Steyn:

[68] *Jackson* (n 31) [81].
[69] *Jackson* (n 31) [133].
[70] William Blackstone (n 30) 160 - 161.

"Parliament does not legislate in a vacuum. Parliament legislates for a European liberal democracy based upon the traditions of common… and… unless there is the clearest provision to the contrary… Parliament must be presumed not to legislate contrary of the Rule of Law."[71]

2.8 The Rule of Law

The rule of law is a principle of "institutional morality"[72] and has become widely accepted as one of the fundamental principles of the UK constitution. In the absence of a written constitution the rule of law can be viewed as a measure against the abuse of governmental power. It can be said there is a long history in the UK constitution of courts interpreting legislation in accordance with the rule of law[73]. The Constitutional Reform Act 2005 has also given the principle statutory recognition. Arguably, the values of the principle are reinforced by section 3(1) Human Rights 19998. The 1998 Act incorporates the rights set out in the European Convention on Human Rights (ECHR) and Parliament has expressly stated its intention for Convention Rights to be incorporated into UK domestic law. Significantly, section 3(1) directs the courts to;

"so far as it is possible to do so… legislation must be read and given effect in a way that is compatible with the Convention rights."

If it is not possible to read and give effect to legislation that is in a way compatible with Convention rights, then section 4(2) stipulates that a High Court or above "may make a declaration of incompatibility". The Court has the authority simply to declare that the Act in question is not compatible with Convention rights, and according to section 4(6)(a) this does not "affect the validity, continuing operation or enforcement of the provision in respect of which it is given". Therefore, UK courts do not have

[71] *R. v Secretary of State for the Home Department Ex p. Pierson* [1998] A.C. 539; [1997] 7 WLUK 527 (HL) 573 – 591.
[72] Jeffrey Jowell, 'The Rule of Law' in Jeffrey Jowell, Dawn Oliver, and Colm O'Cinneide, *The Changing Constitution* (8th edn, Oxford University Press 2015) 27.
[73] See *R (Anufrijeva) v Secretary of State for the Home Department* [2003] UKHL 36, [2004] 1 AC 604*; Ahmed v HM Treasury* [2010] UKSC 2, [2010] 2 WLR 378.

the authority to overturn legislation. Even if a declaration of incompatibility has been made, the Act of Parliament in question will remain valid.

While there is no judicial authority to strike down statute, the rule of law can still have a significant impact on the interpretation and content of legislation. Even before the Human Rights Act the courts will act on the presumption that the legislation was drafted in favour of the rule of law. A case in point is *Anisminic*[74]which concerned a provision[75] that attempted to oust the power of judicial review. The so-called 'ouster clause' stipulated that the Foreign Compensation Commission could not be reviewed by any court of law, presenting a direct challenge to the rule of law. When interpreting the provision, the court held that Parliaments intention was to only limit the courts in reviewing lawful decisions taken by the Commission, in which case it still had the power to review unlawful actions. Indeed, Wade asserted that the decision in *Anisminic* "is tantamount to say that judicial review… is constitutional fundamental which even the sovereign parliament cannot abolish"[76]. The courts presumption that legislation favours of the rule of law was referred to as the 'principle of legality' by Lord Hoffman:

"Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights… But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost"[77].

It follows that Parliament must be explicit in its intention to violate fundamental rights, it cannot be done by implication or by the use of ambiguous words. Lord Reed also supported this proposition in *AXA General Insurance Ltd*[78]. In this case the Supreme Court ruled that acts of the Scottish Parliament were not subject to common law review unless the act sought to violate the rule of law. Lord Reed set out that:

[74] *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL).
[75] Foreign Compensation Act 1950, s 4(4).
[76] Wade and Forsyth, *Administrative Law* (8th edn, Oxford University Press 2008), 616.
[77] *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115, 127 (HL).
[78]*AXA General Insurance v Lord Advocate* [2011] UKSC 46 | [2012] 1 A.C. 868 [49].

"*The principle of legality means not only that Parliament cannot itself override fundamental rights or the rule of law by general or ambiguous words, but also that it cannot confer on another body, by general or ambiguous words, the power to do so.*"[79]

In *Evans v Information Commissioner*[80], the Supreme Court held that the government had acted unlawfully when invoking its 'veto power'[81] to disregard the judgement of the Upper tribunal[82] to release 'advocacy letters' under the Freedom of Information Act 2000. Lord (with whom Lord Kerr and Lord Reed agreed) held:

"A statutory provision which entitles a member of the executive (whether a Government Minister or the Attorney General) to overrule a decision of the judiciary merely because he does not agree with it would… cut across two constitutional principles which are also fundamental components of the rule of law."[83]

Following the Supreme Court judgement, the Government aimed to amend the Freedom of Information Act to unmistakably establish its intention behind the use of the veto power which could have, in effect, overturned the Supreme Court judgement. Nonetheless, this was never carried out and the Government accepted the judgement.

In this context, TRS Allan[84]argues that the doctrine of parliamentary sovereignty is underpinned by democracy and if Parliament were to enact legislation which violated the principles of democracy – the right to vote for example – then the courts should not apply this legislation[85]. In Allan's view "Parliament is sovereign because the judges acknowledge its legal and political supremacy"[86]. Allan was explicit in stating

[79] ibid [152].
[80] *R (Evans) v Attorney General* [2015] UKSC 21, [2015] AC 1787.
[81] Freedom of Information Act 2000, s 53.
[82] [2012] UKUT 313 (AAC).
[83] *Evans* (n 80) [1818].
[84] T.R.S Allan, *Law, Liberty and Justice: legal foundations of British constitutionalism* (Oxford University Press, 1993), ch 11.
[85] ibid 282
[86] ibid 10.

that the courts could, when faced with radical provision, interpret legislation to have a completely different meaning, which would be the equivalent of the judiciary disapplying an act of parliament[87]. Similarly, Lord Woolf, writing extra judicially he affirmed that;

"*both parliament and the court derive their authority from the rule of law… there are limits on the sovereignty of Parliament which it is the courts' inalienable responsibility to uphold and defend."*[88]

In this context, the operation of the rule of law can present challenges to the Diceyan understanding of Parliamentary sovereignty. From one perspective the validity of an Act of Parliament is being determined by content, rather than procedure. For example, the ruling in *Anisminic*[89] - that Parliaments intention was to only limit the courts in reviewing lawful decisions taken by the Commission - arguably contradicts the content of the legislation and the intention of Parliament.

2.9 Constitutional Statute

In contrast to Dicey's claim "that fundamental or so-called constitutional laws are under our constitution changed by the same body and in the same manner as other laws"[90], Laws LJ established a "*hierarchy of Acts of Parliament*"[91] in *Thoburn v Sunderland City Council*[92]. He maintained that there are ordinary statutes and constitutional statutes and that:

"The two categories must be distinguished on a principled basis. In my opinion a constitutional statute is one which (a) conditions the legal relationship between citizen and State in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights…"[93]

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[87] TRS Allan, 'Parliamentary Sovereignty: Law, Politics and Revolution' (1997) 113 Law Quarterly Review 443, 447.
[88] Woolf, 'Droit Public: English Style' [1995] Public Law 57, 68-9.
[89] *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL).
[90] Dicey (n 21) 75.
[91] *Thoburn* (n 62) [62].
[92] *Thoburn* (n 62).
[93] *Thoburn* (n 62) [62].

Laws LJ continued that a test would need to be applied before a constitutional statute was repealed to show that it was the legislator's "actual – not imputed, constructive or presumed – intention"[94]. This approach is not unique, as discussed above the courts already recognise the existence of fundamental rights that cannot be violated without clear and express intent from Parliament. Nonetheless, Laws LJ expanded this test to include limited circumstances in which a constitutional statute could be repealed by implication. More recently, in the case *R (HS2 Action Alliance Ltd) v Secretary of State for Transport*[95], both Lord Neuberger and Lord Mance asserted that in the absence of a written constitution in the UK there exists "*constitutional instruments*"[96] that the court must consider as more fundamental than other statutory instruments. The European Communities Act 1972 and the Act of Union 1707 were cited as examples. This enhances the approach put forward by Laws LJ, however, the courts analysis still refers to implied repeal not express repeal. Significantly, in the case *H v Lord Advocate*[97] a more radical approach was adopted in concluding that the fundamental nature of the Scotland Act 1998 rendered it incapable of being altered other than expressly through statute.

The approach detailed in the above cases presents the possibility for deviation from the well-established doctrine of implied repeal. If this approach is adopted, then the judiciary would not give effect to Parliaments most recent intention were there was a conflict between 'ordinary' legislation and so-called constitutional statutes. This approach contradicts the orthodox doctrine by binding future Parliaments in practice. Arguably, LJ Laws and Lord Hope are advocating an extra step in the legislative process by insisting on a clear and express intention from Parliament - were legislation contradicts a constitutional statute. There is also no clear definition from the above cases of what comprises a constitutional statue or a process for amending or repealing such an Act. A "*hierarchy of Acts of Parliament*"[98] has not been

[94] *Thoburn* (n 62) [63].
[95] [2014] UKSC 3; [2014] 1 W.L.R. 324.
[96] ibid [207].
[97] [2012] UKSC 24; [2013] 1 AC 413.
[98] *Thoburn* (n 62) [62].

endorsed by the sovereign legislator, this is a proposed change to the constitution initiated by the judiciary.

2.10 Act of Union 1707

The constitutional status of Act of Union (with Scotland) 1707 has attracted considerable debate. The Act was passed by the pre-existing Parliaments of Scotland and England to establish the Parliament of Great Britain. Provisions were included to ensure the continued existence of separate Scottish institutions, including the Scottish legal system; and it was also provided that the Union would remain in existence 'forever'. From this perspective, it has been contended that Parliament's authority can be no greater than the Act that created it; in the words of J D B Mitchell the UK Parliament was "born unfree?"[99]. This assertion was famously endorsed by Lord Cooper in *MacCormick v The Lord Advocate*[100]:

"the Treaty and the associated legislation. . . contain some clauses which expressly reserve to the Parliament of Great Britain powers of subsequent modification, and other clauses which contain no such power or emphatically exclude subsequent alteration by declarations that the provision shall be fundamental and unalterable in all time coming . . . I have not found in the Union legislation any provision that the Parliament of Great Britain should be 'absolutely sovereign' in the sense that Parliament should be free to alter the Treaty at will".

Viewed this way, Parliament's right to make and unmake any law has been limited from the outset. However, Lord Cooper's comments were *obiter dicta*, and there is not precedent to support the position that courts can question an Act of Parliament by reference to the Act of Union. Secondly, the argument can be undermined by statute – enacted since 1707 – which appears to inconsistent with the protected characteristics contained within Act of Union[101]. Thirdly, no Scottish court has -

[99] J D B Mitchell, *Constitutional Law* (Edinburgh: W Green & Son 1968) 69-74.
[100] *MacCormick v The Lord Advocate* 1953 SC 396 [41].
[101] For example, the Scottish Universities Act 1853 abolished the condition that Scottish Professors had to be members of the Presbyterian Church, in effect this lowered the status of the Church of Scotland.

before and after *MacCormick* - ever questioned the validity of an Act of Parliament on the grounds that it violated the terms of the Union. When the matter was raised again by the Court of Session in *Gibson v Lord Advocate*[102], Lord Keith stated that it:

"is not a justiciable issue in this court. The making of decisions upon what must essentially be a political matter is no part of the function of the court."[103]

Lord Keith's assertion that a perceived violation of the Act of Union is a political matter indicates the influence that the political constitutionalism can have on the authority of Parliament. Perhaps if Parliament were to enact legislation that was inconsistent with the Act of Union and politically controversial - such as abolishing the Scottish legal system - then the courts may question the validity of that legislation. This is possibly more significant from a Scottish perspective and will be considered in more detail in the Chapter Two.

To return to the overall challenge of common law: there is no conclusive authority of any court in the UK openly refusing to apply legislation considered to be unconstitutional. In contrast to Allan's view perhaps the courts are not prepared to disapply an Act of Parliament; or the judiciary may have not been faced with an Act so extreme that required such action. Elliot and Thomas suggest that refusing to apply legislation may attract the "criticism that judges are overstepping the mark"[104] because even in countries with written constitutions, such as the US, striking down legislation can be controversial. Furthermore, there is no written constitution stipulating that the judiciary have the power to strike down unconstitutional legislation. Thus, to take such action may lead to judges claiming, as Griffith states "superiority over democratically elected institutions"[105]. Similarly, Goldsworthy asserts that such action would result in "a massive transfer of political power… initiated by the judges… rather than one brought about democratically by

[102] [1975] SC 136.
[103] ibid [137].
[104] Elliot & Thomas (n 42) 247.
[105] J.A.G Griffith, 'The Brave New World of Sir John Laws' (2000) 63 Modern Law Review 159,165.

parliament"[106]. For the reasons discussed, perhaps this why supporters of the view, that the judiciary can strike down an Act of Parliament, assert that it is only possible in extreme circumstances.

In 2003 the government sought to do what Tomkins deemed the "unthinkable"[107]: The Asylum and Immigration (Treatment of Claimants ect) Bill included a provision to oust judicial review. This clause became highly controversial. Lord Woolf CJ firmly asserted that this directly challenged the rule of law and:

"if this clause were to become law, it would be so inconsistent with the spirit of mutual respect between the different arms of government that it could be the catalyst for a campaign for a written constitution"[108]

Two former Lord Chancellors also affirmed that they would denounce the Bill in the House of Lords. Considering such controversy, the clause was later extracted by the government. It follows that the judiciary have since, passed comment on the attempts to oust judicial review: Lord Steyn in Jackson contended that Dicey's concept of parliamentary sovereignty is "out of place"[109] in the modern UK. Likewise, Lord Hope in *AXA*[110] stated that;

"The rule of law requires that judges must retain the power to insist that legislation of that extreme kind is not law which the courts will recognise."

On the other hand, Lord Neuberger contends that while the court should always protect individual rights it cannot derive from the express will of Parliament. To do so, he continues, would see a reordering of the UK constitution[111].

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[106] Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Clarendon Press 1999) 240.
[107] Adam Tomkins & Colin Turpin, *British government and the constitution: text and material* (7th edn, Cambridge University Press 2011) 87.
[108] Lord Woolf, 'the Rule of Law and a Change in the Constitution' (2004) 63 Cambridge Law Journal 317, 329.
[109] *Jackson* (n 31) [104].
[110] AXA (n 78) [51].
[111] Lord Neuberger, 'Who Are The Masters Now', (Second Lord Alexander of Weedon Lectutre, 2011) [72]-[73].

In this context it can be argued that there is no consensus among the judiciary on the 'ouster clause', and as previously mentioned there is no authority for the courts striking down legislation. Significantly, the retraction of the provision in the Bill demonstrates a reluctance from Parliament to formally challenge the fundamental principle of the rule of law. This possibly creates what Elliot and Thomas refer to as, a "stand-off"[112] between the different arms of government. This potential for a "stand-off" has perhaps never been fully tested to date, and there is no wide-ranging public debate or demand as to whether the courts should or should not have the authority to strike down legislation. Nonetheless, it is conceivable that these constitutional matters could arise in the future posing a fundamental challenge to the doctrine of parliamentary sovereignty.

2.11 Is Parliament Sovereign?

According to Keith Ewing

"*The legal principle of the sovereignty of Parliament provides both the source of legal authority, and the source of legal restraint of the power of government in a political constitution*."[113]

The preceding sections have highlighted the different aspects of the legal, political and common law constitution, but that is not to say that they operate in isolation. In the absence of a written constitution, each may work together preserving "constitutional balance"[114] within the UK. It can be argued that as the will of the people is represented in Parliament, Parliament should have full legal authority when legislating. As Tomkins maintains, this serves the principle of democracy[115]from which Parliament derives its legitimacy. Political constitutionalism is likely to prevent Parliament from enacting extreme legislation. However, if the political

[112] Elliot & Thomas (n 42) 249.
[113] K.D. Ewing (45) 2118.
[114] Tomkins & Turpin (n 107) 96.
[115] ibid.

process were to "fail"[116] then the judiciary can attempt to re-dress this through the rule of law. In this context, Ewing asserts that it would be "naïve, ignorant or disingenuous to suggest that the process of adjudication is not a political one"[117]. Arguably, following the provisions set out in section 3(1) of the Human Rights Act 1998 the application of judicial review may be scrutinised to a lesser extent. As discussed, opinion is divided on whether judicial review includes the ability to strike down an Act of Parliament. Parliament may never come to pass drastic legislation which challenges fundamental rights. However, it can be argued that if Parliament "did the inconceivable" then the judiciary might also "do the inconceivable[118]. If these constitutional matters were to fully present themselves it is likely that a "constitutional crisis would ensue"[119], therefore Foley's theory of constitutional silences seems most applicable. According to Foley, the willingness to "defer indefinitely deep constitutional anomalies" to prevent the conflict that would arise represents "the core of the constitutional structure"[120]. Suppose the judiciary strike down an Act of Parliament this could lead to demands for greater accountability of judges. Similarly, Parliament may be reluctant in provoking the courts to take such action as it could indicate that the legislator has crossed a constitutional line. Both governing bodies have a vested interest in avoiding conflict and are likely to avoid opening, as Elliot and Thomas state, "Pandora's box"[121]. It may be inaccurate to claim that the UK Parliament is no longer sovereign, but it could be argued that the doctrine of parliamentary sovereignty is evolving within the legal, political and common law constitution, beyond the traditional understanding as set out by Dicey. This argument may be developed through a study of Scotland as part of the territorial constitution.

[116] Elliot & Thomas (n 42) 252.
[117] K.D. Ewing (45) 2112.
[118] Lord Phillip, *Today* (BBC Radio 4, 2 August 2010). Lord Phillips was then the President of the UK Supreme Court.
[119] Sir Jeffery Jowell, 'Parliamentary Sovereignty: the new constitution hypothesis' (expert commentary) in Elliot and Thomas (n 42) 253.
[120] Michael Foley, *The Silence of Constitutions* (London: Routledge 1989) 10.
[121] Elliot & Thomas (n 42) 250.

2.12 Parliamentary Sovereignty and the Territorial Constitution

The UK constitutional is territorial in nature, each country within the state retains its own sense of national identity and appetite for legal autonomy. The UK's ascension in to the EU and the enactment of Human Rights legislation, as discussed above, has posed well-known challenges to Dicey's doctrine. Devolution of power to Scotland, Wales and Northern Ireland has arguably made it difficult for the UK Parliament to fully assert its ultimate authority within the constitution.

2.13 The Territorial Constitution and Scotland

The aim of this work is to focus on the implications and challenges to parliamentary sovereignty that have derived from Scotland, as part of the territorial state. This Chapter has provided a broad overview of the pressures placed on the sovereign power of the UK Parliament, and it can be argued that the constitutional distinctions in Scotland have contributed to each of these practical challenges. Thus, the pressures outlined above may be fully exemplified through a study of the Scottish constitutional trajectory.

In summary, the force of the Act of Union 1707 and the Scotland Act 1998 are heavily influenced by the political constitution, as well as the legal constitution. The doctrine of parliamentary sovereignty was directly challenged within Scottish political constitution during the campaign for a Scottish Parliament. The legal autonomy of the Scottish Parliament has been expanded on an ad hoc basis. It follows, that section 1 of the Scotland Act 2016 now gives support to the theory of manner and form entrenchment; and the significant constitutional status of the Act of Union and the Scotland Act 1998 has been given some consideration by the courts. All of which will be discussed in greater detail in subsequent Chapters.

2.14 Conclusion

Dicey's articulation of parliamentary sovereignty provides a straightforward explanation of the constitutional doctrine. From a theoretical perspective Parliament

is the ultimate source of authority in the UK, subject to no limitation, the legislator can enact any law whatever. However, in practice the doctrine is perhaps not as straightforward as it would appear. This Chapter demonstrates that legislative supremacy can be curbed to some extent by the political process. Consideration has been given to the view that parliament can enact self-imposed limitations on its sovereignty through manner and form entrenchment. In reference to the fundamental role that the judiciary have within the constitution, common law challenges have also been examined. Notwithstanding the various pressures set out above, parliamentary sovereignty endures. Arguably, Parliament -representing the people - can legislate with full capacity, with the various constraints preserving "constitutional balance"[122]. Nevertheless, it can be said that as the territorial nature of the UK constitution evolves, the challenges to the constitutional doctrine appear to be varying and continual. The remainder of this work will study these challanges more thoroughly from a Scottish perspective.

[122] Tomkins & Turpin (n 107) 96.

3. Chapter 2 - Sovereignty and Scotland: The Legal and Political Path to Devolution.

The UK constitution may have previously been considered unitary in nature, with all authority flowing from the Westminster Parliament. However, as a alluded to in Chapter 1, since the emergence of devolution the UK constitution is perhaps more appropriately interpreted as territorial or plurinational in nature. Scotland as a part of the territorial state is of particular interest, because since it entered into a Union with England its constitutional status within (and out-with) the UK has been contested[123]. Scotland has a strong sense of national identity with the continued existence of its own separate institutions since 1707. Before considering the challenges that devolution in Scotland has posed to the sovereignty of the UK Parliament, the aim of this Chapter is to assess the events that shaped the development of devolution in Scotland. The constitutional accommodation of Scotland within the territorial state and the fundamental role of the Act of Union 1707 will be considered. Focus will also be given to the work of the Scottish Constitutional Convention which was an extra-parliamentary process that led to the introduction of Scottish devolution. It is within this context a clear example of the relationship between the legal and political constitution can be found. The Convention's rejection of the doctrine of parliamentary sovereignty and endorsement of the distinct claim of popular sovereignty in Scotland will also be examined.

3.1 Scotland within the Plurinational State

The UK state emerged from a plurality of relationships, which have become entrenched due to the continuation of distinct legal and civic dimensions. In a plurinational state legislating can become challenging because the governing body has more than one *demos* to represent. Nonetheless, as Keating has argued, uniformity within the state is not a necessity if the different constitutional values are

[123] For some discussion on the growing demand for a shift in power from a national to a regional level, and the status of parliamentary sovereignty in Scotland see Jonathan McDonald 'Scottish Independence: a constitutional and international legal perspective' [2012] Juridical Review, 25-49.

respected and accommodated[124]. The peoples coexisting under one constitutional order will share common ground and can identify and be loyal to both the "sub-state national society" and the "host state national society" [125]. The UK Parliament as a plurinational body has attempted to provide for the constitutional differences in Scotland that have persisted since the Union with England. Even prior to devolution, some differences within Scotland were accommodated to some extent. For example, to ensure the independence of the legal system the third Duke of Argyll protected Scottish sovereignty in the aftermath of the Jacobite uprising[126]. In 1885 the Scottish Office, although abolished in 1747, was re-established and upgraded in 1926 including a Secretary of State for Scotland. Also, Scotland can exercise its constituent power in electing representatives to Westminster. In attempting to fulfil its plurinational role, the UK Parliament can be viewed as a legitimate governing body for Scotland. While Scotland embraces a strong national identity, it also shares many common values and has a sense of belonging within the UK, Graeme Morton refers to this as "Unionist Nationalism"[127]. The Conservative Government of John Major, in rejecting the proposal for a devolved parliament, took the view that Scotland "flourished better as an integral part of a British state that actively fostered Scottish civic institutions"[128]. Mullen has observed that there has always been "a distinctly Scottish political space and a distinctly Scottish system of governance within the Union."[129] Significantly, it is the foundation document of the UK Parliament - Treaty of Union 1707 or Act of Union 1707 (sometimes used interchangeably) - which is fundamental in preserving the distinct Scottish institutions within the UK constitution.

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[124] Michael Keating, *Plurinational Democracy: Stateless Nations in a Post Sovereignty Era* (Oxford University Press 2001) 127.
[125] Stephen Tierney '"We the Peoples": Constituent Power and Constitutionalism in Plurinational States' in Martin Loughlin and Neil Walker (eds.), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press 2007) 233.
[126] Alex Murdoch, *Scottish Sovereignty in the Eighteenth Century* in H. T. Dickinson & Michael Lynch (eds), *The Challenge to Westminster: Sovereignty, Devolution and Independence (*Tuckwell, 2000) 43, 44.
[127] See Graeme Morton *Unionist Nationalism: Governing Urban Scotland 1830-1860* (Tuckwell Press, 1999).
[128] Neil MacCorminck '*A Kind of nationalism'* in Neil MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford University Press 1999) 184.
[129] Tom Mullen, 'The Scottish Independence Referendum' (2014) 41 Journal of Law and Society 627, 628

3.2 The Act of Union 1707

The Union of 1707 was mostly initiated by the English state[130], at a time of economic hardship for Scotland. The Scottish elite supported the Union and both the Parliaments of England and Scotland agreed on the Treaty of Union, which was provided for in law as an Act of each Parliament. The protection of distinct Scottish institutions was a fundamental condition during the amalgamation of both states. This made the Union with Scotland and England more "consensual"[131], as Tierney states, than the union of Great Britain with Ireland. The Act of Union 1707 ensures Scotland has representation in both Houses of Parliament; that Scotland had a separate legal system[132]; the continuation of Scots private law[133]; and the continuation of royal burghs in Scotland.

The continuation of constitutional differences in each state, perhaps legitimatises the different understandings of the UK constitution that have emerged since 1707. MacCormick has argued that "there is no doubt 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"[134]. From one perspective the Union between Scotland and England can be interpreted as an "incorporating marriage"[135] in which Scotland constitution was absorbed by the English constitution. Thus, the English Parliament remained, with the addition of Scottish MP's and the doctrine of parliamentary sovereignty, which was emerging in seventeenth century England, became the dominant doctrine of the constitution[136]. From another, perhaps Scottish perspective, the Union with England is not considered an "incorporating marriage" but the creation of two equal states. Therefore, both states own constitutional traditions which have remained, and neither set of traditions should prevail over the other[137].

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[130] Tierney, *Scotland and the Union State* in Aileen McHarg & Tom Mullen, *Public Law in Scotland* (Edinburgh: Avizandum 2006) 30.
[131] ibid 30.
[132] Articles of Union 1707, art XIX.
[133] Articles of Union 1707, art XVIII.
[134] N MacCormick, 'Is there a constitutional path to Scottish Independence' (2000) 53 Parliamentary Affairs 721, 727.
[135] Tierney *Scotland and the Union State* (n 130) 31.
[136] Tierney *Scotland and the Union State* (n 130) 31.
[137] MacCormick, (n 128) 55-60.

Against the backdrop of protected constitutional traditions, the guarantees provided for in the Act of Union raises a fundamental question about the status of the Act. As discussed in Chapter 1, the status of the Act of Union contributes to a wider debate about the emergence of constitutional statute in the UK and the impact of this on the doctrine of parliamentary sovereignty. From a Scottish perspective, the Act of Union is "one of the fundamental generative influences of the contemporary Scottish Legal and political system"[138]. In this context, some members of the judiciary have asserted that the constitutional significance of the Treaty would suggest it cannot be treated as an 'ordinary' Act of parliament. Again, this argument was underpinned in a Scottish court by Lord Cooper in *McCormick*[139]*:*

"I have not found in the Union legislation any provisions that the Parliament of Great Britain should be free to alter the Treaty at will."[140]

As highlighted in Chapter 1, the judiciary have never invalidated an Act of Parliament on the grounds that it contravenes the Act of Union. Also, by virtue of parliamentary sovereignty the judiciary do not have the authority to challenge an Act of Parliament that attempted to alter the Treaty of Union. Significantly in his judgment, Lord Cooper asserted that an Act such as this is unlikely to be justiciable:

"*there is no precedent nor authority… for the view that the domestic courts of either Scotland and England have jurisdiction to determine whether a governmental act of the type here in controversy is or is not conform to the provisions of a Treaty"*[141]

Lord Cooper's assertion that challenges to the Treaty are not justiciable, does not mean the Act does not hold significant force within the constitution. Its force may exist beyond the common law constitution. Indeed, the Act of Union plays a

[138] 'Fundamental Law' in title on 'Constitutional Law', *Stair Memorial Encyclopedia* (Reissue 2002), 66.
[139] 1953 SC 396.
[140] ibid.
[141] ibid [413].

fundamental role within the UK constitution. For example, during the establishment of the new Supreme Court for the UK, the Faculty of Advocates argued that:

"a Supreme Court which is created must be consistent with.. the Act of Union of 1707. These instruments are fundamental parts of the constitution.. any proposal for a Supreme Court which contravened any provision of these instruments would be unlawful"[142].

This demonstrates the influence that the Act of Union 1707 has had on the decisions of the UK legislator. From a strict legal perspective, the legislative supremacy of the UK Parliament eclipses the fundamental nature of the Act of Union. Jeffrey Goldsworthy has commented that the strict preservation of Scottish institutions protected under the Act of Union 1707 "had little noticeable impact on the English doctrine of parliamentary sovereignty" which subsequently "came to be accepted by Scottish lawyers as well"[143]. Even if those provisions were considered irreversible, it was not believed that this would be "judicially enforceable"[144].

Nonetheless, it can be argued that any attempt to alter significant aspects of separate Scottish institutions could attract political consequences. As discussed in Chapter 1, the legal and the common law constitution can be heavily influenced by the political constitution. Thus, in the absence of judicial or strict legal protection then perhaps the continued existence of separate Scottish institutions is better viewed as a moral or political agreement[145] under the UK constitution. Arguably, the 1707 Treaty can be said to hold great normative force, and it is within this context the UK Parliament is committed to the Act of Union 1707.

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[142] Faculty of Advocates, *Response to the Consultation Paper by the Secretary of State for Constitutional Affairs and Lord Chancellor: Constitutional Reform: a Supreme Court for the United Kingdom* (Nov, 2003).
[143] Jeffrey Goldsworthy *Historical Conclusions* in Jeffrey Goldsworthy *The Sovereignty of Parliament: History and Philosophy* (Oxford University Press, 2010) 232.
[144] ibid 232.
[145] Martin Loughlin, *Sword and Scales: An Examination of the Relationship Between Law and Politics* (Bloomsbury Publishing 2000) 153.

The UK Parliament's commitment to the institutional pluralism within the territorial state was called into question when the decision was taken to persist in implementing the Abolition of Domestic Rates etc., (Scotland) Act 1987 (colloquially known as the poll tax legislation). The controversial legislation provoked a political challenge to the constitutional status quo. The extra-parliamentary process confronted the traditional doctrine of sovereignty and directed the UK constitution to a more decentralised state, the significance of these events will be considered in the following section.

3.3 The Road to Devolution: Sovereignty and the Political Constitution

The introduction of the poll tax legislation was unpopular among the majority of the Scottish people[146] and was introduced in Scotland, a year before England, notwithstanding the controversy. In the 1987 UK general election the Conservative Party, who implemented the poll tax legislation, won the election with 42% of the vote and a subsequent majority in the House of Commons. Taking the electoral results from north of the border it was quite clear that Scotland had rejected a Conservative Government with only 24% of the votes and 10 out of the 72 seats. While most of the Scottish seats were held by the Labour Party, who were the official opposition, the then Conservative government with a majority in the House did not need the support or the votes of the Scottish people to enforce their policies. The legislation brought several constitutional differences in to the limelight. The fact that the legislation was introduced in Scotland a year early enhanced the perception that the Scots were not being treated as an equal nation. Debatably, it hindered many Scots sense of belonging within the Union making it difficult for them to identify with a state that they felt completely disregarded their will.

Resistance to the poll tax legislation was not merely defiance of a policy that particularly offended the political preferences of certain individuals, for say financial reasons. To take Lutz' explanation of expectations of a realistic and idealistic

[146] See 'The Poll Tax is introduced in Scotland – 1989' http://www.bbc.co.uk/scotland/history/modern_scotland/the_poll_tax/ accessed December 2017.

constitution[147]: generally, people do not expect that each individual's political preferences are all upheld, but, upholding the will of a majority and the 'common desires' of the people, which includes equal treatment, is a realistic expectation. In this instance, the defiance of the tax was the assembled will of the majority of Scots to question the "very legitimacy of the tax" [148] and a government who could enact such legislation, an "activation of revolutionary constituent power"[149]. In accordance with Schmitt's 'decisionism' it was not necessarily the content of the legislation but how it was introduced, lacked popular legitimacy. What is more, enforcing clearly unwanted legislation on a sub-state nation was a failure of the UK Parliament as the governing body of a plurinational state. The Conservative Government's position and their policies, from a Scottish perspective, could no longer be considered legitimate. Thus, an extra-parliamentary Scottish Constitutional Convention was established.

The Scottish Constitutional Convention was founded following recommendations in the 1989 report, *Claim of Right for Scotland* with a view to drawing out plans for a Scottish Assembly. This was a campaign for an unprecedented level of Home Rule. Significantly, the *Claim of Right* was a notable document issued to reiterate

"the sovereign right of the Scottish people to determine the form of Government best suited to their needs."[150]

Affirming the *Claim of Right 1989*, the convention began in 1989 receiving cross party support as well as support from civic bodies, Trade Unions and local authorities in Scotland. The will of the Scots was assembled through the Convention to maintain that the constitutional arrangements in the UK were no longer working and that Scotland was "being governed without consent"[151]. The Convention was not an attempt for Scotland to be separated from the Union, it was an effort to alter

[147] Donald S. Lutz, *The principles of constitutional design* (Cambridge University Press 2006) 69.
[148] Marco Goldini and Chris McCorkindale, 'Why We (Still) Need a Revolution' (2013) 14 German Law Journal 2220.
[149] Tierney, *We the Peoples* (n 125) 243.
[150] Scottish Constitutional Convention, *Towards Scotland's Parliament* (The Scottish Constitutional Convention 1990) 10.
[151] Scottish Constitutional Convention, *A Claim* 51.

aspects of the current constitution. The SCC was an exercise of constituent power beyond the democratic sphere. Representative democracy in this case had failed most of the Scottish people as a means of exercising their constituent power within the Union. Not only this, dissatisfied with the actions of Parliament there were no official methods in the UK constitution for the 'remodelling' of the state to ensure it fulfilled its purpose. The perceived illegitimate actions of the UK Parliament created the circumstances and justified a retaliation within the political constitution. With no official means to challenge the legal constitution, this power manifested in an extra-parliamentary Constitutional Convention. Again, in the context of parliamentary sovereignty no person or body can set aside legislation[152]. Nonetheless, in an attempt to solve this dissatisfaction a scheme for a Scottish Assembly was subsequently drawn up: *Scotland's Claim, Scotland's Right*. The Convention process took a representative form, more representative of the Scottish people than the then Conservative government. The Convention declared to "ensure the approval of the Scottish people"[153] before proceeding with any action.

Significantly, The *Claim of Right* endorsed by the Convention alleged that the actions of the UK Parliament had breached the Act of Union 1707:

"*the Scots are a minority which cannot ever feel secure under a constitution which, in effect, renders the Treaty of Union a contradiction in Terms*"[154]

It can be argued that the early introduction of the legislation in Scotland breaches the Act of Union 1707, in that the equal treatment of all citizens within the UK in regard to privileges and rights is protected under these Acts. Again, this has never been legally clarified, but as discussed the implications of the breaching the Act of Union may go further than the legal constitution. Therefore it followed, as set out above, that the *Claim* declared that sovereignty rested with the Scottish people and not the UK Parliament

[152] A V Dicey, *An Introduction to the Study of the Law of the Constitution* (First published 1885, 8th edn, Macmillan 1915) 39-40.
[153] A Claim of Right for Scotland 1988, 19.
[154] Ibid.

Generally, popular sovereignty is the tradition that sovereign power resides with the people. Intrinsically linked, popular sovereignty can be better understood as the power to constitute – a constitutional making power to found, establish and organize. John Locke in describing the constituting power as the ability to establish, maintain and overthrow leaders, believed that this was the original and superior power of the state. The Convention may have popularised the claim, but its declaration of popular sovereignty was not asserted randomly. This was very much an attempt to revive a distinct tradition of popular sovereignty in Scotland:

"*This concept of sovereignty [the Westminster model] has always been unacceptable to the Scottish Constitutional tradition of limited government or popular sovereignty"*

It has long been debated by several Scottish academics[155], politicians[156] and to some extent the judiciary[157] that the people of Scotland have enjoyed a historical tradition of popular sovereignty. The claim of popular sovereignty in Scotland is often claimed to date back as far as 1320, expressed in the renowned historical document, the Declaration of Arbroath. The tradition has foundations within Scotland's constitutional history, and has to some extent been considered within Scottish common law. The following section will review the significance of the claim throughout Scotland's constitutional history.

3.4 A Historical Claim of Popular Sovereignty in Scotland

The Declaration of Arbroath was an appeal to the Pope for intervention in the tensions between Scotland and England to ensure Scottish independence from England. In doing so it set the will of the people above the monarch, maintaining that they were bound to the King 'by law and by his merits' as long as the people's

[155] Neil MacCormick 'Is There a Constitutional Path to Independence?' (2000) 53 Parliamentary Affairs 721-736.
[156] A. Salmond, 'Constitutional rights' speech given at the Foreign Press Association, London, 16 January 2013.
[157] *MacCormick* (n 128).

freedom was guaranteed. If the King would not ensure such freedom or breach his duties in serving the people, the declaration affirmed: "we should… make some other man who was well able to defend us our King."[158] Balancing the will of the Scottish people against the legitimacy of their ruler can convincingly be read as an ancient assertion of popular sovereignty in Scotland. Further, the writings of political philosopher George Buchannan (1506-82) in, *De Iure Regni Apud Scotos*[159]. Buchanan set out to convey the relationship between the people and the monarch. Relying on the Declaration of Arbroath 1320, Buchannan was of the view that the power of the monarchy was dependant on the peoples consent and if a monarch abused their power the people should "exert themselves at one to drive him out as our enemy"[160]. Buchanan emphasised that in Scotland there "uniquely survived kingdoms based on the choice and consent of the populace rather than on external conquest." Thus, "polities, royal or governmental power" is constrained "expressly or impliedly" by the populace as by "generation by generation, they confirm the title to rule of the next representative of the same old royal line."[161] Indeed, the sovereign power of the Scots to remove illegitimate leaders was exercised during the overthrown of Queen Mary in 1567.

However, these historic claims are also subject to much debate. It has been argued[162] that there is no weight in the argument that there is a distinct Scottish history of a limited monarchy or that any limitations are evidence of a distinct tradition of popular sovereignty. It can be argued that prior to the Declaration of Arbroath 1320, there was the Magna Carta 1215 that set to limit the power of the English monarch. While the Scots revolt against Queen Mary, cited as evidence in support of the tradition, similar sentiments can be derived from the overthrow of Edward II of England. The writings of Buchannan are also questioned: said to be framed around

[158] The Declaration has been translated into English on this website. http://www.constitution.org/scot/arbroath.htm accessed March 2018.
[159] George Buchanan, *De Iure Regni Apud Scotos*, (Saltire Society 2006).
[160] Aileen McHarg & Tom Mullen, *Public Law in Scotland* (Edinburgh: Avizandum 2006) 28.
[161] MacCormick, (n 128) 124.
[162] Dan Sharp 'Parliamentary Sovereignty: a Scottish Perspective' [2010] Cambridge Student Law Review 135.

his political observations[163] at the time, rather than the "legal realities"[164]. Another criticism of the historical tradition is that during this period Scotland was not democratic, generally power was exercised by the Scottish nobles. In which case you cannot establish a 'people' to consider themselves sovereign[165].

However, these arguments can be challenged. Firstly, despite sharing a Monarch since 1603, the documents produced by Scotland and England following the Glorious Revolution of 1688, to reduce the power of the monarch, differed in some respects. When compared, they can enhance the argument that there were aspects of popular sovereignty in Scottish constitutional history: following the Revolution, the reigning King of England, James II (VII of Scotland), fled to France, and as a result the English throne was considered unoccupied and offered to William III of Orange and Mary (James' daughter). The offer was subject to limitations on the royal prerogatives, by affording more power to parliament, asserting the idea sovereignty did not rest with the Monarch alone, rather the King/Queen in Parliament. This offer was accepted, and the English Parliament convened enacting the Bill of Rights 1689 providing said limitations. At the same time the Scottish Parliament also offered William and Mary the Scottish Crown again on a limited basis under the *Claim of Right 1689*, which was also accepted. Notably, the document limiting the power of the monarch produced in Scotland is "more radical"[166] than the one produced in England: The *Claim* in Scotland did not declare that the King had abandoned the throne. The English Parliament's assertion that the King had left the throne unoccupied through abdication was, as Tierney states, "a legal fiction"[167]. Given the unsettled relationship between the Monarch and Parliament in England, removing the King may have been deemed unconstitutional in England. Therefore, implying abdication could allow a smooth transfer of the throne to William and Mary[168]. On the other hand, the 1689 *Claim* in Scotland, instead declared that King James lost his

[163] See Colin Kidd, *Subverting Scotland's Past: Scottish Whig Historians and the Creation of an Anglo-Scottish Identity: 1689-1830* (Cambridge University Press 2003) 19-20.
[164] Paul McGinnis and Arthur Williamson (eds), *The British Union: A Critical Edition and Translation of David Hume of Godscroft's De Unione Insulae Britannicae* (Ashgate 2002) 7.
[165] Sharp (n 162) 135 - 138.
[166] Tierney *Scotland and the Union State* (n 129) 29.
[167] ibid 29.
[168] ibid 29.

right to rule, continuing with the Scottish constitutional practice of limiting or removing the monarchy. This was said to be a right lost when he altered the constitution "from a legally limited monarchy to an Arbitrary Despotic because of his inversion of the ends of government"[169]. These historic actions and documents demonstrate the different interpretations of authority in each state; as well as potential confirmation that in early Scottish political history it was recognised that a leader could not rule absolutely, rather power came from the bottom up. Secondly, as for there being no "people" to establish as sovereign, the people's power, from a constituent perspective did not need a democratic platform. If they believed the King was acting illegitimately they could resist as they saw fit. While resisting a Monarch is not distinct to Scotland it would appear that the aforementioned documents recognised this power - more so than in England. Similarly, the National Covenant of 1638 was signed as an appeal against the tyranny of the King. This was to prevent him from enforcing his religious views on the Scots, after the Presbyterians in Scotland were accused of treason by the King, aiming to protect their religion, if he persisted the document maintained he could be legitimately overthrown. Significantly, the Covenant represented the nobility, gentry and the clergy. It was acknowledgement of popular power which included the people, not just the political elites[170]. Finally, the sovereignty of the people does not need to be accompanied by "legal realities". Even if the writings of George Buchannan were reflective of his political observation, they can be considered as acknowledging the difference between "popular legitimacy" and "legal legitimacy" at the time. In any case, the view that a tradition of popular sovereignty emanated in a pre-Union Scotland remains contestable. Perhaps, as Wicks suggests, it is more effective to consider events after 1707, as this was a "break in continuity"[171].

3.5 Popular Sovereignty in Scotland: MacCormick v Lord Advocate

A clear consideration of the historic Scottish tradition can be found within Scottish case law. In his renowned *obiter dicta* Lord Cooper, in the case *MacCormick v Lord*

[169] ibid 29.
[170] Tierney, *Scotland and the Union State* (n 130) 28.
[171] Elizabeth Wicks 'A new constitution for a new state? The 1707 Union of England and Scotland' (2001) 117 Law Quartery Review 109 – 126.

Advocate[172], asserted*:*

"*the principle of the unlimited sovereignty of Parliament is a distinctly English principle which has no counterpart in Scottish constitutional law… I have difficulty in seeing why it should have been supposed that the new Parliament of Great Britain must inherit all the peculiar characteristics of the English Parliament but none of the Scottish Parliament*".[173]

Although Lord Cooper's comments were *obiter* and controversial due to the fact that it was a deviation from the general consensus among the judiciary regarding legislative supremacy, his remarks have had a continuing relevance regarding claim of popular sovereignty in Scotland. In accordance with the different interpretations of the Union – as set out above - MacCormick maintains that while the Union set out to establish a new state, in practice, "the larger partner was a continuing entity" with the addition of Scottish peers and MP's. Therefore, it can be said that the 'English' tradition of parliamentary sovereignty continued, and being, in the words of Dicey, the 'keystone' of the British constitution the doctrine was assumedly endorsed in Scotland. As discussed, the Treaty of Union 1707 did not necessarily result in a complete integration of Scotland into the UK. The preservation of Scotland's civic institutions has perhaps allowed a Scottish identity to "coexist with British nationality."[174] Lord Cooper's comments can be reconciled with the view that Scotland entered into the Union as an equal partner, preserving its distinct constitution traditions (which included popular sovereignty).

The interpretation of popular sovereignty in Scotland endorses a right to self-determination[175] and perhaps differs from the doctrine of parliamentary sovereignty. Neil MacCormick has contended that traditionally sovereignty in Scotland can be interpreted as belonging " *to the people, to the community of the realm, rather than*

[172] *MacCormick* (n 128).
[173] *MacCormick* (n 128).
[174] Sharp (n 162).
[175] McHarg & Mullen (n 160) 28.

to Parliament."[176] This interpretation can also be reconciled with the SCC assertion that sovereignty rests with the Scottish people. In this context, as Bogdanor has argued

"there is...some degree of conflict between the idea of sovereignty of Parliament and the idea of the sovereignty of the Scottish people"[177].

On the other hand, it is also important to reflect on the fact that the claim of a tradition of popular sovereignty in Scotland does not go unchallenged. There is the view, as Lord Anderson states in *Macgregor v Lord Advocate*, "*that the Constitution of Scotland is the same as that of England since 1707*"[178]. Thus, while Scotland has maintained its own national identity through separate institutions as discussed above, that does not necessarily mean there are two interpretations of sovereign power within the plurinational state. Furthermore, Johnathan MacDonald finds it difficult to maintain that parliamentary sovereignty is a distinctly English principle. In his view the doctrine emerged as Scotland and England united, developing throughout the years of the Union, and significantly was popularised, in the 19th Century - a century after the Act of Union[179]. As previously mention, Lord Cooper's comments were a deviation from the general consensus among the judiciary; the Scottish courts both before[180] and after[181] the *MacCormick* case have recognised that parliamentary sovereignty is a valid principle in Scotland. Also, the UK Parliament went to great efforts to explicitly assert its sovereignty in relation to Scottish matters under section 28(7) of the Scotland Act 1998.

As mention above popular sovereignty is a principle which commonly relates to the authority of the people, but sovereignty is a multifaceted concept and by its very

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[176] Neil MacCormick, *United Kingdom: What State? What Constitution?* in Neil MacCormick, *Questioning Sovereignty: Law State, and Nation in the European Commonwealth* (Oxford University Press 1999) 55.
[177] See V Bogdanor, 'Devolution and the Territorial Constitution', (Gresham Lecture 2005) available at <http://www.gresham.ac.uk/lectures-and-events/devolution-and-the-territorial-constitution> accessed July 2019.
[178] 1921 SC 847 at 848.
[179] see MacDonald (n 123) 25-49.
[180] *Edinburgh & Dalkeith Railway Co v Wauchope* (1842) 1 Bell's App. Cas. 252.
[181] *Sillar v Smith* 1982 S.L.T. 539.

nature its very nature may manifest itself different ways. In comparison to the doctrine of parliamentary sovereignty, there is not an endless amount of literature analysing the manifestation of popular sovereignty in Scotland. There is also no widely recognised description, such as Dicey's articulation of parliamentary sovereignty. This may be due to the fact that parliamentary sovereignty is the dominant doctrine in the plurinational state; but it is also possible that there is no clear definition because the indigenous claim has manifested in different ways throughout Scottish constitutional history. The 1320 Declaration of Arbroath, often cited as one of the first substantive examples of popular sovereignty[182] in Scotland, endorses resistance by the people towards an unjust Monarch; the *Claim of Right 1989* coupled with the Scottish Constitutional Convention can be viewed as an act of constituent power to found a Scottish Parliament. More recently popular sovereignty has been channeled via referenda, in 1998 to establish the Scottish Parliament, and in 2014 to vote on an independent Scotland. Thus, it can be challenging to determine a specific definition of popular sovereignty in Scotland. The manifestation of popular sovereignty in Scotland may also be attributed to an activation of the wider political constitution within the UK: holding the plurinational Parliament to account. Therefore, the tradition may be reconciled with the doctrine of parliament sovereignty in that it is a principle which operates within the legal constitution

The claim of popular sovereignty in Scotland, endorsed by the SCC, lay at the heart of the campaign for devolution. Significantly, as Keating has suggested the claim was "refurbished and pressed into new use"[183], and it can be argued that the tradition has had a continued relevance with the Scottish Constitutional trajectory from the 1989 onwards. Devolution represents a significant change in the UK constitution, and the process that preceded the establishment of Scottish settlement is noteworthy. The SCC presented a practical political challenge to the sovereignty of the Westminster Parliament, a challenge which questioned the very nature of parliamentary sovereignty. Raising awareness of the alternative interpretation of

[182] MacCormick, *United Kingdom: What State? What Constitution?* (n 176) 55.
[183] Trevor Salmon and Michael Keating (eds.) *The Dynamics of Decentralization: Canadian Federalism and British Devolution* (Queen's University Press 2001) 23.

sovereignty provided the potential for distinct constitutional traditions in Scotland to manifest itself in different ways.

In due course the work of the Convention eventually laid the foundations for the proposals of a Scottish Parliament. The UK Political and Constitutional Reform Committee acknowledge that the Constitutional Convention was "highly successful in achieving its aim"[184]. The devolution proposals were then put to the Scottish people via referenda and the people used their constituent power once again, albeit through parliamentary means, to ratify their Parliament. The Scotland Act 1998 was passed, and a Scottish Parliament was established. The work of the Convention transferred the political constitution into a legal reality

3.6 The Scottish Constitutional Convention: The Political and Legal Constitution

As set out in Chapter One, the theory of parliamentary sovereignty becomes "*empty when it is no longer accompanied by a real political supremacy."*[185] The Scottish Constitutional Convention was a successful activation of the political constitution, convened to contest the status quo and remodel the legal constitution. The Convention had no legal significance under the British Constitution, it could not invalidate the poll tax legislation and it could not force the sovereign Parliament to legislate for its proposals. It follows that the force of the Convention could be found within the political constitution. In practice it did not need to be legally ratified in order to be legitimate. Indeed, the power of the constituent over the constituted body was firmly asserted by the Chair of the Convention, Canon Kenyon Wright: who famously maintained that the Conservative Government's refusal to act upon the Conventions proposals would receive the response: "we say yes – and we are the Scottish people."[186] The Convention, viewed as another source of authority questioning the supremacy of Westminster (with substantial legitimacy, political

[184] Political and Constitutional Reform Committee, *Do We Need a Constitutional Convention for the UK?* (House of Commons 2012-13, 371) 9.
[185] Vernon Bogdanor 'Devolution: Decentralisation or Disintegration' (1999) 70 The Political Quarterly 185.
[186] Yes/Yes - Reverend Kenyon Wright (1997) available at: http://www.bbc.co.uk/news/special/politics97/devolution/scotland/people/wright.shtml accessed January 2018.

momentum and support from most of Scotland's elected MP's) began to pose practical challenges to the sovereignty of Parliament. Arguably, for the Government to disregard the will of the political constitution would be illegitimate. This can be linked to Ewing's analysis that the purpose of the political constitution is to hold the government to account but also to ensure the will of the people is transferred into law.

Thus, as a plurinational body the UK would ultimately have to address the challenge to the status quo to continue to hold any legitimate governing position in Scotland[187]. Despite the challenges to parliamentary sovereignty, and the unreceptive attitude by the Conservative Government, the public power "endured even after the Conventions own dispersal"[188]. The activation of popular resistance within Scotland can be viewed as effective in the remodelling of the Constitution.

3.7 The Introduction of Scottish Devolution and Parliamentary Sovereignty

The introduction of devolution in Scotland altered the Union in an unprecedented way. This fundamental change was initiated within the political constitution and not by the sovereign parliament, arguably demonstrating the force of the political constitution. Devolution changed the unitary nature of the constitution, and devolved powers away from the UK Parliament. The UK Parliament has expressly reiterating its sovereign power within the Scotland Act 1998[189]. Nonetheless, the establishment of a Scottish Parliament has given Scotland a degree of legal autonomy and an institutional platform for constitutional and political differences to manifest. Additionally, the work of the SCC offered the prospect a distinct constitutional tradition. Against this backdrop, Scottish devolution had the potential to challenge the absolute sovereignty of the UK Parliament from the outset. From this perspective, the following chapters will examine Scottish devolution and its impact on the traditional doctrine.

[187] Tierney, *We the Peoples* (n 125) 234.
[188] Goldini and McCorkindale (n 148) 2225.
[189] s 28(7)

3.8 Conclusion

State uniformity is not a necessity if the constitutional differences are respected within the territorial state. Since the beginning of the Union the UK Parliament has made attempts to accommodate Scottish diversity. However, the enactment of the unpopular poll tax legislation resulted in a challenge to the central authority within the state. The *Claim of Right* challenged the traditional doctrine of sovereignty but this was not a rejection of the UK constitution. Instead, as Tierney states, it was a reaffirmation of the UK constitution as a union state[190].

As discussed in Chapter 1 the political constitution can act as a an internal and external limit on the sovereignty of the UK Parliament. Significantly, the Scottish Constitutional Convention did not have legal authorisation, yet it initiated change in the legal constitution. As Dicey claimed *"sovereignty is limited on every side by the possibility of popular resistance"*[191]. The success of the Constitutional Convention can be said to exemplify Dicey's theory of the political sovereign.

Nonetheless, this Chapter has demonstrated that the work of the SCC was transformative, and popularised the traditional claim of popular sovereignty in Scotland. The introduction of devolution altered the UK constitution and gave "institutional expression to Scots political identity". In this context, the following Chapters will review Scottish devolution and its interaction with the doctrine of parliamentary sovereignty.

[190] Tierney *Scotland and the Union State* (n 129) 40.
[191] Dicey (n 152) 79.

4. Chapter 3 – The 'process' of Devolution in Scotland and Parliamentary Sovereignty

The UK Government's white paper on Scottish Devolution stated that meeting Scottish aspirations of self-government was the best way to "enhance the Union"[192]. Devolution was initially considered an appropriate move to strengthen the integrity of the UK constitution. Despite the rejection of parliamentary sovereignty during the SCC's campaign for devolution, the Scotland Act 1998 reiterates that sovereignty rests with the UK Parliament[193]. However, according to Bogdanor:

"*Constitutionally… the Scottish Parliament will be subordinate. Politically, however… it will be anything but subordinate. For the Scotland Act creates a new locus of political power… that of representing the people of Scotland"*[194].
"In Scotland, then, the supremacy of Parliament will bear… an attenuated meaning after the setting up of its own Parliament"[195].

In this context, the aim of this Chapter is to examine Scottish devolution within the legal, political and common law constitution to assess the impact of Scottish devolution on the traditional doctrine of parliamentary sovereignty. The Chapter will begin by reviewing the Scotland Act 1998, and the ways in which the Act underpins parliamentary sovereignty. As Scottish politics influenced the introduction of devolution the next section will analyse the Scotland Act 1998 within the political constitution, reinforcing Bogdanor's "*attenuated meaning*" theory. In considering the political legitimacy invested within the Scottish Parliament the Chapter will then move to analyse judicial review of the 1998 Act, and the status of the Scottish Parliament within the common law constitution. Finally, it will be concluded that the UK constitution is more than what section 28(7) of the Scotland Act 1998 assumes it to be and that the introduction of Scottish devolution continues to compromise the integrity of the orthodox doctrine.

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[192] Scottish Office, *Scotland's Parliament* (Cm 3658, 1997) para 3.1.
[193] Scotland Act 1998, s 28(7)
[194] Vernon Bogdanor 'Devolution: Decentralisation or Disintegration' (1999) 70 The Political Quarterly 185.
[195] ibid 187.

4.1 The Scottish Parliament – A Creature of Statute

The Scotland Act 1998 provided for a Scottish Parliament, with a broad range of devolved powers. The Act does not specify what is devolved. Instead it lists matters reserved to Westminster under Schedule 5 of the Act, and anything that is not reserved is devolved. Responding to the demand for devolution, the UK parliament fulfilled its plurinational role, allowing the Scottish electorate to receive a Government they voted for. Focusing on Scottish matters and offering more effective representation, Holyrood gives Scotland a stronger voice within the Union, ensuring, as Aileen McHarg states, that "Scottish issues are not side-lined"[196].

It does not follow that the Scottish Parliament enjoys a superior status over the UK Parliament. It was reiterated during the passing of the 1998 Act that Westminster would retain its superior status. Consequently, the UK has not established a federal model, in which ultimate legal authority is divided between central and regional governments. Unlike the classic conceptions of federalism the power of devolved governments within the UK is limited and asymmetrical in nature. In accordance with parliamentary sovereignty devolved power can be viewed as delegated power. The UK Government's white paper on devolution, *Scotland's Parliament*[197], stated that the UK Parliament will remain sovereign in all matters. Therefore, devolution was designed to preserve the UK sovereignty: section 28(7) of the 1998 Act asserts that the devolved legislation does "not affect the power of the Parliament of the United Kingdom to make laws for Scotland". The Scottish Parliament derives its authority from an ordinary Act of Parliament and can, therefore be considered a creature of statute. Indeed, the UK Government's position in 1997 was that Parliament was exercising its sovereignty by

[196] Aileen McHarg & Tom Mullen, *Public Law in Scotland* (Edinburgh: Avizandum 2006) 12.
[197] *Scotland's Parliament* (n 192).

"*devolving legislative responsibilities to a Scottish Parliament without in any way diminishing its own powers. The Government recognises that no UK Parliament can bind its successors*"[198].

The 1998 Act also places express limitation on the Scottish Parliament's power to legislate. Any attempt by the Scottish Parliament to legislate in relation to a reserved matter would be out with legislative competence, and unlawful under section 29(1). The 1998 Act provides procedural mechanisms to safeguard against the Scottish Parliament attempting to pass legislation beyond its legislative competence[199]. The Advocate General, the Lord Advocate or the Attorney General have the power to review all Scottish Bills to ensure the provisions are within the competence of the Parliament.

From a legal perspective, parliamentary sovereignty does not bear an attenuated meaning in Scotland. The introduction of Scottish devolution is completely consistent with the traditional doctrine of Parliamentary sovereignty. The Scotland Act 1998 is not legally entrenched, and while there may be no foreseeable appetite to abolish the Scottish settlement, Westminster always retains the legal power to amend or repeal the Act 1998 and disband the Scottish Parliament. The Scotland Act is also subject to implied repeal. This underpins Bogdanor's comments above that constitutionally the "Scottish Parliament is subordinate". Viewed this way, the introduction of devolution in Scotland does not challenge the absolute nature of parliamentary sovereignty as described by Dicey.

However, despite the significant weight given to parliamentary sovereignty even within the wider UK constitution, the doctrine – as previously observed – can be restricted by the influence of the political constitution. It has also been faced with challenges from self-imposed entrenchment and common law constitutionalism. Therefore, in the absence of a written constitution, coupled with the political foundations on which the Scottish Parliament was built, it is possible to imagine that

[198] ibid para 4.2.
[199] Scotland Act 1998, s 31, s 32.

the Scotland Act 1998 is more than a creature of UK statute. Devolution gives political and democratic expression to Scotland, and should be analysed beyond a strict legal perspective. As discussed in Chapter Two, there can be different interpretations or understandings of the Union between Scotland and England, one reads as an incorporating Union and the other reads as a Union of two equal states. Likewise, it can be said that there may be different interpretations of the nature of Scottish devolution. One which interprets the settlement as a creature of UK statute, as set out above, and another which reads as a "a new locus of political power" in Scotland.

4.2 Scottish Devolution: "a new locus of political power"

The Scottish Parliament was born out of a manifestation of popular sovereignty, a movement which rejected the doctrine of parliamentary sovereignty[200]. The "cultural tradition"[201] of popular sovereignty, endorsed during the SCC, arguably "lies at the core"[202] of the Scottish Parliament. Lord Hope of Craighead, writing extra judicially, asserted that the introduction of the Scottish Parliament endorsed "*a popular view that sovereignty is being returned to and will reside with the people of Scotland*"[203]. Devolution is grounded on the basis that there is separate political will within Scotland. The devolved settlements in the UK are asymmetrical in that they are designed to meet the specific needs of each country. The extra-parliamentary SCC was very influential in forming the basis of Scottish devolution and perhaps set practical parameters for the UK Parliament when legislating. The UK Government's White Paper*[204]* set out a broad framework, significantly to "achieve the parliament envisaged by the Scottish Constitutional Convention"[205]. From the outset the UK Parliament had lost some element of control over what the devolved legislation would look like. Likewise, the UK Parliament as MacCormick states, legislated for

[200] Scottish Constitutional Convention, Towards Scotland's Parliament (The Scottish Constitutional Convention 1990) 10.
[201] Gavin Little 'Scotland and Parliamentary Sovereignty' (2004) 24 Legal Studies 540, 554.
[202] ibid 554.
[203] Lord Hope, 'The Human Rights Act 1998: The Task of the Judges' (1999) 20 Statute Law Review 185, 188.
[204] *Scotland's Parliament* (n 192).
[205] The Scottish Office, *Report of the Consultative Steering Group on the Scottish Parliament: 'Shaping Scotland's Parliament'* (1998), Section 2, 4.

Scottish devolution "in response to a very long-standing and strongly articulated"[206] political demand. Thus, Scottish devolution was influenced and designed by political actors[207]perhaps reinforcing Scotland's claim of right to self-determination. Similarly, the proposals for devolution were put before Scottish people for approval via referenda, ratifying the political legitimacy invested within the settlement. According to Bogdanor, the right to self-determination was perhaps "implicitly accepted"[208] by the government in 1997 when restricting the referendum on devolution to Scottish voters. The other three countries within the Union had no direct input into altering the constitution and devolving powers to Scotland.

Devolution in Scotland is politically dynamic and, according to Walker, different "powerful orientations now also compete to frame the debate about Scottish distinctiveness"[209]. On one hand there is support for the idea of the UK as a Union state. The concept of the UK as a Union state has been conceptualised in different ways throughout constitutional history, even prior to the Union in 1707; but Walker links a contemporary interpretation in Scotland to the narrative that the sub-state nations with in the UK reclaim a degree of constitutional autonomy, in which the integrity of the plurinational state depends upon the continued constitutional accommodation of each nation. This interpretation may be equated to something less "hierarchical" than the Diceyan doctrine of sovereignty, but also not as structured as a federal system of government. This understanding may be evident in the *Claim of Right* and the work of the SCC. Indeed, the work of the Convention was a successful attempt at reaffirming the UK constitution as a union state. Therefore,
"the developing system of Scottish self-government flows not from a 'top-down' grant of powers but from the 'bottom-up' assertion and negotiated settlement of the parties to the Union."[210]

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[206] Neil MacCormick, *Questioning Sovereignty law, state, and nation in the European Commonwealth* (Oxford: Oxford University Press 1999) 74.
[207] Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford University Press 2005) 150.
[208] Bogdanor, *Decentralisation or Disintegration* (n 194) 186.
[209] Neil Walker, *The Territorial Constitution and the Future of Scotland* in Aileen McHarg, Tom Mullen, Alan Page, and Neil Walker (eds), *The Scottish Independence Referendum: Constitutional and Political Implications* (Oxford University Press 2016).
[210] Walker, *The Territorial Constitution* (n 209) 18.

On the other hand, there is the emerging view that the accommodation of Scottish differences within the Union - dominated by the doctrine of parliamentary sovereignty - is insufficient. This view can be linked to a nationalist vision and the rise of the SNP Party from the 1970s onwards. Significantly, it is captured within the growing support for an independent Scotland, which has mostly remained intact since the unpredicted narrow loss in 2014 referendum[211]. While both interpretations are different, they do share similarities in that both seek constitutional autonomy and are driven by the right to self-determination. Devolution endorses the territorial nature of the constitution, and in the famous words of Ronald Davies, it is "a process, not an event"[212] which has developed on an ad hoc basis. It has given further legal and political recognition to Scottish differences within the territorial state, creating the space for different interpretations of the constitution to continuously manifest. Thus, it would appear inadequate in practice to reconcile the "process" of devolution and its impact within the UK constitution, simply as an Act of the UK Parliament.

The Scotland Act 1998 may have created a new locus of political power in Scotland, but Scotland remains within the UK's constitutional arrangements. The claim of popular sovereignty imbedded in the ground work of devolution and the operation of the traditional doctrine parliamentary sovereignty may not be categorised as a "stand-off"[213] between two concepts. As observed, the UK Parliament addressed the challenge to the status quo, but as discussed this did not result in a transfer of sovereignty. Devolution can be viewed as a re-ordering of the constitution to allow separate political will in Scotland to manifest, while maintaining the superior supervisory role of the UK Parliament. This can be enhanced by Walker's theory that a pluralistic approach to the constitution can accommodate the difference between the legal and political constitution. Walker has asserted that:

[211] My Scotland poll: Yes to independence takes the lead (Lord Ashcroft Polls, August 2019) https://lordashcroftpolls.com/2019/08/my-scotland-poll-yes-to-independence-takes-the-lead/ accessed August 2019.
[212] UK Politics Ron Davies' fightback begins (BBC, February 1999) http://news.bbc.co.uk/1/hi/uk_politics/272015.stm accessed May 2018.
[213] Little (n 201) 558.

"*while ritual deference continues to be paid to the legal theory of the unitary state, the developing culture of negotiation and balanced settlement reflects a rather different political understanding*"[214]

The concept of political difference may on another view be linked to Bogdanors suggestion that in Scotland parliamentary sovereignty bears an "attenuated meaning" in a post devolution era. Notwithstanding Walker's theory, if the parliamentary sovereignty bears an attenuated meaning then it is likely to place significant pressures on the legislative supremacy of the UK Parliament, which may compromise the operation of doctrine. The success of the SCC, the vote in favour of devolution, the expansion of devolution and the growing support for independence may imply that a majority of the Scottish people do not fully endorse the traditional doctrine. From this perspective it may lose its normative force.

It can be said that the unwritten nature of the constitution has allowed it to flexibly accommodate the changes within the plurinational. Nonetheless, a lack of guiding principles, as highlighted by Institute for Government, has "led to disagreement about the nature of the post-devolution constitution"[215]. Therefore, different interpretations of the constitution have manifested and it can be argued that Scottish devolution is more than a creature of statute. Consequently, it is important to consider how in practice this impacts the doctrine of parliamentary sovereignty.

4.3 Scottish Devolution and the Political Constitution

As discussed in Chapter 1, the political constitution may limit the absolute nature of parliamentary sovereignty. Arguably, the political legitimacy invested within the Scottish devolution settlement can contribute to the internal and external limits on the legislative authority of Parliament. This view can be endorsed in practice through the development of the settlement, and significantly the operation of the Sewel Convention - which was agreed upon during the establishment of devolution.

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[214] N Walker 'Beyond the Unitary Conception of the United Kingdom Constitution?' [2000] Public Law 384, 397.
[215] Institute for Government, *Devolution at 20* (Institute for Government, May 2019) 6, https://www.instituteforgovernment.org.uk/publications/devolution-at-20 accessed August 2019.

4.4 The Sewel Convention

The Sewel Convention is documented in a memorandum of understanding between the UK and devolved governments. The Convention was an expectation that was initiated by Lord Sewel during the passing of the bill. Lord Sewel maintained that the convention would allow "political dialogue"[216] between both Parliaments' if issues were to arise around legislating on devolved matters. The political momentum invested within the Scottish Parliament gives strength to the argument that any attempts by the UK Parliament to assert its dominance and interfere with the authority of the Scottish Parliament could be viewed - within the political constitution - as illegitimate. This position firmly proposed by the SCC, during the campaign for devolution, who concluded that:

"through widespread recognition of the parliament's legitimate authority, both within Scotland and internationally, such a course of action is both practically and politically impossible.[217]

In its original form the Sewel Convention ensures that the UK Parliament will not normally legislate on devolved matters without the consent of the Scottish Parliament. Where UK legislation falls within the scope of the Convention there will normally be a period of consultation between the UK and Scottish Parliament. This may result in amendment's to the proposed legislation to address any devolved concerns. Throughout the 20 years of devolution, the Sewel Convention has evolved beyond its original form. Mark Elliot has argued that the written understanding cannot "be authoritative in the way that legislation can be decisive as to what the law is", he adds that constitutional conventions "can and do"[218] develop. The Sewel Convention, in relation to Scotland and Wales, not only includes legislation that

[216] HL Deb 21 July 1998, vol 592, cols 791.
[217] Scottish Constitutional Convention *Scotland's Parliament, Scotland's Right*. (Edinburgh: Convention of Scottish Local Authorities:, 1995) 10.
[218] Mark Elliot, 'The Supreme Court's judgment in Miller: in search of constitutional principle' (2017) 76 Cambridge Law Journal 257, 274.

effects devolved matters, it now extends to UK legislation that determines the scope of what is devolved.

Notwithstanding the UK Parliament's controversial decision to enact the EU (Withdrawal) Bill 2018 without the consent of the Scottish Parliament, the Sewel Convention has been well respected and adhered to throughout 20 years of devolution. The introduction of the Scotland Act 2016 attempted to fulfil the proposals of the Smith Commission by placing Sewel Convention on a statutory footing. The Supreme Court have subsequently held[219] that the new provisions did not change the pre-existing nature of the convention, which will be discussed in more detail in the following Chapter. Nonetheless, the Sewel Convention continues to hold great normative force. In *Imperial Tobacco v Lord Advocate*[220] Lord Hope refers to the complex list of reserved matters under Schedule 5 and observes that, at first sight, the list

"*might have been expected to give rise to frequent disputes which would require to be resolved by the courts. That this has not happened until now is due partly to the use of legislative consent motions passed by the Scottish Parliament to enable the UK Parliament to pass legislation on devolved issues*"[221].

The Institute for Government's report on *Devolution at 20*[222] detailed the successful operation of the Sewel Convention. The reported highlighted that the convention had be frequently used across a wide range of policy areas. In the case of Scotland 155 bills (up to March 2019) had been subject to consent motions. According to the report the frequent and successful operation of the Convention demonstrates that:

"*that Whitehall departments have to navigate a complex set of territorial relations to ensure that their legislation functions effectively across different parts of the UK."*[223]

[219] *R. (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] A.C. 61; [2017] 1 WLUK 387 (SC).
[220] [2012] UKSC 61, 2013 S.C. (U.K.S.C.) 153 (SC).
[221] ibid [6].
[222] *Institute for Government* (n 215) 64.
[223] ibid.

It can be said that Scottish devolution was introduced, designed and is heavily influence by the political constitution. The introduction of the Sewel Convention and its successful operation implies that the UK Parliament, when legislating, is mindful of the political legitimacy invested within the Scottish Parliament. Sewel is not a legal rule but it is a vital part of the constitution. This corresponds with Bogdanor's view that the Scotland Act 1998 creates a new locus of political power that represent the people of Scotland. The devolution settlement in Scotland has continuously evolved since its inception, and the UK Parliament as a plurinational body has transferred additional powers to the Scottish settlement in 2012 and 2016.

4.5 The Development of Devolution

Against the backdrop of Union state and nationalist objectives within the Scottish political constitution, the settlement has been expanded upon following a so-called "demand-and-supply model"[224]. According to Elliot, this means that the devolution settlements have been revised "only when the pressure to do so becomes sufficient"[225]. Again, this contributes to the internal and external influence of the political constitution.

The Scottish National Party, after winning the historic 2007 Scottish election, launched a 'National Conversation'[226] to consult with the public on the constitution and encourage support for Scottish independence. This was a historic election because it was the first time the Scottish people overwhelming supported a political party who continuously campaign for an independent Scotland[227]. The main Parties in Scotland who rejected independence did not contribute to the 'National Conversation'. Instead cross-party debate began about extending devolution rather than independence. The instigators of the debate, such as the then Scottish Labour Leader Wendy Alexzander, supported an independent review of devolution,

[224] Mark Elliot '1,000 words / Devolution' (Public Law for Everyone, September 2016) https://publiclawforeveryone.com/2016/09/26/1000-words-devolution/ accessed May 2018.
[225] ibid.
[226] Scottish Government, *Your Scotland, Your Voice: A National Conversation,* (2009) available at http://www.gov.scot/Publications/2009/11/26155932/0
[227] See https://www.snp.org/independence accessed February 2018

recognising that "mainstream public opinion" suggests that Scotland "wants to walk taller"[228] within the UK. The UK Government was responsive to this and, along with support from the Scottish Parliament, authorised the Calman Commission. The Commission sought to assess the experience of devolution and recommend any necessary changes to the constitution to "enable the Scottish Parliament to serve the people of Scotland better"[229]. The SNP Government did contribute to the Commission, but "on factual matters only"[230]. This process was initiated from Parliament but was said to have been driven by public opinion. The main recommendations in the final report were to strengthen the Scottish parliament with additional powers and improving the relationship between both Holyrood and Westminster. Increasing Holyrood's financial accountability to the electorate was also proposed. These recommendations were acknowledged by Westminster and accommodated by the Scotland Act 2012. The Act enhanced the devolution settlement by transferring more power to Ministers, administrative control over Scottish elections and the most noted, financial power over income tax. The title of the Scottish Executive was also changed to the Scottish Government. The Scotland Act 2016 - established in the aftermath of the referendum on Scottish Independence - also expanded the powers of the Scottish Parliament and due to its significance it will be discussed in greater detail in the following Chapter.

The Calman Commission as a project itself was initiated by the sovereign Parliament, although this followed suggestion that there was a demand for more autonomy in Scotland, and an unprecedented level of support for the SNP, which posed a potential threat to the integrity of the Union. Rather than making "any law whatever", it can be said that in this instance the UK Parliament was legislating in response to the political climate in Scotland at the time. Additionally, the 2012 Act resulted in Westminster devolving more powers, perhaps further reducing elements of its legislative authority in relation to Scottish matters.

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[228] Commission on Scottish Devolution, *Serving Scotland better: Scotland and the United Kingdom in the 21st century* (Edinburgh: Commission on Scottish Devolution, 2009) 6.
[229] ibid 1.
[230] Paul Cairney, *The Scottish political system since devolution: from new politics to the new Scottish government* (Exeter 2011) 280.

Arguably the political force behind the Scottish Parliament can make it difficult for the UK Parliament to fully exercise its right to make and unmake any law in relation to devolved matters. This presents a challenge to the first aspect of Dicey's traditional doctrine, as set out in Chapter One. Scottish devolution can contribute to the wider limitations of the political constitution, but it may also have contributed to reducing the relevance of the doctrine post-devolution[231]. The Scottish Parliament could be viewed as superior in relation to Scottish domestic affairs. This has been acknowledged to some extent by the Sewel Convention, which is a political process placing an additional internal restriction on the UK Parliament's unlimited authority. In this context, the following section will consider the Scotland Act 1998 as a potential contribution to the argument that there can be self-imposed limits on the sovereignty parliament.

4.6 The Scotland Act 1998 and Self-Imposed Limitations

As discussed in Chapter One, the *Diceyan* orthodox provides that no Parliament is bound by another. The Scotland Act 1998, like any other Act of Parliament, can be repealed. However, this aspect of legislative supremacy was called into question by the SCC:

"In theory under Britain's unwritten constitution such an Act can be repealed or amended without restriction… however… No Westminster government would be willing to pay the political price of neutralising or destroying a parliament… supported by the people of Scotland"[232]

According to the SCC, the Scottish Parliament could not, from the outset, be abolished by future Parliaments. In *Devolution at 20* the report recognised that devolution is a permanent feature of the UK constitution[233]. Likewise, both the Calman Commission and the Smith Commission, which preceded the enactment of the Scotland Act 2012 and 2016, recognised that the devolution in Scotland is

[231] Little (n 201) 561.
[232] Scottish Constitutional Convention *Scotland's Parliament, Scotland's Right*. (Edinburgh, 1995) 10.
[233] *Institute for Government* (n 215) 3.

permanent feature within the UK constitution. The Calman Commission in its findings asserted the legitimacy of Holyrood stating that the Parliament

"*had embedded itself in both the constitution of the United Kingdom and the consciousness of Scottish people - it is here to stay."*[234] .

It follows that devolution in Scotland may be considered a permanent feature of the UK constitution, which is becoming further entrenched as more legislative powers are devolved on an ad hoc basis. The Scotland Act 2016[235] has transferred this understanding into legislation, and while the force of the provision is legally debatable, the UK Parliament does not legislate in a vacuum. The legislative process as discussed throughout can be limited internally and externally by the political constitution. It is within this context, that the 1998 Act can be considered to have placed self-imposed limitations, even prior the 2016 Act.

If it is already, for the most part, recognised – through the Sewel Convention – that the UK Parliament lacks political authority to legislate in devolved areas without the consent of the Scottish Parliament, then it is unlikely that the UK Parliament would legislate to abolish the settlement. The referendum clause contained in the Scotland Act 2016 significantly enhances this position and will be discussed in more detail in the following Chapter. It can be argued that since the inception of devolution future Parliaments are bound by the Scotland Act 1998 due to practical politics. This reinforces the view that the 1998 Act is more than a creature of statute. From this perspective, it is important to consider the status of devolution within the common law constitution.

4.7 The Scotland Act 1998 and the Common Law Constitution

The Scotland Act 1998 is a significant piece of legislation because it allowed for the creation of another law-making body within the UK constitution. Significant as the 1998 Act may be, it is still an Act of the sovereign Parliament and, from a Diceyan

[234] *Serving Scotland Better* (n 228) 14.
[235] Scotland Act 1998, s 63A (as inserted by the Scotland Act 2016, s 1).

perspective, it should be recognised by the courts as subordinate legislation. Following the introduction of devolution members of the judiciary have reviewed the 1998 in accordance with section 28(7). Lord President Rodger, in *Whaley v Watson,*[236] stressed that

"the fundamental nature of the [Scottish] parliament as a body which – however important its role – has been created from statute and derives its power from statute"[237].

It can be said that Lord Rodger recognised the political legitimacy invested within the Scottish Parliament, but was clear that this did not impinge on the legislative supremacy of Westminster. This interpretation which can be reconciled with the view that the Scottish Parliament is a creature of statute and that it does not significantly challenge the traditional doctrine. However, more recently there have been some signs that suggest the courts acknowledge that the modern constitution presents significant challenges the orthodox doctrine, which includes Scottish devolution. As discussed above, there are different interpretations of the UK constitution post-devolution and this is reflected in the developments in case law. Indeed, a few members of the judiciary have expressed a nuanced approach towards the status of the Scottish Parliament.

4.8 The Status of the Scottish Parliament

In the case *Jackson v Attorney General*[238], Lord Steyn referred to the Scotland Act 1998 during the discussion on the doctrine of parliamentary sovereignty. Lord Steyn expressed the view that:

"The settlement contained in the Scotland Act 1998 also point to a divided sovereignty…The classic account given by Dicey… can now be seen to be out of

[236] 2000 S.C. 340.
[237] ibid [348].
[238] *R. (on the application of Jackson) v Attorney General* [2005] UKHL 56; [2006] 1 AC 262

place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the general principle of our constitution."[239]

The idea that sovereignty is divided following the Scotland Act 1998 was not elaborated on in the rest of the judgement. Lord Steyn maintained that parliamentary sovereignty still holds great constitutional significance, but it can be inferred from his comments that it is not a principle that is entirely endorsed in Scotland. To maintain that sovereignty is "divided" following devolution may imply that the Scottish Parliament is more than a subordinate legislator, yet the UK Parliament devolved powers with the intention of retaining all sovereign power.

Another noteworthy case is *AXA General Insurance Ltd*[240] case. In this case several insurance companies sought judicial review of the Damages (Asbestos-Related) (Scotland) Act 2009. The courts can rely on the grounds set out in section 29 of the 1998 Act to review acts of the Scottish Parliament. However, the petitioners in this case argued the act in question could also be challenged on traditional common law grounds of 'irrationality'. The Supreme Court ruled that acts of the Scottish Parliament were not subject to common law review unless the Act sought to violate the rule of law. Lord Hope developed this, stating that "the traditions of universal democracy" are entrenched within the Scottish Parliament, therefore the court should "intervene if, if at all, only in the most exceptional circumstances"[241]. This raised many constitutional issues because the courts have supervisory jurisdiction over *"any person or body to whom… authority has been delegated or entrusted by statute*"[242]. Generally, the courts have a wide scope to review subordinate legislation. Whereas, it is contradictory to the premise of judicial review and democracy that primary legislation can be reviewed in terms of irrationality. In this instance the court affords acts of the Scottish Parliament a primary rather than subordinate status. Lord Hope continues:

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[239] ibid [102].
[240] *AXA General Insurance v Lord Advocate* [2011] UKSC 46 | [2012] 1 A.C. 868
[241] *ibid* [49].
[242] *West v Secretary of State for Scotland* 1992 S.C. 385; [1992] 4 WLUK 232 (IH (1 Div)) [385].

"A sovereign Parliament is… immune from judicial scrutiny because it is protected by the principle of sovereignty. But it shares with the devolved legislatures, which are not sovereign, the advantages that flow from the depth and width of the experience of its elected members and the mandate that has been given to them by the electorate."[243]

It can be said that the political power invested in the Scottish Parliament is recognised, and on this basis Lord Hope has taken the view that the courts should have a narrow scope when reviewing acts of the Scottish Parliament on common law grounds. He further declares that an act of the Scottish Parliament, within the sphere of legislative competence, enjoys *"the highest legal authority"*[244]. Thus, intervention is only necessary in extreme cases - were attempts are made to *"abrogate fundamental rights"*[245]. Significantly, the same interpretation may be applied to an Act of the UK Parliament. For example, in *Jackson* Lord Steyn expressed that the courts may have to adopt a different hypothesis to the supremacy of Parliament in *"exceptional circumstances*"[246], such as an attempt to abolish judicial review. In addition to Lord Steyn's "*divided sovereignty*"[247], these similarities perhaps place the constitutional position of Holyrood on par with Westminster, affording the 1998 act constitutional status. Again, this was never the intent behind the 1998 Act.

Furthermore, in the previously discussed *Thoburn v Sunderland City Council*[248] *case* Laws LJ took the view that a constitutional statute *"conditions the legal relationship between citizen and State in some general, overarching manner"*[249]*:* the Scotland Act 1998 could perhaps fall into this category. It can be argued that in accordance with the rule of law the court respects the importance of democracy and, therefore, recognises the legitimate nature of the Scottish Parliament.

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[243] *AXA* (n 240) [49].
[244] *AXA* (n 240) [46].
[245] Lord Hope of Craighead, 'Is the Rule of Law now the Sovereign Principle?' in Richard Rawlings, Peter Leyland and Allison Young (Eds.), Sovereignty and the Law (Oxford University Press 2013) 93.
[246] *Jackson* (n 238) [102].
[247] *ibid.*
[248] [2002] EWHC 195, [2003] QB 151.
[249] *Ibid* [62].

In the case *Imperial Tobacco v Lord Advocate*[250] the court was asked to determine if the Tobacco and Primary Medical Services (Scotland) Act 2010 fell within the competence of the Scottish Parliament. The Inner House of the Court of Session held that it did not relate to a reserved matter. In determining the scope of the legislation the Inner House were clear that the fundamental nature of the Scottish Parliament did not require a different approach to interpretation. Lord Reed maintained that

"*the democratic legitimacy of the Scottish Parliament does not in itself warrant a different approach to interpretation from that applicable to Acts of Parliament"*[251].

Both Lord Reed and Brodie firmly asserted that the Scotland Act is "*not a constitution*"[252], but an Act of Parliament and should be interpreted as such. It was asserted that Westminster is also "*a representative and democratically elected Parliament"*[253] who established and placed limits on the Scottish Parliament. It is up to the courts to "*apply those limits*"[254] to give effect to Parliaments intention. In doing so the courts do not *"undermine democracy but protect it"*[255]. Likewise, the Supreme Court dismissed the appeal on the basis it did not relate to a reserved matter. Significantly, the Supreme Court also reiterated that the interpretation of a statute should not be linked to its constitutional significance. Lord Hope asserted:

"the description of the Act as a constitutional statute cannot be taken, in itself, to be a guide to its interpretation"[256]

The judiciary in this case still give acknowledgement to the legitimacy of the Scottish Parliament. Lord Hope asserts that the content of the 1998 Act "*might influence the approach to be taken*"[257]. However, when interpreting the limits of devolved competence the court was unwilling to accept it holds anything more than a

[250] *Imperial Tobacco* (n 220).
[251] [2012] CSIH 9, 2012 WL 280451 [58].
[252] *ibid* [71].
[253] *ibid* [58].
[254] *ibid.*
[255] *Imperial Tobacco* (n 220) [58].
[256] *ibid* [15].
[257] *ibid* [10].

subordinate status. From this perspective, it can be said that the constitutional significance of the Scotland Act 1998 is not fundamental in the courts approach to devolved competence.

Nevertheless, it is not to say that the constitutional significance of the Scotland Act 1998 is not persuasive within the common law constitution. In *H v Lord Advocate*[258] Lord Hope refers to the fundamental nature of the Scottish settlement, and notably states that the 1998 Act is protected from implied repeal. One of the issues that the appellants sought review from the Supreme Court in *H* was possible conflict between the Extradition Act 2003 and the Scotland Act 1998. If there was a conflict, the Extradition Act was a later statute and in accordance with implied repeal should take priority over the 1998 Act. Nonetheless, Lord Hope, with whom the other judges agreed, held that there was no clash between the queried provisions within the Extradition Act 2003 and the Scotland Act 1998, both were consistent. However, in terms of constitutional status the significance lies in Lord Hope's *obiter dictum,* in which he considers what would have happened if there had been a conflict between two statutes:

"It would perhaps have been open to Parliament to override the provisions of section 57(2) in my opinion only an express provision to that effect could be held to lead to such a result. This is because of the fundamental constitutional nature of the settlement that was achieved by the Scotland Act"[259]

Lord Hope was clear that any alteration to the Scotland Act 1998 cannot be determined by "implication"[260], it must be set out "expressly"[261] by Parliament in statute. Lord Hope's *dictum* in *H* is noteworthy for several reasons. Unlike *Thoburn* which was a decision of the Administrative Court, this was a position expressed by the judiciary in the Supreme Court. Also, while *Imperial* asserted that the 1998 Act is not a constitution, this was relating to the limits of devolved competence, whereas

[258] [2012] UKSC 24; [2013] 1 A.C. 413; [2012] 6 WLUK 422 (SC (SC)).
[259] ibid [30].
[260] ibid.
[261] ibid [32].

Lord Hope in *H* considered the status of the 1998 Act against an Act of the UK Parliament. Significantly, if this approach expressed by Lord Hope is adopted, then the judiciary may set aside an later Act of the UK Parliament in favour of the earlier 1998 Act. This creates the potential for a change in the rule of recognition, and presents a significant challenge to the Diceyan doctrine. Arguably, an "express enactment" requirement may place limits on Parliament's unfettered legislative supremacy and presents an opportunity for the court to question the authority of Parliament. It also implies that the Scotland Act 1998 is more than an ordinary piece of legislation, potentially binding future parliaments.

The judiciary in the UK mostly affirm the traditional principle in relation to devolved matters, as asserted in *Imperial Tobacco v Lord Advocate*[262]. However, the abovementioned cases demonstrate a development in the courts interpretation of the status of the Scottish Parliament, which could be an attempt to accommodate the evolving political nature of Scottish devolution. This may also contribute to the wider challenge of constitutional statute in the UK constitution. Indeed, the fundamental status afforded to the Scotland Act 1998 may be attributed to the other devolutionary statutes and the Human Rights Act 1998[263]. It is significant that Scottish devolution has creates the space for some members of the judiciary to envisage possible limits on the absolute nature of parliamentary sovereignty.

4.9 Conclusion: Parliamentary Sovereignty and Scottish Devolution

The UK Parliament's attempts to affirm the principle of parliamentary sovereignty in Scotland after the tradition of popular sovereignty had been revived, may have always proved difficult. The Scottish Parliament gave institutional form to the recommendations of the Scottish Constitutional Convention, which rejected the doctrine of parliamentary sovereignty. Also, the Scottish Parliament has given "institutional expression to the Scots political identity"[264], and it can be said that

[262] *Imperial Tobacco* (n 220).
[263] Farrah Ahmed and Adam Perry, 'The quasi-entrenchment of constitutional statutes' (2014) 73 Cambridge Law Journal 514.
[264] M Loughlin, *The Idea of Public Law* (Oxford University Press 2004), 84.

Westminster's legal assertion of its sovereignty in the 1998 Act does not fully echo the political reality. Thus, different interpretations of the constitution post-devolution continue to manifest.

In this context, this Chapter has examined the challenges to the orthodox doctrine post devolution - beyond a strict legal analysis. Arguably, the well-established Sewel Convention, and the proposals of both the SCC and the Calman Commission demonstrate a practical limitation on Westminster's ability to make or unmake any law. The political autonomy of the Scottish Parliament may also limit legislative supremacy and perhaps bind future Parliaments, as Hilaire Barnett states "no assertions of the sterile sovereignty of Westminster would quell political dissent from north of the border"[265]. The constitutional status that the Scotland Act 1998 has been afforded - in light of its political legitimacy - could possibly change the way in which the courts interpret the Act. Thus, while parliamentary sovereignty is still legally applicable in Scotland and remains a fundamental doctrine of the constitution, in practice this may not be the case. Gavin Little has suggested that the gap between parliamentary sovereignty and the political reality of Scottish devolution "may widen to the extent that the former becomes increasingly difficult to sustain"[266]. Recent political developments in Scotland are perhaps challenging the doctrine yet again, and will now be considered in the final chapter to enhance this argument.

[265] Hilaire Barnett, *Constitutional and Administrative Law* (9th edn, Routledge 2011) 138.
[266] Little (n 201) 566.

5. Chapter 4: Parliamentary Sovereignty and The Scotland Act 2016

The 2014 referendum on Scottish independence was an event of great constitutional and political significance. Although Scotland voted to remain within the Union, the political events surrounding the referendum led to a profound expansion of the Scottish devolution settlement. The Scotland Act 2016 makes two fundamental changes to the Scotland Act 1998. Section 1 notes the UK Parliament's commitment to the Scottish Parliament, and provides that the Scottish Parliament and the Scottish Government are permanent features of the UK constitution. Section 1 also asserts that the Scottish Parliament is not to be abolished without the consent of the Scottish people, voting in a referendum. Section 2 has attempted to place the Sewel Convention on a statutory footing. From a legal perspective both sections are an express reiteration of a political commitment. Nonetheless, the provisions can be considered to "cement"[267] the Scottish devolution settlement within the UK constitution, which possibly poses a direct challenge to parliamentary sovereignty.The significance of section one in particular is twofold: firstly, the provision supports the political presumption that the Scottish Parliament is entrenched. Secondly, it introduces a degree of manner and form entrenchment with political conditions attached. In Chapter 4 it was argued that from a political perspective the Scottish Parliament could not be abolished, thus, the enactment of the 2016 Act may be viewed as the legal constitution aligning with the political constitution.

Considering the political and constitutional significance of the referendum on Scottish independence, this Chapter will begin with an overview of the events that surrounded the referendum. In similar structure to the previous Chapter, the Scotland Act will be evaluated within the legal and political constitution, which includes a consideration of any self-imposed entrenchment. The political impact of the 2014 referendum continues to unfold with the addition of constitutional pressures and uncertainties emanating from the UK's pending exit from the EU. Against this backdrop, there have been a number of Supreme Court cases in which the Scotland

[267] Richard Ekins 'Legislative freedom in the United Kingdom' (2017) 133 Law Quarterly Review 582, 584.

Act 2016 has been considered. Thus, the latter half of this Chapter will return to analysing the status of the Scotland Act 1998 within the common law constitution. Finally, it will be concluded that the evolution of Scottish devolution has continued to place pressure on parliamentary sovereignty, demonstrating that, from a Scottish perspective, the absolute nature of the doctrine is advancing beyond a Diceyan interpretation.

5.1 The Referendum on Scottish Independence: The Path to the Scotland Act 2016

In the 2011 Scottish Parliament election the SNP, with a manifesto commitment to deliver a referendum on Scottish Independence, won a historic majority. It was against expectation that any Party would dominate in the Scottish Parliament, or that it would be a pro-independence party. This was a moment of constitutional significance in the UK because it created a potential threat to the integrity of the Union and allowed a previously closed issue to be brought onto the political agenda. However, having a political mandate to purse a referendum does not necessarily translate into the legal power to conduct one in the UK constitution. The UK government insisted that if there were to be a referendum on independence it would relate to "the Union of the Kingdoms of Scotland and England"[268]. As the Union is a reserved matter it would be unlawful for the Scottish Parliament to legislate for a referendum**.** On the other hand, the Scottish Government maintained that the referendum could be used simply as a mechanism to determine public opinion on the matter of independence[269]. The opposing views were never reconciled and the legal debate endured. However, an *Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland*[270], known as the Edinburgh Agreement, was finally reached in October 2012. The Edinburgh Agreement can be viewed, as Andrew Tickell states, as "an act of

[268] Scotland Act 1998, sch 5.
[269] Scottish Government, *Your Scotland, Your Referendum* (2012) available at https://www.webarchive.org.uk/wayback/archive/20170703123959/http://www.gov.scot/Publications/2012/01/1006 accessed December 2018.
[270] Available at https://webarchive.nationalarchives.gov.uk/20130102230945/http://www.number10.gov.uk/wp-content/uploads/2012/10/Agreement-final-for-signing.pdf accessed March 2018,

statesmanship", and a compromise between the "right to self-determination" in Scotland and the "legal uncertainty"[271]. Considering the SNP's persistence, Tickell maintains that continued constitutional resistance from the UK Government could have thrown open "a Political Pandora's Box"[272].

On the 18th September 2014 the Scottish people exercised their sovereignty in the referendum and by 55%-45%, voted to remain as part of the UK. The people of Scotland choose to continue under the plurinational constitutional arrangements. The referendum on Scottish independence can be said to demonstrate a record level of citizen engagement in Scotland. Sharing similarities with the SCC, it the 2014 referendum was dominated by the people, as a reality[273]. Many voters engaged as demonstrated through the historical turnout of 84.59%[274], this perhaps exhibits a willingness in Scotland to embrace the right to self-determination.

As the question on the 2014 Ballot paper gave only two options: independence or the status quo, it would be reasonable to expect that following the no vote the UK would have continued on its constitutional trajectory. However, in the days preceding the referendum the polls narrowed to suggest that the Scottish people would prefer an alternative to the plurinational state. Therefore, the UK Government responded to the political climate and made a pledge to expand the devolution settlement, in the event of a no vote. The pledge, known as the Vow, maintained that a vote to reject independence would bring "faster, safer and better change"[275] .The Vow declared that the Scottish Parliament is permanent and promised to deliver extensive new powers to a strict timetable, which would start on the 19th of September.

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[271] Andrew Tickell 'Our Jekyll and Hyde constitution: the constitutional law and politics of Scotland's independence "neverendum"' in Aileen McHarg, Tom Mullen, Alan Page, and Neil Walker (eds) *The Scottish Independence Referendum: Political and Constitutional Implications* (Oxford University Press 2016) 327.
[272] *ibid* 325.
[273] Stephen Tierney, ""And the Winner is… the Referendum": Scottish Independence and the Deliberative Participation of Citizens' (Centre on Constitutional Change, September 2014) https://www.centreonconstitutionalchange.ac.uk/opinions/and-winner-referendum-scottish-independence-and-deliberative-participation-citizens accessed July 2018.
[274] Scotland Decides (BBC News) https://www.bbc.co.uk/news/events/scotland-decides/results accessed October 2016.
[275] Scottish independence: Cameron, Miliband and Clegg sign 'No' vote pledge (BBC News, September 2014) at http://www.bbc.co.uk/news/uk-scotland-scotland-politics-29213418 accessed October 2016.

On the 19th September 2014 the then Prime Minster David Cameron announced that the Vow would be taken forward and Lord Smith of Kelvin would oversee the process. Lord Smith led the Smith Commission working with the five main Scottish Political Parties[276]. In what Lord Smith referred to as an "unprecedented achievement"[277] the political leaders came together, in a short space of time, and reached an agreement on a package of new powers. The Smith Commission agreement was made up of three pillars. Pillar two and three related to expanding welfare powers and the financial responsibility of the Scottish Parliament, but in terms of parliamentary sovereignty pillar one is of interest because it related to the "constitutional settlement for the governance of Scotland"[278]. Significantly, the Report recognised that the sovereign right of the Scottish people had been expressed in the 2014 referendum, and in the context of Scotland remaining within the UK the devolution settlement should be "durable but responsive". It can be said that this position aligns with the view that parliamentary sovereignty continues to lose touch with the wider political reality in Scotland, confirming Lord Steyn's comments on *divided sovereignty"*[279]. Consequently, the first recommendation under pillar one was that UK legislation should state that "the Scottish Parliament and the Scottish Government are permanent institutions"[280]. This echoes the declaration of permanency in the Vow.

It can be argued that from the outset - like the SCC and the 1998 Act - the UK Parliaments decision to expand the devolution settlement in Scotland was influenced by the political developments around the referendum on Scottish independence. The Commission stated that their purpose was to reflect the sovereign right of the Scottish people to "determine the form of government best suited to their needs"[281]. Fulfilling this promise in the wake of the no vote resulted in an alteration of the UK

[276] The Scottish Conservatives, Greens, Labour, Liberal Democrats and the SNP
[277] The Smith Commission, *Report of the Smith Commission for Further Devolution of Powers to the Scottish Parliament* (Edinburgh: Smith Commission 2014) 04.
[278] *ibid* 13.
[279] *R. (on the application of Jackson) v Attorney General* [2005] UKHL 56; [2006] 1 AC 262 [102].
[280] *Smith* Commission (n 277) para 21.
[281] ibid para 20.

constitution, with more powers being devolved to the Scottish Parliament, which would perhaps challenge the doctrine of parliamentary sovereignty once again. The following will now assess section 1 and 2 of the Scotland Act 2016 in respect of the political, legal and common law constitution.

5.2 Scotland Act 2016 and the Political Constitution

Section 1

Section 1 of the 2016 Act introduced a new section 63(A), which provided that:

"The Scottish Parliament and the Scottish Government are a permanent part of the United Kingdom's constitutional arrangements"

The purpose of this provision is to signify the commitment of the UK Parliament to the Scottish Parliament. Notwithstanding the insertion of 63A, if the UK Parliament did unilaterally abolish the Scottish Parliament without the consent of the Scottish people, there would be a significant political backlash. As discussed in Chapter 4, both the SCC and the Calman Commission had previously recognised the political entrenchment of the Scottish Parliament. In written evidence submitted to the Political and Constitutional Reform Committee the Scotland Office advised that: "there has never been any question in the past 16 years that the Scottish Parliament and Scottish Government are anything other than permanent"[282]

The proposal of permanency was a contentious issue because in accordance with parliamentary sovereignty, the UK Parliament cannot bind its own successors. In the absence of any legal guarantees the insertion of 63A can viewed as an articulation of a political understanding that is already in place. While this section does not place any legal limitation on the legislative supremacy of the UK Parliament, it adds to the political limitations on the execution of parliamentary sovereignty, as demonstrated throughout this research. A similar limitation was introduced by Statute of Westminster 1931 as a commitment by the Imperial Parliament to self-governing

[282] House of Commons Political and Constitutional Reform Committee, *Constitutional implications of the Government's draft Scotland clauses* Ninth Report of Session (Cm 1022, 2014–15) 11.

dominions, which was upheld and ultimately independence was granted. That does not equate Scotland to self-governing domains but demonstrates that there is political precedent for the provisions contained in section 1. Notably, the original drafting of the clause was amended to remove the phrase "Scottish Parliament is recognised as". The Devolution (Further Powers) Committee reported received submitted evidence which highlighted that the phrase the "recognised as" states a matter of fact rather than a clear statement in law . Deputy First Minster of Scotland, John Swinney asserted that in reference to the constitutional challenges of making the Scottish Parliament a permanent fixture, it would be better if it was stated as "boldly as possible"[283]. This section offers clear and expressed assertion by the sovereign Parliament that the Scottish Parliament is permanent feature of the UK constitution. From this perspective, perhaps the more significant aspect of section 1 of the Scotland Act 2016 is the introduction of a referendum provision. The newly inserted section 63(A)(3) declares that:

"the Scottish Parliament and the Scottish Government are not to be abolished except on the basis of a decision of the people of Scotland voting in a referendum"

Section 1(2) places the reversibility of the Scottish settlement, beyond Westminster, and in the hands of the Scottish people. Notwithstanding the theoretical challenges of this clause, the UK Parliament pursued this provision to echo its commitment to the Scottish Parliament. This clause may be viewed as a commitment by the UK Parliament not to exercise its sovereign power, rather than a restriction on the exercise of sovereign power[284]. Nonetheless, the UK Parliament has given express recognition to the political legitimacy invested within the Scottish Parliament which can be reconciled with Lord Hope's view in *AXA.*

[283] Devolution (Further Powers) Committee, *An Interim Report on the Smith Commission and UK Government Proposals*, 3rd Report, (Session 4 2015) para 44.
[284] See Mark Elliot, "A "Permanent" Scottish Parliament and the Sovereignty of the UK Parliament: Four Perspectives" (UK Constitutional Law Blog, November 2014) https://ukconstitutionallaw.org/2014/11/28/mark-elliott-a-permanent-scottish-parliament-and-the-sovereignty-of-the-uk-parliament-four-perspectives/ accessed March 2019.

Taking forward the recommendation of permanency, and further amending the wording to strengthen the clause firmly asserts the legitimacy that is invested within the Scottish Parliament. The then Secretary of State for Scotland, David Mundell, stated that removing that phrase puts it "beyond question"[285] that the Scottish Parliament and Government are permanent"[286]. The new provision adds an additional step within the UK Parliaments legislative process, possibly cementing and contributing to the wider internal and external limitation of the political constitution. From a Scottish perspective, the political intent invested within this provision holds great normative force. Since the inception of devolution, it has been claimed that the Scottish Parliament, in a political context, could not be abolished[287] and this section can be said to explicitly confirm this claim.

Section 2

Section 2 of the 2016 Act places the Sewel Convention on a statutory footing, which also followed recommendation made during the Smith Commission. Section 2 inserts the following addition to section 28:

"But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament"[288].

Again, the Devolution Committee argued that the drafted phrase would weaken the effect of the clause and recommended that the words "recognised as" be removed by the UK Parliament. Nevertheless, the wording of the proposal was not amended, and section 2 of the Scotland Act 2016 now inserts the new provision 28(8) into the 1998 Act. Since its enactment, the force of section 28(8) has proved to some extent redundant within the legal and common constitution. The Supreme Court in *Miller*[289]

[285] HC Deb 9th November 2015, Vol 602, col 57.
[286] *ibid*.
[287] Scottish Constitutional Convention *Scotland's Parliament, Scotland's Right*. (Edinburgh: Convention of Scottish Local Authorities:, 1995) 10.
[288] s 28(8).
[289] *R. (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] A.C. 61; [2017] 1 WLUK 387 (SC).

has also asserted that notwithstanding section 28(8), the Sewel Convention is not a legal rule, which will be discussed in more detail below.

The majority decision in *Miller* may have affirmed that the Sewel Convention holds no legal force, but it did not reduce the political accountability that is attached to the convention. The Supreme Court was clear that they did not underestimate the importance of political conventions, and therefore the operation of the convention should be reviewed within the political constitution[290]. It can be said the Sewel Convention, now placed on a statutory footing has not qualified the ultimate law making authority of the UK Parliament. More recently, in attempting to negotiate the UK's exit from the EU the UK Parliament has unprecedentedly overridden the convention, notwithstanding the political controversy. Parliament has enacted the EU (Withdrawal) Act 2018 without the consent of the Scottish Parliament.

Kenneth Campbell has stated that "Post Miller, we know that" Sewel "has no justiciable character, but its political valence is now unclear"[291]. Indeed, the Supreme Court's decision confirms that the convention cannot be legally enforced but it did not assert that the convention was inapplicable. As discussed in Chapter 4 the Sewel Convention is a well-respected aspect of the devolution settlement and can pose practical challenges to the legislative freedom of the UK Parliament. The UK Parliament is never legally refrained from acting without the Scottish Parliament's consent, but unlike before, the UK Parliament may have placed a stronger political commitment on its choice to do so or not, in the form of statute. Thus, perhaps the significance that can be derived from the insertion of section 28(8) is that the express commitment to Sewel raises the political character of the convention. The sequence of events that followed the enactment of section 28(8) have been controversial, and have possibly highlight the political differences within the territorial constitution. These matters may also intensify if the Scottish Parliament continues to refuse to consent to Brexit related legislation. At the time of writing, the full challenge (if any)

[290] *Miller* (n 289) [51].
[291] Kenneth Campbell, 'Constitutional Dogs That Barked and Dogs That Did Not: The Scottish Continuity Bill in the Supreme Court' (UK Constitutional Law Blog, January 2019) https://ukconstitutionallaw.org/2019/01/14/kenneth-campbell-constitutional-dogs-that-barked-and-dogs-that-did-not-the-scottish-continuity-bill-in-the-supreme-court/ accessed January 2019.

of section 28(8) cannot be determined. The UK's exit from the EU is likely to test the nature of the Sewel Convention.

While the political character of the Sewel Convention and the newly inserted referendum clause cannot be legally enforced, both hold significant normative force within the constitution. The previous Chapters have reviewed the force of the political constitution against the backdrop of parliamentary sovereignty. The arguments set out above can be reconciled with the view that the Scottish Parliament is more than a creature of UK statute. Arguably, the referendum provision can be viewed as endorsing, albeit not expressly, the claim of popular sovereignty that underpins the devolution settlement. Following the enactment of the 2016 Act, Aiden O'Neill has suggested that the "Scottish constitutional tradition of popular sovereignty has most recently been restated and confirmed by the UK Parliament"[292]. Again this places an increasing limitation on the first aspect of the Diceyan doctrine: the right to make and unmake any law. The following section will analyse section 1 of the Scotland Act 2016 in the context of self-imposed entrenchment, and the potential impact of the Diceyan doctrine.

5.3 Legal Constitution: The Scotland Act 2016, and Self-Imposed Entrenchment

From a purely legal perspective it can be argued that the 2016 Act is consistent with the traditional doctrine of parliamentary sovereignty. In theory, the 2016 Act does not amend the fundamental aspects of the traditional doctrine, as set out in Chapter 1. Therefore, the expansion of the Scottish settlement does not elevate the status of the Scotland Act 1998, and it is likely Parliament's right to repeal, amend or overlook the legislation would go legally unchallenged. Accordingly, the legal effect of the Scotland Act 1998 only remains relevant while the statute is in force. Nonetheless, the newly inserted referendum lock enhances the theory of manner and form entrenchment.

[292] On appeal to the Supreme Court by IWGB *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin).

Before exploring the potential self-imposed limitations that section 1 has introduced, it is important to highlight that the other constitutional provision contained in section 2 does not entrench the Sewel Convention. As discussed, the words "recognised as" and "normally" – phrases which are not included in section 1 – implies that Sewel remains a convention, and not a legal rule. Thus, at this point it is reasonable to suggest that placing the Sewel Convention on a statutory footing does not amount to a self-imposed limitation within the legal constitution.

5.4 Section 1 and Self-Imposed Entrenchment

Central to the doctrine of parliamentary sovereignty is the unfettered legislative freedom of the UK Parliament. The previous Chapter argued that the Scotland Act 1998 had become politically entrenched, this section will now argued that the referendum provision has placed an express self-imposed practical condition within the legal constitution - should the issue ever arise. The theory of manner and form entrenchment, as discussed in Chapter 1, may be reconciled with the theory of parliamentary sovereignty, because the UK Parliament can still enact any law whatever once the specified conditions have been met. This provision does not prevent the UK Parliament from abolishing the Scottish Parliament, instead, it has added an additional step in that legislative process.

On the other hand, fulfilling this addition step may not be straightforward. As mention above, the significance of this provision is two-fold: Firstly, the section contributes to the overall theory of manner and form, as a potential challenge to the UK constitutional doctrine of sovereignty. As discussed in Chapter 1 the UK Parliament has succeeded in enacting legislation with conditions attached, most notably the enactment of the European Union Act 2011. Therefore, this section offers another example of self-imposed entrenchment within the UK constitution. Secondly, fulfilling the manner and form requirement attached to this provision is perhaps beyond the control of the UK Parliament. Suppose the UK Parliament holds a referendum with the intention of repealing the Scotland Act 1998, and the Scottish people vote against such action. Fulfilling this requirement may be more politically sensitive than other manner and form conditions; such as achieving two-thirds

majority in the House of Commons. Arguably, the foundations on which the Scottish Parliament was established and the expansion of the devolution settlement throughout the last 20 years have mostly been driven from the political constitution. It may follow, that any alteration of the 1998 Act would be steered by political influence. It can be said that the introduction of the 1998 Act was the legal constitution aligning with the political constitution after a long campaign for legal autonomy. Likewise, the Calman Commission, which steered the expansion of the settlement, highlighted that the Scottish Parliament had become political entrenched. Thus, the Scotland Act 2016 has to some extent given legal effect to that political understanding. While the theory of manner and form can, from one perspective, be considered an extra procedural mechanism in Parliament's right to make any law whatever, this requirement may be influenced more by the political constitution than the legal constitution. It is reasonable to contend that Parliament has expressly strengthened the political understanding that it cannot unilaterally abolish Scottish Parliament. Although there is no current appetite to abolish the Scottish settlement, this Act has possibly succeeded in binding future Parliaments for the foreseeable future. This can be viewed as a direct challenge to the second aspect of the Diceyan doctrine as set out in Chapter 1. In this context, the constitutional provisions introduced by the Scotland Act 2016 should be considered within the common law constitution.

5.5 The Scotland Act 2016 and the Common Law Constitution

Chapter 4's analysis of the common law constitution demonstrates some developments in the court's interpretation of the status of the Scottish Parliament. From this perspective, it is important to return to the common law constitution following the enactment of the Scotland Act 2016. The UK's pending exit from the EU takes the UK constitution into unprecedented territory, and subsequently there have been some significant Supreme Court judgements in which the court has reviewed provisions within the Scotland Act 2016.

5.6 R (Miller) v Secretary of State for Exiting the European Union

The *Miller*[293]case concerned a challenge to the UK Governments position that article 50 – which sets out the procedure for a member state to leave the EU - could be triggered using prerogative power. The Supreme Court held that the UK Government would have to seek authorisation from the UK Parliament to trigger article 50. In addition to reviewing the prerogative power, the Supreme Court was also confronted with the question of whether devolved consent had to be obtained when legislating to initiate the UK's exit from the EU. The court considered whether the insertion of section 28(8) raised the status of the Sewel Convention from a political convention to a legal rule. The majority in *Miller* held:

"*the UK Parliament [was] not seeking to convert the Sewel Convention into a rule which can be interpreted, let alone enforced, by the courts; rather, it [was] recognising the convention for what it is, namely a political convention*"[294].

It follows that, if the Sewel Convention is not a legal rule then it does not impose a legal requirement on the UK Parliament, and thus, the judiciary are not obligated to enforce the convention. While the scope of the convention was not directly related to the legal matter in question, the court asserted:

"are neither the parents nor the guardians of political conventions; they are merely observers"[295].

The court maintained that they can recognise the "*operation*" of a convention "*in the context of deciding a legal question*" but they could not rule on its *"operation or scope"*[296]. The courts analysis is consistent with the doctrine of parliamentary sovereignty in that Parliament cannot limit its own authority. However, Elliot has highlighted that the Courts assertion that it cannot rule on the operation or scope of a

[293] *Miller* (n 289).
[294] *ibid* [148].
[295] *Miller* (n 289) [146].
[296] *ibid*.

convention, sits "uncomfortably"[297] case law[298] and may have the "effect of marginalising the role"[299] of conventions. In any case, it can be said that from the wording contained section 28(8) and the parliamentary debates on the provision, that the court's ruling corresponds with Parliament's intention.

Notwithstanding the insertion of section 28(8) the courts analysis is clear that the Sewel Convention remained a convention. In accordance with the aspects of the traditional doctrine, as set out in Chapter 1, section 2 of the Scotland Act 2016 does not impinge on Parliaments right to make and unmake any law. In this context, it holds the same status as any other Act of Parliament and, therefore, it is likely Parliaments right to repeal, amend or overlook the provision would go legally unchallenged. Indeed, this has now played out in practice as the UK Parliament has enacted legislation to withdraw from the EU without the consent of the Scottish Parliament. Thus, it is clear within the legal and common law constitution that future Parliaments are not bound by this provision. Arguably, the courts analysis of section 2 in *Miller* may highlight the significance of the commitment made in section 1 of the Scotland Act 2016, though the court did not review this provision. The Supreme Court asserted that it:

"would have expected [the] UK Parliament to have used other words if it were seeking to convert a convention into a legal rule justiciable by the courts"[300].

As discussed above the Parliament's use of the words "recognised" and "normally" offer a clear indication that the Sewel Convention is not a legal rule, and the courts have given effect to this. However, it is notable that these phrases are not included within section 1 of the Scotland Act 2016. The words "recognised as" were in the initial draft of the provision and removed following recommendation to strengthen the clause. Furthermore, section 1 was enhanced with the addition of a referendum

[297] 'The Supreme Court's judgment in Miller: at 276.
[298] *Evans v Information Commissioner [2012] UKUT 313 (AAC) and Attorney-General v Jonathan Cape Ltd. [1976] Q.B. 752 at 770.*
[299] Mark Elliot, 'The Supreme Court's judgment in Miller: in search of constitutional principle' (2017) 76 Cambridge Law Journal 257, 278.
[300] *Miller* (n 289) [148].

provision. Thus, it is plausible to argue that Parliament's intention to entrench the Scottish Parliament within the UK constitution is clear. If the court was confronted with a review of section 1 of the 2016 Act, however unlikely, it may not be as straightforward to apply a similar interpretation. Albeit every provision is subject to parliamentary sovereignty. The contrast between in the wording of both provisions, and the courts handling of section 2 may demonstrate the extent of the commitment made in section 1. In his analysis of referendums, Tierney has stated that

"the popular political momentum carried by a referendum can bring with it vital constitutional imperatives which a supreme court, to remain relevant, can neither ignore nor approach through the mode of a narrow traditional positivism that does not speak to political reality"[301]

From a Scottish perspective the judgment in *Miller* (enhanced by the enactment of the EU (Withdrawal) Act 2018) may represent a strong reaffirmation of parliamentary sovereignty. Arguably, as the court asserts that Parliament's intention was not to give the convention a legal status, then the purpose of statutory acknowledgement is far from clear. If the Sewel remains a convention then its force operates within the political constitution. Again, placing Sewel on a statutory footing is a reiteration of a political commitment. As a political commitment the continuation or disintegration[302] of the convention will be dependent on the political climate rather than any legal rule.

Nonetheless, the influence of the political climate within the territorial constitution, as discussed throughout this research, cannot be underestimated. Perhaps in 2016 when the UK Parliament made the political commitment to entrench the Sewel Convention it was not expected that the legality of the provision would be judicially tested so soon after its enactment. Likewise, perhaps it was not expected that the UK Parliament would proceed to enact legislation without the consent of the Scottish Parliament so soon after attempting to place the convention on a statutory footing.

[301] Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford University Press 2012) 149 – 150.
[302] Elliot (n 299) 279.

The courts analysis in Miller, as Elliot describes, "lays bare the smoke-and-mirrors exercise to which s. 28(8) of the Scotland Act 1998 reduces"[303]. Following Miller it would appear there is no final arbitrator for the operation of the Sewel Convention, other than the UK Parliament. The sequence of events may have been a contemporary assertion of parliamentary sovereignty, but may highlight the constitutional differences within the Union, adding to the limitations of the traditional doctrine.

5.7 UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill, Re[304]

The Scottish Continuity Bill has presented a significant development in the UK Parliament's efforts to exit the EU and has attracted much debate. When the Bill had passed through the Scottish Parliament the Presiding Officer disagreed with the Scottish Government that the Bill was within competence. This marked a significant constitutional first for the devolved settlement. As discussed in Chapter 3 there is procedural mechanisms contained within the Scotland Act 1998 to ensure that the Scottish Parliament does not legislate beyond competence. Thus, following a reference under section 33 of 1998 by the Attorney General and the Advocate General for Scotland, the Bill was subsequently submitted to Supreme Court for consideration.

5.8 Background to the Continuity Bill

The initial draft of the continuity bill (section 12) provided that retained EU law could not be amended by the devolved legislature, unless the amendment would have been within the competence of the devolved legislature before exit day. Both the Scottish and Welsh administrations criticised this provision and argued that if returning powers did not fall correspondingly to each administration then their legislative power would be excessively restricted, which went against the spirit of devolution. As a result, both Governments advised their respective legislatures to withhold consent to the UK Bill. On the expectation that consent would be refused

[303] Elliot (n 299) 280.
[304] [2018] UKSC 64; [2019] 2 W.L.R. 1; [2018] 12 WLUK 159 (SC (SC)).

the Scottish Parliament introduced the UK Withdrawal from the European Union (Legal Continuity) Bill as an alternative to the UK Parliament's European Union (Withdrawal) Bill. The aim of the Bill is to ensure that Scottish legislation continues to align with EU law and to empower Scottish Ministers to amend devolved statute, after the UK's exit from the EU.

5.9 The Supreme Court Judgement

The Supreme Court held that the Bill could not be put forward for Royal Assent in its current form and required amendment. Significantly, the court's judgement made reference to the character of the Scottish Parliament:

"*The powers of the Scottish Parliament, like those of Parliaments in many other constitutional democracies, are delimited by law. The Scottish Parliament is a democratically elected legislature with a mandate to make laws for people in Scotland. It has plenary powers within the limits of its legislative competence*."[305]

The Supreme Court's reference to "plenary powers" is an indication of the authority that Scottish Parliament enjoys and perhaps reaffirms the significance of the settlement within the constitution. Likewise, the reference to the democratic mandate invested within the Scottish Parliament, echoes the approach adopted in *AXA*. The court's analysis may also align with the commitment made in section 1 of the Scotland Act 2016. In that respect, the court rejected the challenge by UK law officers who argued that the entire Continuity Bill was "contrary to the constitutional framework underpinning the devolution settlement"[306].

Indeed, the judgment confirmed that section 33 provides an exhaustive basis for assessing the legislative competence of the Scottish Parliament. The Supreme Court reiterates that the UK Parliament has the power to legislate for Scotland, found it 28(7) of the 1998 Act, and asserts that reference under section 33 should only be reviewed by the limits set out in section 29 of the Act. As discussed in Chapter 3, the

[305] *Continuity Case* (n 304) [12].
[306] ibid [23].

court in *AXA* determined that the scope for reviewing Acts of the Scottish Parliament was narrow. According to the judgement, the limited grounds for review relate to a potential breach of fundamental rights, or the rule of law. This analysis differs from the constitutional limits recognised in *AXA*. However, the Court highlights that *AXA* was not a reference under section 33, but a judicial review on appeal from the Court of Session. The Court adds that if it is determined under section 29 that the Scottish Parliament lacks legislative competence, then the enactment in question "is a nullity" [307]. However, the court asserts that Act of the Scottish Parliament which is found to be out with competence on "more general public law grounds is not necessarily a nullity" [308].

In some respects, the judgment has confirmed the constitutional significance of the Scottish Parliament, however, the Court is clear that the power of the Scottish Parliament is ultimately limited by the sovereignty of the UK Parliament:

"… it does not enjoy the sovereignty of the Crown in Parliament; rules delimiting its legislative competence are found in section 29 of and Schedules 4 and 5 to the Scotland Act, to which the courts must give effect" [309]

Thus, the judgement in this case also serves as a confirmation that parliamentary sovereignty continues to be a fundamental doctrine of the constitution. In respect of the Scotland Act 2016, the court reiterated the analysis of the section 28(8) that was established in the *Miller* case. As previously discussed, the newly inserted section 63A raises the question of whether parliament is subject to manner and form entrenchment. However, the judgement only made quick reference to section 63A and did not consider the effect (if any) of the provision.

Nonetheless, Mike Gordon has suggested that the courts analysis of section 17 of the Continuity Bill may also be reconciled with the theory of manner and form. Overall the Supreme Court ruled that the Bill would not be outside the legislative

[307] *Continuity Case* (n 304) [26].
[308] *ibid*.
[309] *ibid* [12].

competence of the Scottish Parliament, except section 17. Section 17 sought to make the consent of Scottish Ministers a condition for the legal effect of any retained EU law to be devolved. The Supreme court held that Section 17 would be outside legislative competence as it would attempt to modify section 28(7) which provides that the 1998 Act "does not affect the power of the Parliament of the United Kingdom to make laws for Scotland".

Significantly, the judiciary asserts that this section "reflects the essence of devolution"[310]. In determining that section 17 is invalid on the grounds that it modifies section 28(7) of the 1998 Act, the Court rejected the challenge that the provision related to a reserved matter: "the Parliament of the United Kingdom"[311]. This was concluded on the basis that the section did not attempt to amend the traditional doctrine, nor would it have that effect. The judgement highlighted that if section 17 were enacted it would impose a condition on the legislative power of the UK Parliament. However, in accordance with parliamentary sovereignty the UK Parliament could amend, disapply or repeal the section.

It can be said that the courts analysis of section 17 is somewhat contradictory. On one hand, section 17 is considered to be out with the competence of the Scottish Parliament because it would impose conditions of the UK Parliament which would be inconsistent with section 28(7). On the other, if section 17 was enacted it would not impinge on the sovereignty of Parliament. To some extent, it can be inferred that the UK Parliament's legislative authority may be subject to certain conditions, such as section 17, without intruding on its sovereignty. Mark Elliot has also suggested the judgement "implies a preparedness to disaggregate"[312] from considering whether parliament is sovereign, to the consideration of whether the exercise of Parliament's legislative authority is subject to certain conditions. In this case the judiciary continue to endorse the traditional of parliamentary sovereignty, yet the ruling, may also suggests that there has been some development in the rule of recognition as the

[310] *Continuity Case* (n 304) [41].
[311] Scotland Act 1998, Sch.5, para,1(c).
[312] Mark Elliot, 'The Supreme Court's judgment in the Scottish Continuity Bill case' (Public Law for Everyone, December, 2018) https://publiclawforeveryone.com/2018/12/14/the-supreme-courts-judgment-in-the-scottish-continuity-bill-case/ accessed April 2019.

court attempts to accommodate the current constitutional settlement. The 2016 Act may elevate the political status of the Scottish Parliament, which may continue to influence judicial interpretation of the 1998 Act. The Continuity Bill case contributes to the judiciary's increasing recognition of the status of the Scottish Parliament. It has been argued throughout that judicial interpretation of the Scotland Act 1998 has evolved with the constitution and that the provisions contained within the Scotland Act 2016, section 1 in particular, may add to this.

As set out in Chapter One the doctrine of parliamentary sovereignty has come under increasing pressure within the common law constitution. The UK courts have disapplied an act of the UK Parliament to give effect to EU law[313]; the judiciary have established a category of constitutional statutes[314]; and they have suggested that legislation cannot override fundamental common law values[315]. This can be viewed as the courts response to constitutional changes, in which Scottish devolution has played a significant role. Arguably, section 28(7) of the 1998 Act sets out the intention of the UK Parliament in terms of the Scottish settlement. However, devolution in Scotland has evolved both legally and politically and the case law set out above and in Chapter 4, demonstrates the impact this has had on judicial review. The judiciary's attempts to accommodate the legitimacy of the Scottish settlement may demonstrate a deviation from a strict interpretation of the traditional diceyan doctrine.

5.10 Conclusion: Parliamentary Sovereignty and Scottish Devolution

The referendum on Scottish independence perhaps demonstrates the different interpretations of the constitution that have developed post devolution. The introduction of the Scotland Act 2016 marks an appropriate point to return to the debate surrounding parliamentary sovereignty and Scottish devolution. As set out at the beginning of this research parliamentary sovereignty, as described by Dicey, remains the fundamental doctrine of the constitution. Nonetheless, the doctrine has

[313] *R v Secretary of State for Transport, ex p Factortame Ltd* [1992] 1 QB 680.
[314] *Thoburn v Sunderland City Council* [2002] EWHC 195, [2003] QB 151.
[315] *Jackson* (n 279); *AXA General Insurance v Lord Advocate 46* [2010] CSOH 2 (OH); [2011] UKSC.

come under increasing pressure by the evolving constitution, in which Scottish devolution has played a fundamental role. The constitutional differences emanating in Scotland since the Union have found their voice within the political constitution. This led to the pursuit of self-government and both the legal and common law constitution have responded.

Against this backdrop, this Chapter has demonstrated that Scottish devolution has evolved in such a way to challenge each principle, as set out in Chapter One, of the Diceyan doctrine. A declaration of permanency, with a referendum requirement attached, places political limitations on the UK Parliament's ultimate legislative authority. Contrary to the second aspect of the traditional doctrine, this may practically bind all future Parliaments. Reminiscent of the Scotland Act 1998[316], the proposals that underpinned the 2016 Act were also derived from a body external to Parliament, the Smith Commission, which limited the UK Parliament's input into the development of the settlement. Thirdly, the expressed assertion that the Scottish Parliament is a permanent fixture within the UK constitution may enhance the claim that the Scotland Act 1998 is more than an ordinary act of the UK Parliament, and instead is a statute of constitutional significance[317]. Some members of the judiciary have already identified the political legitimacy within the Scottish Parliament[318], and attributed the Scotland Act 1998 constitutional status[319]. Fourthly, the manner and form requirement established in section 2 of the 2016 Act could potentially adapt the rule of recognition in relation to Scottish matters. Albeit, legally the final decision would rest with the UK Parliament and all of these developments can be reversed by the sovereign Parliament.

In addition, it can be argued that the relevance of the traditional doctrine in Scotland is reducing. Devolving temporary power to the Scottish Parliament to hold a referendum that, in some way, related to a reserved matter has possibly set the precedent that Scotland's future within the Union does not rest with the sovereign

[316] The Proposals of the Scotland Act 1998 were underpinned by the Scottish Constitutional Convention.
[317] AXA (n 315).
[318] As previously discussed AXA (n 315); *Jackson* (n 279).
[319] *Thoburn* (n 314).

Parliament. The UK Parliament has entrenched a profound political condition on something that it is legally entitled to do. It has expressly committed to the "precedent" that the future of the Scottish Parliament can only be decided by the Scottish people. Indeed, this can only be a political declaration in law, but, as Lord Keen explained, it is a declaration grounded on legitimacy. As debated in previous Chapters, if the UK Parliament ignores the wider political reality in Scotland, by disregarding that declaration, then it could risk its legitimacy as a Governing body for Scotland. Notably, the Scots right to self-determination has, unlike before, received some indirect recognition in UK legislation. On this basis, the relevance of the traditional doctrine within Scotland may continue to diminish, particularly in the wake of Brexit.

These considerations are far from saying that the doctrine of parliamentary sovereignty is no longer applicable from a Scottish perspective. Both the UK Parliament and the judiciary continue to assert the traditional doctrine in relation to Scottish matters. Yet it may be argued that traditional doctrine has evolved beyond the Diceyan interpretation. From a Scottish perspective, it is a plausible argument that the doctrine of parliamentary sovereignty bears an increasingly "attenuated meaning".

6. Conclusion

Dicey's classic articulation of parliamentary sovereignty provides a straightforward theoretical understanding of the traditional doctrine. In recent times, there are many voters and politicians who support the UK's exit from the EU in defence of the traditional doctrine[320]. The Institute for Government's recent report on *Devolution at 20* continues to assert the understanding that devolution did not change the principle of parliamentary sovereignty[321]. Recent Supreme Court[322] judgements have significantly endorsed the Diceyan doctrine as a fundamental principle of the constitution. Nevertheless, the UK constitution is more than legal theory and must be reviewed in that context.

Thus, there are three contentions at the heart of this thesis. Firstly, Dicey's definition can be broken-down into four principles, which serve to ensure Parliament is the ultimate source of authority in the UK. Secondly, it has been argued that despite the wider political, legal and common law challenges, which have mostly derived from the plurinational nature of the UK constitutional and international obligations, the classic definition continues to dominate UK constitutionalism. Nonetheless, the final aim of this research was to assess the Diceyan doctrine in a practical context to demonstrate the gap between constitutional theory and reality. This has been examined from a Scottish perspective. The UK Parliament's interaction with Scotland when attempting to accommodate constitutional differences - from the Act of Union 1707 to the introduction of devolution - demonstrates that the operation of parliamentary sovereignty may be reduced in practice. Significantly, it can be argued that the introduction and development of Scottish devolution gives a political and legal platform to a distinct political identity in Scotland. Arguably, this platform is

[320] Dominic Grieve 'Brexit and the sovereignty of parliament' (The Constitutional Unit, 2018) https://constitution-unit.com/2018/02/08/brexit-and-the-sovereignty-of-parliament-a-backbenchers-view/ accessed April 2019.
[321] Institute for Government, *Devolution at 20* (Institute for Government, May 2019) 59 https://www.instituteforgovernment.org.uk/publications/devolution-at-20 accessed August 2019
[322] *R. (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] A.C. 61; [2017] 1 WLUK 387 (SC); *UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill, Re* [2018] UKSC 64; [2019] 2 W.L.R. 1; [2018] 12 WLUK 159 (SC (SC)).

developing as a direct challenge to all four aspects of the Diceyan doctrine. Firstly, Parliament's right to make and unmake any law is placed under pressure by the political legitimacy invested within the Scottish Parliament. While strict legal theory determines that the Scotland Act 2016 does not change the legal status of the Scottish Parliament, any attempt to legislate contrary to section 1 seems in practice unlikely. In this context, future Parliaments are potentially bound by the legitimacy of the settlement. Likewise, the political legitimacy of the Scottish Parliament has created the space for some members of the judiciary to interpret the Scotland Act 1998 as a constitutional statute, and envisage possible limits on the absolute nature of parliamentary sovereignty. These arguments were established in four chapters as follows.

As reviewed in Chapter 1, the four principles which make up Dicey's classic definition highlight the unlimited nature of the UK Parliament's power. The orthodox doctrine has been placed under pressure by the UK's membership of the EU and the introduction of the Human Rights Act 1998. Likewise, the plurinational nature of the state has presented some constitutional differences within the UK, particularly in Scotland, and this ultimately created the circumstance which led to devolution. Despite these challenges, the traditional doctrine has remained the theoretical doctrine of the UK constitution.

The Act of Union 1707 is a statutory instrument which protects Scotland's differences, but may have also contributed to the development of different interpretations of the UK constitution. The UK Parliament has made some attempts to facilitate the Scottish differences since 1707. However, as Chapter two reveals, the UK Parliament failed in its plurinational role by disregarding the will of the Scots and enforcing the 'poll tax' legislation. As a result, an extra-parliamentary campaign formed as the Scottish Constitutional Convention in pursuit of home rule for Scotland. The SCC popularised an alternative tradition of popular sovereignty and directly challenged the Diceyan doctrine. Arguably, Westminster was politically forced to respond to an external body (SCC) questioning its authority. The SCC was a successful movement of popular sovereignty in Scotland, and subsequently a

Scottish Parliament was established. The campaign for devolution in Scotland demonstrates the relationship between the political and legal constitution in that the sovereign Parliament met the political will of the Scottish people. Scottish devolution made a significant alteration to the UK constitution, therefore it is necessary to assess the impact of devolution on the traditional doctrine.

Although the SCC movement rejected parliamentary sovereignty, and was successful in its aims, the traditional doctrine is still legally applicable within Scotland[323]. However, Chapter Three demonstrates that devolution in Scotland has continuously challenged aspects of Diceyan sovereignty. The establishment of the Sewel Convention placed a political limit on Westminster's power to legislate on devolved matters in practice. Since the establishment of devolution, further powers have been devolved away from the UK Parliament to the Scottish Parliament on an ad hoc basis. Furthermore, some members of the judiciary have deemed that the Scotland Act 1998 holds constitutional significance due to the legitimacy invested in Holyrood. In the words of Lord Denning "Freedom once given cannot be taken away. Legal theory must give way to practical politics"[324]. From a political perspective, it is unlikely that the UK Parliament would be able to stringently assert its sovereign power within Scotland without political consequences.

In addition to these challenges, the Scottish political climate is continuously evolving and has, within Scotland, fostered different interpretations of the post-devolution settlement. Consequently, the question of Scottish independence was brought onto the political agenda. While the UK Parliament is strongly resistant to an independent Scotland, Westminster facilitated the proceedings for a referendum to place the decision in the hands of the Scottish people. Scotland voted to remain within the plurinational state but that did not result in maintaining the status quo. Therefore, Chapter four has demonstrated that constitutional changes post-referendum pose a challenge to all four aspects of the traditional doctrine. The Scotland Act 2016 reasserts the political understanding[325] that Westminster cannot abolish the Scottish

[323] Scotland Act 1998, s 28(7)
[324] *Blackburn v Attorney-General* [1971] 1 WLR 1037 [1040].
[325] The UK Parliament is not legally bound by the provision.

Parliament. The provision also includes a requirement to obtain the consent of the Scottish people via a referendum, if the Scottish Parliament is to be disbanded. This potentially hinders the law making authority of the UK Parliament in practice, and viewed from this perspective, may bind future Parliaments. Arguably, section 1 of the 2016 Act can enhance the view that the 1998 Act is constitutional in nature which is a striking departure from Diceyan sovereignty, and could incite a variation in the current rule of recognition.

Despite the introduction of section 2 of the 2016 Act, the UK Parliament has recently disregarded the Sewel Convention when legislating for Brexit, substantiated under the "not normally"[326] requirement of section 2. However, any political repercussions following this remain to be seen. Arguably, the constitutional provisions contained in the Scotland Act 2016, coupled with the political precedent set in 2014 (that the decision on independence ultimately rested with the Scottish people) endorses an 'attenuated' view of parliamentary sovereignty in Scotland. This contributes to the wider challenges to the doctrine, but from a Scottish perspective the constitutional gap between Scotland and the UK may begin to intensify beyond repair.

6.1 Scotland and the future of parliamentary sovereignty

"*even in the absence of this most radical of challenges to the very existence of the UK as currently constituted, it is clear that devolution will complicate the UK's withdrawal from the EU in ways that offer no obvious resolution capable of reconciling the competing interests at stake*"[327]

The UK's exit from the European Union can in one instance reaffirm the sovereignty of Westminster, however, on the other hand it has opened the door to complex constitutional questions. As discussed, Scotland returned a vote to remain in the EU by 62%, thus the circumstances in which the UK will leave the EU, will have significant political as well as legal implications for the territorial constitution.

[326] Scotland Act 1998, s 28(8) (as inserted by the Scotland Act 2016, s 2).
[327] Michael Gordon 'Brexit: a challenge for the UK constitution, of the UK constitution?' (2016) 12 European Constitutional Law Review, 409.

Scotland's vote to remain in the EU has encouraged the campaign for an independent Scotland. The Scottish Government have asserted that the exit from the EU goes against the wishes of the Scottish voters which is a "material"[328] change in circumstances, justifying a second referendum on independence. Again, the UK Government do not endorse an independent Scotland[329], but the legalities around facilitating a referendum on Scottish independence were only temporarily served by the Edinburgh Agreement 2012. Should the Scottish Government pursue another referendum on Scottish independence these constitutional issues are likely to resurface.

Since its inception, the devolution settlement has continued to evolve as Westminster responds to the political demands within the plurinational state. From this perspective, perhaps Gavin Little was apt in writing that challenges to the Diceyan approach in Scotland were "likely to intensify over time"[330]. It may be concluded that section 28(7) of the Scotland Act 1998, which asserts that Westminster remains sovereign in all Scottish matters, is not necessarily an all-encompassing account of the constitution. Following this trend, the relevance of the traditional doctrine in Scotland may continue to diminish in the long term, as the UK constitution evolves.

[328] 'Election 2015: Sturgeon says only "material change" could spark Scots referendum' (BBC News 2015) www.bbc.co.uk/news/election-2015-scotland-32222806 accessed November 2016.
[329] Andrew Tickell 'Our Jekyll and Hyde constitution: the constitutional law and politics of Scotland's independence "neverendum"' in Aileen McHarg, Tom Mullen, Alan Page, and Neil Walker (eds) *The Scottish Independence Referendum: Political and Constitutional Implications* (Oxford University Press 2016).
[330] Gavin Little 'Scotland and Parliamentary Sovereignty' (2004) 24 Legal Studies 540.

Bibliography

Secondary Sources

Books

Allan T.R.S , *Law, Liberty and Justice: legal foundations of British constitutionalism* (Oxford University Press, 1993)

Barnett H, *Constitutional and Administrative Law* (9th edn, Routledge 2011).

Blackstone W, *Commentaries on the Laws of England I* (first published 1765, Routledge 2001).

Buchanan G, *De Iure Regni Apud Scotos*, (Saltire Society 2006).Dicey A.V *An Introduction to the Study of the Law of the Constitution* (1885).

Cairney P, *The Scottish political system since devolution: from new politics to the new Scottish government* (Exeter 2011) 280.

Foley M, *The Silence of Constitutions* (London: Routledge 1989

Goldsworthy J, *Historical Conclusions* in Jeffrey Goldsworthy *The Sovereignty of Parliament: History and Philosophy* (Oxford University Press, 2010)

Goldsworthy J, *The Sovereignty of Parliament: History and Philosophy* (Clarendon Press 1999) 240.

Gordon M, *Parliamentary Sovereignty in the UK Constitution: process, politics and democracy* (Hart Publishing, 2015).

Hart HLA, *The Concept of Law* (Oxford 1961)

Heuston, *Essays in Constitutional Law (London 1964)*

H.W.R .Wade, *Constitutional Fundamentals* (Stevens, 1980).

Jennings I, *Constitutional Laws of the Commonwealth* (Oxford University Press, 1957)

Jowell J, 'The Rule of Law' in Jowell J, Oliver D, and O'Cinneide C, *The Changing Constitution* (8th edn, Oxford University Press 2015) 27

Jowell J, 'Parliamentary Sovereignty: the new constitution hypothesis' (expert commentary) in Elliot and Thomas (n 41) in Elliot M & Thomas H, *Public Law* (3rd edn, OUP 2017) 229

Keating M, *Plurinational Democracy: Stateless Nations in a Post Sovereignty Era* (Oxford University Press 2001) 127.

Kidd C, *Subverting Scotland's Past: Scottish Whig Historians and the Creation of an Anglo-Scottish Identity: 1689-1830* (Cambridge University Press 2003) 19-20.

Loughlin M, *The Idea of Public Law* (OUP 2003).

Lutz D, *The principles of constitutional design* (Cambridge University Press 2006)

MacCormick N, *Questioning Sovereignty law, state, and nation in the European Commonwealth* (Oxford: Oxford University Press 1999).

McGinnis P and Williamson A (eds), *The British Union: A Critical Edition and Translation of David Hume of Godscroft's De Unione Insulae Britannicae* (Ashgate 2002)

McHarg A & Mullen T, *Public Law in Scotland* (Edinburgh: Avizandum 2006)

Mitchell J D B, *Constitutional Law* (Edinburgh: W Green & Son 1968)

Morton G, *Unionist Nationalism: Governing Urban Scotland 1830-1860* (Tuckwell Press, 1999).

Murdoch A, *Scottish Sovereignty in the Eighteenth Century* in H. T. Dickinson & Michael Lynch (eds), *The Challenge to Westminster: Sovereignty, Devolution and Independence (*Tuckwell, 2000) 43, 44.

Lord Hope of Craighead, 'Is the Rule of Law now the Sovereign Principle?' in Rawlings R, Leyland P and Young A (Eds.), *Sovereignty and the Law* (Oxford University Press 2013

Salmon T and Keating M (eds.) *The Dynamics of Decentralization: Canadian Federalism and British Devolution* (Queen's University Press 2001) 23.

Stair, 'Fundamental Law' in title on 'Constitutional Law', *Stair Memorial Encyclopedia* (Reissue 2002)

Stephen, *The Science of Ethics* (London 1882).

Tickell A, 'Our Jekyll and Hyde constitution: the constitutional law and politics of Scotland's independence "neverendum"' in Aileen McHarg, Tom Mullen, Alan Page, and Alan Page, and Neil Walker (eds), *The Scottish Independence Referendum: Constitutional and Political Implications* (Oxford University Press 2016).

Tierney S, *Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press 2007) 233.

Tierney S, *Constitutional Law and National Pluralism* (Oxford University Press 2005).

Tierney S, *Scotland and the Union State* in Aileen McHarg & Tom Mullen, *Public Law in Scotland* (Edinburgh: Avizandum 2006)

Tierney S, '"We the Peoples": Constituent Power and Constitutionalism in Plurinational States' in Martin Loughlin and Neil Walker (eds.), *The Paradox of*

Tomkins A & Turpin C, *British government and the constitution: text and material* (7th edn, Cambridge University Press 2011)

Wade W and Forsyth C, *Administrative Law* (8th edn, Oxford University Press 2008).

Walker N , The Territorial Constitution and the Future of Scotland in Aileen McHarg, Tom Mullen, Alan Page, and Neil Walker (eds), *The Scottish Independence Referendum: Constitutional and Political Implications* (Oxford University Press 2016).

Journal Articles

Ahmed F and Perry A, 'The quasi-entrenchment of constitutional statutes' (2014) 73 Cambridge Law Journal 514

Allan T.R.S , 'Parliamentary Sovereignty: Law, Politics and Revolution' (1997) 113 Law Quarterly Review 443, 447

Bogdanor V, 'Devolution: Decentralisation or Disintegration' (1999) 70 The Political Quarterly 185

Craig P 'Public law, political theory and legal theory' [2000] Public Law 205

Ekins R 'Legislative freedom in the United Kingdom' (2017) 133 Law Quarterly Review 582

Elliot M, 'The Supreme Court's judgment in Miller: in search of constitutional principle' (2017) 76 Cambridge Law Journal 257, 274

Elliot M & Tierney S, 'Political pragmatism and constitutional principle: the European Union (Withdrawal) Act 2018' [2019] Public Law 37

Ewing K.D. , The Resilience of the Political Constitution (2013) 14 German Law Journal 2111

Goldini M and McCorkindale C, 'Why We (Still) Need a Revolution' (2013) 14 German Law Journal 2220

Gordon M, ‘Brexit: a challenge for the UK constitution, of the UK constitution?’ (2016) 12 European Constitutional Law Review, 409

Gordon M ‘The UK's Sovereignty Situation: Brexit, Bewilderment and Beyond …’ (2016) 24 Kings Law Journal 333

Griffith J.A.G, ‘The Brave New World of Sir John Laws’ (2000) 63 Modern Law Review 159

Little G ‘Scotland and Parliamentary Sovereignty’ (2004) 24 Legal Studies 540

Lord Hope, ‘The Human Rights Act 1998: The Task of the Judges’ (1999) 20 Statute Law Review 185, 188

Lord Neuberger, ‘Who Are The Masters Now’, (Second Lord Alexander of Weedon Lecture, 2011) [72]-[73]

Lord Woolf, ‘Droit Public: English Style’ [1995] Public Law 57

Lord Woolf, ‘the Rule of Law and a Change in the Constitution’ (2004) 63 Cambridge Law Journal 317, 329

Loughlin M, *Sword and Scales: An Examination of the Relationship Between Law and Politics* (Bloomsbury Publishing 2000)

MacCormick N, ‘Is there a constitutional path to Scottish independence?’ (2000) 53 Parliamentary Affairs 721, 730

McDonald J, ‘Scottish Independence: a constitutional and international legal perspective’ [2012] Juridical Review, 25-49.

McLean I and McMillan A, ‘Professor Dicey's contradictions’ [2007] Public Law 435.

Mullen T, ‘The Scottish Independence Referendum’ (2014) 41 Journal of Law and Society 627.

Sharp D, ‘Parliamentary Sovereignty: a Scottish Perspective’ [2010] Cambridge Student Law Review 135.

Tierney S, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford University Press 2012) 149 – 150

Wade H.W.R, ‘The Basis of Legal Sovereignty’ [1955] Cambridge Law Journal 172

Wade W, ‘Sovereignty: revolution or evolution?’ (1996) 112 Law Quarterly Review 568

Walker N, ‘Beyond the Unitary Conception of the United Kingdom Constitution?’ [2000] Public Law 384, 397

Wicks E, ‘A new constitution for a new state? The 1707 Union of England and Scotland’ (2001) 117 Law Quartery Review 109 – 126.

Zhou, H-R ‘”Revisiting the ‘Manner and Form’ Theory of Parliamentary Sovereignty”’ (2013) 129 London Quarterly Review 610.

Debates

HL Deb 21st July 1998, Vol 592

HC Deb 9th November 2015, Vol 602

UK Parliament: Reports

Commission on Scottish Devolution, Serving Scotland Better: Scotland and the United Kingdom in the 21st Century (2009).

House of Commons Political and Constitutional Reform Committee, *Constitutional implications of the Government's draft Scotland clauses* Ninth Report of Session (Cm 1022, 2014–15)

Political and Constitutional Reform Committee, *Do We Need a Constitutional Convention for the UK?* (House of Commons 2012-13, 371)

Scottish Office, *Scotland’s Parliament* (Cm 3658, 1997)

The Scottish Office, *Report of the Consultative Steering Group on the Scottish Parliament: 'Shaping Scotland's Parliament'* (1998)

Scottish Parliament: Reports

Scottish Government, *Your Scotland, Your Referendum* (2012) available at https://www.webarchive.org.uk/wayback/archive/20170703123959/http://www.gov.scot/Publications/2012/01/1006 accessed December 2018

The Smith Commission, *Report of the Smith Commission for Further Devolution of Powers to the Scottish Parliament* (Edinburgh: Smith Commission 2014)

Blogs & Websites

Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland Available at https://webarchive.nationalarchives.gov.uk/20130102230945/http://www.number10.gov.uk/wp-content/uploads/2012/10/Agreement-final-for-signing.pdf accessed March 2018.

Bogdanor V, 'Devolution and the Territorial Constitution', (Gresham Lecture 2005) available at <http://www.gresham.ac.uk/lectures-and-events/devolution-and-the-territorial-constitution> accessed July 2019

Campbell K, 'Constitutional Dogs That Barked and Dogs That Did Not: The Scottish Continuity Bill in the Supreme Court' (UK Constitutional Law Blog, January 2019) https://ukconstitutionallaw.org/2019/01/14/kenneth-campbell-constitutional-dogs-that-barked-and-dogs-that-did-not-the-scottish-continuity-bill-in-the-supreme-court/ accessed January 2019

Declaration of Arbroath has been translated into English on this website. http://www.constitution.org/scot/arbroath.htm accessed March 2018

Douglas-Scott S, Brexit 'The Referendum and the UK Parliament: Some Questions about Sovereignty' (UK Constitutional Law Blog, June 2016) https://ukconstitutionallaw.org/2016/06/28/sionaidh-douglas-scott-brexit-the-referendum-and-the-uk-parliament-some-questions-about-sovereignty/ accessed June 2017

'Election 2015: Sturgeon says only "material change" could spark Scots referendum' (BBC News 2015) www.bbc.co.uk/news/election-2015-scotland-32222806 accessed November 2016.

Elliot M '1,000 words / Devolution' (Public Law for Everyone, September 2016) https://publiclawforeveryone.com/2016/09/26/1000-words-devolution/ accessed May 2018

Elliot M, "A "Permanent" Scottish Parliament and the Sovereignty of the UK Parliament: Four Perspectives" (UK Constitutional Law Blog, November 2014) https://ukconstitutionallaw.org/2014/11/28/mark-elliott-a-permanent-scottish-parliament-and-the-sovereignty-of-the-uk-parliament-four-perspectives/ accessed March 2019

Elliot M, 'The Supreme Court's judgment in the Scottish Continuity Bill case' (Public Law for Everyone, December, 2018) https://publiclawforeveryone.com/2018/12/14/the-supreme-courts-judgment-in-the-scottish-continuity-bill-case/ accessed April 2019.

Gordon M: The European Union Act 2011(UK Constitutional Law Blog, January 2012) https://ukconstitutionallaw.org/2012/01/12/mike-gordon-the-european-union-act-2011/ accessed January 2019.

Institute for Government, *Devolution at 20* (Institute for Government, May 2019) 6, https://www.instituteforgovernment.org.uk/publications/devolution-at-20 accessed August 2019.

McHarg A, Manifesto Watch: The Constitutional Implications of the Rise of the SNP (UK Constitutional Law Blog, April 2015) https://ukconstitutionallaw.org/2015/04/29/manifesto-watch-aileen-mcharg-the-constitutional-implications-of-the-rise-of-the-snp/ accessed November 2016

My Scotland poll: Yes to independence takes the lead (Lord Ashcroft Polls, August 2019) https://lordashcroftpolls.com/2019/08/my-scotland-poll-yes-to-independence-takes-the-lead/ accessed August 2019.

Reverend Wright, K Yes/Yes - (1997) available at: http://www.bbc.co.uk/news/special/politics97/devolution/scotland/people/wright.shtml accessed January 2018

Scotland Decides (BBC News) https://www.bbc.co.uk/news/events/scotland-decides/results accessed October 2016.

Scottish independence: Cameron, Miliband and Clegg sign 'No' vote pledge (BBC News, September 2014) at http://www.bbc.co.uk/news/uk-scotland-scotland-politics-29213418 accessed October 2016.

//www.snp.org/independence accessed February 2018

Tierney S, ""And the Winner is… the Referendum": Scottish Independence and the Deliberative Participation of Citizens' (Centre on Constitutional Change, September 2014) https://www.centreonconstitutionalchange.ac.uk/opinions/and-winner-referendum-scottish-independence-and-deliberative-participation-citizens accessed July 2018.

'The Poll Tax is introduced in Scotland – 1989' http://www.bbc.co.uk/scotland/history/modern_scotland/the_poll_tax/ accessed December 2017.

UK Politics Ron Davies' fightback begins (BBC, February 1999) http://news.bbc.co.uk/1/hi/uk_politics/272015.stm accessed May 2018.

Scottish Constitutional Convention, *Towards Scotland's Parliament* (The Scottish Constitutional Convention 1990) 10.
Scottish Government, *Your Scotland, Your Voice: A National Conversation*, (2009) available at http://www.gov.scot/Publications/2009/11/26155932/0

Other Publications

Scottish Constitutional Convention, *Towards Scotland's Parliament* (The Scottish Constitutional Convention 1990) 10

Scottish Constitutional Convention *Scotland's Parliament, Scotland's Right*. (Edinburgh: Convention of Scottish Local Authorities, 1995)

Faculty of Advocates, *Response to the Consultation Paper by the Secretary of State for Constitutional Affairs and Lord Chancellor: Constitutional Reform: a Supreme Court for the United Kingdom* (Nov, 2003).

Lord Phillip, *Today* (BBC Radio 4, 2 August 2010)

Speeches

Salmond A, 'Constitutional rights' speech given at the Foreign Press Association, London, 16 January 2013

7. List of Cases

Ahmed v HM Treasury [2010] UKSC 2, [2010] 2 WLR 378

Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147 (HL)

Attorney-General v Jonathan Cape Ltd. [1976] Q.B. 752 at 770.

AXA General Insurance v Lord Advocate 46 [2010] CSOH 2 (OH); [2011] UKSC.

Blackburn v Attorney-General [1971] 1 WLR 1037 [1040]

British Railways v Pickin [1974] AC 765 (HL).

Burmah Oil Company v Lord Advocate (1965) AC 75

Edinburgh & Dalkeith Railway Co v Wauchope (1842) 1 Bell's App. Cas. 252.

Evans v Information Commissioner [2012] UKUT 313 (AAC)

Gibson v Lord Advocate [1975] SC 136.

Harris v Minister for the Interior [1965] AC 172

H v Lord Advocate [2012] UKSC 24; [2013] 1 A.C. 413; [2012] 6 WLUK 422 (SC (SC)).

Imperial Tobacco v Lord Advocate [2012] UKSC 61, 2013 S.C. (U.K.S.C.) 153 (SC)

Imperial Tobacco v Lord Advocate [2012] CSIH 9, 2012 WL 280451 [58].

MacCormick v The Lord Advocate 1953 SC 396 [41]

Macgregor v Lord Advocate 1921 SC 847 at 848.

New South Wales v Trethowan [1932] AC 526.

R (Anufrijeva) v Secretary of State for the Home Department [2003] UKHL 36, [2004] 1 AC 604

R (Evans) v Attorney General [2015] UKSC 21, [2015] AC 1787.

R v Secretary of State for Transport, ex p Factortame Ltd [1992] 1 QB 680

R (HS2 Action Alliance Ltd) v Secretary of State for Transport [2014] UKSC 3; [2014] 1 W.L.R. 324.

R. (on the application of Jackson) v Attorney General [2005] UKHL 56; [2006] 1 AC 262, [274].

R. (on the application of Jackson) v Attorney General [2002] EWHC 195, [2003] QB 151

R. (on the application of Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5, [2018] A.C. 61.

R. v Secretary of State for the Home Department Ex p. Pierson [1998] A.C. 539; [1997] 7 WLUK 527 (HL) 573 – 591.

R *v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115, 127 (HL).

Roe v Wade 410 US 113 (1973).

Sillar v Smith 1982 S.L.T. 539

Thoburn v Sutherland City Council [2002] EWHC 195, [2003] QB 151

UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill, Re [2018] UKSC 64; [2019] 2 W.L.R. 1; [2018] 12 WLUK 159 (SC (SC)).

Vauxhall Estates Ltd v Liverpool [1932] 1 KB 733

Whaley v Watson 2000 S.C. 340

West v Secretary of State for Scotland 1992 S.C. 385; [1992] 4 WLUK 232 (IH (1 Div)) [385]

EU Cases

Case 6/64 *Costa v Enel* [1964] CMLR 425,455.

Case C-221/89 *R v Secretary of State for Transport, ex p Factortame Ltd* [1992] 1 QB 680.

8. List of Legislation

Abolition of Domestic Rates ect, (Scotland) Act 1987

Act of Union 1707

Acquisition of Land (Assessment and Compensation) Act 1919

Dentists Act 1878

European Communities Act 1972

Fixed-term Parliaments Act 2011

Foreign Compensation Act 1950

Freedom of Information Act 2000

Government of Wales Act 2006

Housing Act 1925

Human Rights Act 1998

Northern Ireland Act 1998

Scotland Act 1998

Scotland Act 2012

Scotland Act 2016