

# *Scotland's Contested Constitution*

*By Iain Halliday<sup>1</sup>*

The 'historically unusual character of the United Kingdom, and the curiously evolutionary character of its constitutional arrangements,'<sup>2</sup> creates a situation in which the constituent parts of the UK have very little definitive constitutional status. The constitution is flexible and, as a consequence, frequently contested. The constitutional status of Scotland, the Scotland Act and the Scottish Parliament are all susceptible to this contestation.

## *1) Scotland*

As a nation and a country, though not a fully independent State,<sup>3</sup> Scotland falls victim to lack of definitive constitutional status; it is unclear what Scotland actually is. Perhaps this is because there is no such thing as a 'pure' nation anywhere in Europe. 'What we recognize as nations are formed over time from a myriad of strains.'<sup>4</sup> The situation is particularly complex in relation to the UK: 'In the United Kingdom, state and nation have long been in tension, and neither has a shared meaning. The term 'nation' is applied both to the whole and to its constituent parts.'<sup>5</sup>

Despite this ambiguity, Neil MacCormick identifies three ways of thinking about what makes a 'nation' or a 'country.' The first concerns civic institutions and common authoritative rules with a territorial scope; the second concerns culture, language, heritage, music and a way of life associated with a geographical home; the third concerns common ethnicity and common ancestry.<sup>6</sup> Scotland fits neatly into the first two of these categories as it has its own public institutions<sup>7</sup> and legal system, and it has a distinct cultural heritage. The third is more difficult to reconcile with today's multi-cultural society. Ethnically, the Scots are not particularly distinct from the English, Welsh or Irish. In addition, it would be wrong to deny anyone their claim to Scottish identity merely on the grounds of ethnicity. Ian Brownlie recognizes the limited usefulness of ethnicity in relation to establishing a right to self-determination,

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<sup>2</sup> N MacCormick, *Questioning Sovereignty* (Oxford University Press, 1999), 49.

<sup>3</sup> To meet the criteria of the Montevideo Convention on Rights and Duties of States 1933, which reflects customary international law on what constitutes a State, Scotland would need capacity to enter into international relations.

<sup>4</sup> A Massie, *Playing the Scottish Card* in Taylor A (ed) *What a State! Is Devolution for Scotland the end of Britain?* (London: Harper Collins, 2000) 201-204.

<sup>5</sup> M Keating, *The Independence of Scotland* (Oxford University Press, 2009), 11.

<sup>6</sup> N MacCormick, 'Questioning Sovereignty' (n1), 169.

<sup>7</sup> Local Government remained distinct in Scotland even after the Union.

claiming 'if the purely ethnic criteria are applied exclusively many long-existing national identities would be negated on academic grounds.'<sup>8</sup>

However, MacCormick was not identifying the essential conditions for nationhood, merely identifying common themes in the concept of a nation. Thus, ethnic diversity aside, Scotland has a clear claim to nationhood. This conclusion does not assist in determining what Scotland is constitutionally; it is merely the first step in recognizing Scotland's distinctive nature. Whether a person considers themselves Scottish is an individual concern which has little effect on the status of the 'country' as a whole as 'nations are not entities at all, but elements ultimately of individual consciousness.'<sup>9</sup> A person could just as easily consider themselves Cornish, rather than English, due to the distinct cultural and linguistic heritage of Cornwall. This does not relieve Cornwall of its status as a region within England.

What makes Scotland different?

Unlike Cornwall, Scotland has a recognized right to self-determination. The right<sup>10</sup> to self-determination can be found in several international treaties including the International Covenant on Economic, Social and Cultural Rights 1966,<sup>11</sup> the International Covenant on Civil and Political Rights 1966<sup>12</sup> and the United Nations Charter 1945.<sup>13</sup> However, this right is generally only enjoyed by colonial territories, 'self-determination as a concept is capable of developing further so as to include the right to secession from existing states, but that has not yet convincingly happened.'<sup>14</sup> Therefore Scotland is unlikely to be able to unilaterally exercise the right to self-determination. However the scope of self-determination has been extended beyond this restricted view and can 'apply beyond the colonial context, within the territorial framework of independent states.'<sup>15</sup> Ian Brownlie concludes that self-determination consists of 'the right of a community which has a distinct character to have this character reflected in the institutions of government under which it lives.'<sup>16</sup> Scotland certainly fits into this wide definition.

However, that being said, '(t)he UN has always strenuously opposed any attempt at the partial or total disruption of the national unity and territorial integrity of a country.'<sup>17</sup> Therefore Scotland's position under international law is far from certain.

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<sup>8</sup> I Brownlie, 'The Rights of Peoples in International Law' in Crawford J (ed) *Rights of Peoples* (Oxford : Clarendon Press, 1988) 5, para 1-16..

<sup>9</sup> MacCormick *Questioning Sovereignty* (n1), 172.

<sup>10</sup> Although not originally recognised as a right, practice since 1945 within the UN can be seen as having ultimately established self-determination as a right under international law – M Shaw, *International Law* 5<sup>th</sup> edn (Cambridge University Press, 2003), 226.

<sup>11</sup> Art 1(1).

<sup>12</sup> Art 1(1).

<sup>13</sup> Art 1(2).

<sup>14</sup> Shaw *International Law* (n9), 231.

<sup>15</sup> *Ibid*, 271.

<sup>16</sup> Brownlie *The Rights of Peoples in International Law* (n7), 5.

<sup>17</sup> Shaw *International Law* (n9), 230.

Nonetheless, Scotland's right to self-determination has been recognized by several UK politicians, including Margaret Thatcher:<sup>18</sup>

'As a nation, [the Scots] have an undoubted right to national self-determination; thus far they have exercised that right by joining and remaining in the Union. Should they determine on independence, no English party or politician would stand in their way, however much we might regret their departure.'

Consequently, the ambiguities and disputes surrounding the right of self-determination 'have hardly arisen in the Scottish case. Even the most unionist of politicians accept the legitimacy of Scottish independence, on condition only that this is the will of the Scottish people.'<sup>19</sup> Therefore it is generally accepted that Scotland has a political right to self-determination. It could be said this right to self-determination is implicit in the concept of union.<sup>20</sup>

The right of the Scottish people to self-determination supports the view that Scotland is more than a mere region within the UK. However, several other factors contribute to Scotland's constitutional status. Two major influences are the interpretation of the 1707 Union Agreement<sup>21</sup> and categorization of the UK as either a 'unitary' or a 'union' state. As Turpin and Tomkins note:<sup>22</sup>

It used to be generally thought that the UK has a unitary constitution... however, it may be that the better view is that the UK has a union constitution that is neither straightforwardly unitary nor systematically federal in character. In a unitary state 'the same rules regarding legal authority apply throughout the state, and there is no division of sovereignty between the centre and the sub-state levels, as in a federal state'<sup>23</sup> Due to the doctrine of parliamentary sovereignty in relation to the Westminster Parliament, this could be seen as an accurate description of the UK. The opposite of a unitary state is a federal state, such as the United States of America. Lying somewhere in the middle of these polarized concepts is the 'union' state: 'one in which, because of the way the state emerged historically, heterogeneity of governance arrangements between constituent regions or nations has become a normal and persistent feature.'<sup>24</sup>

The argument that the UK constitution is heterogeneous, gained judicial support in *MacCormick v Lord Advocate*<sup>25</sup> in 1953. Lord President Cooper's *obiter dictum* that 'the principle of the unlimited sovereignty of Parliament is a distinctively English principle

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<sup>18</sup> M Thatcher, *The Downing Street Years* (London: Harper Collins, 1993), 624.

<sup>19</sup> Keating *The Independence of Scotland* (n4), 81.

<sup>20</sup> *Ibid.*

<sup>21</sup> This agreement involves three separate documents; The Articles of Union agreed between the Commissioners appointed to negotiate the union, the Union with England Act 1707 passed by the Scottish Parliament and the Union with Scotland Act 1706 passed by the English Parliament.

<sup>22</sup> C Turpin & A Tomkins, *British Government and the Constitution* 6<sup>th</sup> edn, (Cambridge University Press, 2007), 180.

<sup>23</sup> A McHarg, *Public Law in Scotland: Difference and Distinction*, in A McHarg & T Mullen (ed) *Public Law in Scotland* (Edinburgh: Avizandum Publishing Ltd, 2006) 1-22, 16.

<sup>24</sup> *Ibid.*

<sup>25</sup> *MacCormick v Lord Advocate* 1953 SC 396.

which has no counterpart in Scottish constitutional law<sup>26</sup> has had a lasting effect on how the UK constitution is understood in Scotland. It has led commentators such as Neil MacCormick to argue 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.'<sup>27</sup> Under these conditions, the constitution cannot accurately be described as unitary. 'Recognition of the United Kingdom as a union state provides a much more accurate, if complex, picture of the state than to focus solely upon its unitary nature.'<sup>28</sup>

For many, devolution in 1998 confirmed the status of the UK as a union state. Lord Steyn's obiter remark in *Jackson v Attorney General*<sup>29</sup> that 'the settlement contained in the Scotland Act 1998... point[s] to a divided sovereignty'<sup>30</sup> supports this view.<sup>31</sup> However, Neil Walker defends the unitary constitution, arguing that 'it is a more flexible affair than is often imagined.'<sup>32</sup> For Walker, the union state is not an alternative to the unitary state; it is merely 'a different way of categorizing and measuring institutional homogeneity or diversity within states.'<sup>33</sup> This distinction does not deny the UK characterization as a union state; it merely disengages such a conclusion from discussions of unitary and federal constitutions. However, it has been argued that 'Walker underestimates the extent to which the concept of unitary legal sovereignty is itself challenged within the UK.'<sup>34</sup> Therefore, although far from certain, it is safe to conclude that the UK is a union state; it naturally follows that Scotland is an independent entity within that union.

Interpretation of the Union Agreement can also be used to determine Scotland's constitutional status. Many regard the Agreement to have initiated an incorporating union: 'the evidence from historical facts would seem to suggest that Scotland was engulfed by England.'<sup>35</sup> As a consequence the Scottish Parliament (and with it the Kingdom of Scotland) ceased to exist; all that remained was the English Parliament 'unchanged, apart from its new name and the addition of the Scottish members.'<sup>36</sup> Scotland remained distinct in several ways, for instance the independent legal system and Court system were preserved.<sup>37</sup> However ultimately the Scottish constitution was

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<sup>26</sup> *Ibid*, 411.

<sup>27</sup> Neil MacCormick, *Is There a Constitutional Path to Scottish Independence?* Parliamentary Affairs (2000) 53 721-736, 727.

<sup>28</sup> E Wicks, *The Evolution of a Constitution* (Oxford: Hart Publishing, 2006), 169.

<sup>29</sup> *Jackson v Attorney General* [2005] UKHL 56.

<sup>30</sup> *Jackson v Attorney General* [2005] UKHL 56, para 102.

<sup>31</sup> However it is unclear what Lord Steyn means by 'divided sovereignty' as the Scottish Parliament created by the Scotland Act 1998 is not a sovereign legislature - Turpin & Tomkins '*British Government and the Constitution*' (n21) at 73.

<sup>32</sup> N Walker, *Beyond the unitary conception of the United Kingdom Constitution?* Public Law (2000) 384-404 .

<sup>33</sup> *Ibid*, 398.

<sup>34</sup> K Armstrong, *United Kingdom - Divided on Sovereignty?* in Walker N (ed) *Sovereignty in Transition* (Oxford: Hart Publishing, 2003) 327-350, 347.

<sup>35</sup> M K Addo & V M Smith, *The Relevance of Historic Fact to Certain Arguments Relating to the Legal Significance of the Acts of Union* Juridical Review (1998) 37, 49.

<sup>36</sup> P H Scott, *1707 - The Union of Scotland and England* (Edinburgh: Chambers, 1979), 52.

<sup>37</sup> Union with Scotland Act 1706, Articles 18 and 19 respectively.

replaced with that of England: 'The Union of Scotland and England was in fact an incorporating marriage similar in reality to a conquest of Scotland by the English constitutional system.'<sup>38</sup> This view was not endorsed by Lord Cooper in *MacCormick*:<sup>39</sup>

It is difficult to envision 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, as if all that happened in 1707 was that Scottish representatives were admitted to the Parliament of England. That is not what was done.

According to some commentators the union was not a union at all, rather a creation of an entirely new State: 'the union cannot... be described as a merging of two states. It was more accurately two renunciations of title and a new state acquiring title over the same territory immediately thereafter.'<sup>40</sup> Whether the Union Agreement of 1707 is viewed as the creation of an entirely new state or a continuation of the English state under a new name and with extended territorial scope is irrelevant for present purposes. The important point is that on the 1<sup>st</sup> May 1707, Scotland ceased to exist as an independent State. By passing the Union with England Act 1707, the Scottish Parliament forfeited Scotland's right to independent autonomous governance, in exchange for becoming part of the newly created United Kingdom. Consequently Scotland could be seen as merely a region within the United Kingdom.

However, Scotland's distinct civic institutions, legal system and cultural heritage, the recognized right of the Scottish people to self-determination, and the categorization of the UK as a union state all seem to suggest Scotland is a separate nation within the UK. This view is supported by the first words uttered in the new Scottish Parliament by Dr Winifred Ewing on 12 May 1999: 'The Scottish Parliament, adjourned on the 25<sup>th</sup> day of March in the year 1707, is hereby reconvened.'<sup>41</sup> This suggests that the new Parliament is a 'revival of the independent Parliamentary tradition of the pre-1707 era.'<sup>42</sup> It could therefore be said the Union is an ongoing agreement between two independent entities, Scotland and England. Should one of those entities no longer wish to be a party to that agreement, it is entitled to break away and revive its status as an independent State. Although many hold this view, this conclusion is not supported by Lord Hope's *obiter* comment in *Imperial Tobacco Ltd v Lord Advocate*<sup>43</sup> that 'Thirteen years have elapsed since the [Scottish] Parliament met to conduct business for the first time on 2 July 1999.'<sup>44</sup>

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<sup>38</sup> S Tierney, *Scotland and the Union State* in A McHarg A & T Mullen (ed) *Public Law in Scotland* (Edinburgh: Avizandum Publishing Ltd, 2006) 25-44, 31.

<sup>39</sup> *MacCormick v Lord Advocate* 1953 SC 396, 411

<sup>40</sup> E Wicks, *A New Constitution for a New State? The 1707 Union of England and Scotland* *Law Quarterly Review* (2001) 117, 109-126, 112.

<sup>41</sup> Scottish Parliament Official Report, 12 May 1999, Dr Winifred Ewing.

<sup>42</sup> Stair Memorial Encyclopaedia, *Constitutional Law* (Reissue) 2 Fundamental Law Para 61.

<sup>43</sup> *Imperial Tobacco Ltd v Lord Advocate* [2012] UKSC 51.

<sup>44</sup> *Ibid*, para 5.

## 2) *The Scotland Act*

If Scotland can be regarded as a country, a nation and an independent entity with the right to self-determination, what is the Scotland Act 1998? Given the special status of Scotland within the UK, should the Act reinstating a degree of self-government to that country also be afforded a special status within the constitutional order? Did Scotland acquire a written constitution in 1998?<sup>45</sup> According to Dicey the important statutes with which 'it would be political madness to tamper gratuitously,'<sup>46</sup> such as the Act of Union with Scotland 1706, has no more claim to supremacy than 'utterly unimportant statutes,'<sup>47</sup> such as the Dentists Act 1879. Parliament has 'the right to make or unmake any law whatever; and further... no person or body is recognized by the law of England as having right to override or set aside the legislation of Parliament.'<sup>48</sup> This is the orthodox view of parliamentary sovereignty. This unfortunately labelled doctrine concerns neither 'sovereignty' nor 'Parliament.' Rather, what it concerns is the 'legal supremacy' of 'Acts of the Crown-in-Parliament.'<sup>49</sup> This supremacy prevents the Scotland Act from enjoying any special status; it is an ordinary Act, open to implied or express repeal just like any other Act of Parliament.<sup>50</sup>

It has been argued that, although open to repeal as a formal matter of law, politically the Scotland Act cannot be amended without the consent of the Scottish people:<sup>51</sup> In political terms at least the Scotland Act cannot be repealed or significantly amended without the consent of the Scottish people. This argument finds its energy in modern democratic theory that asserts that constitutional legitimacy is to be found in the will of the people.

Whilst this is no doubt correct, any attempt to unilaterally repeal the Scotland Act against the wishes of the Scottish people is unlikely to obtain a positive reception, it does not change the constitutional status of the Act. Due to the lack of overarching design, the British constitution is often described as a 'political constitution'.<sup>52</sup> 'Some of the most important features of the British constitution are not derived from legal rules.'<sup>53</sup> Due to this influence, the political argument enjoys a degree of pragmatic sway. However, ultimately this does not affect the legal status of the Act and leaves the question 'What, constitutionally, is the Scotland Act?' unanswered.

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<sup>45</sup> As is suggested by Bradley & Ewing in; A W Bradley & K D Ewing, *Constitutional and Administrative Law* 14<sup>th</sup> edn (Harlow: Pearson Longman, 2007) at 49.

<sup>46</sup> A V Dicey, *Introduction to the Study of the Law of the Constitution* 10<sup>th</sup> edn (London: Macmillan, 1964) at 145.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*, 70.

<sup>49</sup> A Tomkins, *The Constitutional Law in MacCormick v Lord Advocate* *Juridical Review* (2004) 3, 213 at 215.

<sup>50</sup> S Tierney, *Scotland and the Union State* (n37), 38.

<sup>51</sup> *Ibid.*, 39.

<sup>52</sup> C Munro, *Studies in Constitutional Law* 2<sup>nd</sup> edn (London: Butterworths, 1999) at 8.

<sup>53</sup> *Ibid.*, 9.

The constitutional status of the Scotland Act depends upon the survival of the orthodox view of parliamentary sovereignty. Whilst the doctrine 'remains formally intact as a matter of law,'<sup>54</sup> it faces many contemporary challenges. One such challenge is common law constitutionalism that suggests that 'fundamental normative rights, antecedent to the constitution, implicate conditions on the exercise of parliamentary sovereignty.'<sup>55</sup> One such condition was identified by Laws LJ in *Thoburn v Sunderland City Council*<sup>56</sup> who distinguished between ordinary statutes and constitutional statutes. A constitutional statute is immune from implied repeal. The case concerned the European Communities Act 1972, however Laws LJ also cites the Scotland Act as an example of a constitutional statute.<sup>57</sup> Another, less universal, statement that constitutional statutes exist and should be afforded special rules of interpretation can be found in *Robinson v Secretary of State for Northern Ireland*.<sup>58</sup> In this case, the Northern Ireland Act 1998 was described as 'a constitution for Northern Ireland.'<sup>59</sup> As a result, 'the provisions should, consistently with the language used, be interpreted generously and purposively, bearing in mind the values which the constitutional provisions are intended to embody.'<sup>60</sup> This generous reading of what is essentially an ordinary Act of Parliament was adopted because 'the Act was passed to implement the Belfast Agreement, which was itself reached, after much travail, in an attempt to end the decades of bloodshed and centuries of antagonism.'<sup>61</sup> It could be argued that, as the equivalent Act for Scotland, the Scotland Act should also be regarded as a constitution and should be interpreted accordingly.

However *Robinson* was distinguished in the Inner House of the Court of Session in *Imperial Tobacco Ltd*:<sup>62</sup> the Scotland Act has no clear background purpose, such as the implementation of the Belfast Agreement that premised the Northern Ireland Act. For the Scotland Act 'there is nothing in the statute or in its background which suggests that one should read the provisions... expansively or restrictively.'<sup>63</sup> In addition, the principle derived from *Robinson* was deemed to provide little assistance to the Court, for the purpose of determining what is reserved and what is devolved.<sup>64</sup>

In addition to distinguishing the approach adopted in relation to the Northern Ireland Act, the *Imperial Tobacco* case expressed significant judicial support for the proposition that the Scotland Act is little more than an ordinary Act of the UK Parliament. Lord Reed categorically states 'the Scotland Act is not a constitution, but an Act of Parliament.'<sup>65</sup> He accepts that the Scotland Act 'established new

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<sup>54</sup> Turpin & Tomkins *British Government and the Constitution* (n21), 74.

<sup>55</sup> D Sharp, *Parliamentary Sovereignty: a Scottish perspective*, Cambridge Student Law Review (2010) 6(1), 135-154, 145.

<sup>56</sup> *Thoburn v Sunderland City Council* [2003] QB 151.

<sup>57</sup> *Ibid*, 186.

<sup>58</sup> *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32.

<sup>59</sup> *Ibid*, para 25.

<sup>60</sup> *Ibid*, para 11.

<sup>61</sup> *Ibid*, para 10.

<sup>62</sup> *Imperial Tobacco Ltd* 2012 SLT 749.

<sup>63</sup> *Ibid*, para 14.

<sup>64</sup> *Ibid*, para 183.

<sup>65</sup> *Ibid*, para 71.

constitutional arrangements which were intended to be stable and workable.<sup>66</sup> However beyond the facilitation of this objective, the Scotland Act should be interpreted like any other Act. Lord Brodie echoes the principle expressed in *Robinson*: 'I do not, and could not, take issue with the proposition that the Scotland Act should be interpreted generously and purposively with a view to ensuring that the constitutional settlement that it embodies is coherent, stable and workable.'<sup>67</sup>

However this is not due to the constitutional status of the Scotland Act, but instead because 'as a matter of generality... any enactment should be subject to a purposive construction.'<sup>68</sup> The Supreme Court agreed with these comments,<sup>69</sup> unanimously adopting Lord Hope's opinion that 'the exercise to be undertaken was in essence no different from that which was applicable in the case of any other United Kingdom statute.'<sup>70</sup> Whilst Lord Hope does not expressly deny the existence of constitutional statutes or that the Scotland Act could be regarded as such, he adopts a pragmatic approach, concluding 'the description of the Act as a constitutional statute cannot be taken, in itself, to be a guide to its interpretation. The statute must be interpreted like any other statute.'<sup>71</sup>

It is generally undisputed that the Scotland Act is, as described in *Martin v Most*,<sup>72</sup> 'a monumental piece of constitutional legislation,' however the Courts have resisted the temptation to let this dictate their interpretation of the Act. Politically the Scotland Act may be a constitution for Scotland, it may be irrevocably without the consent of the Scottish people, it may prevent Westminster from legislating in devolved areas without the consent of the Scottish Parliament; however, constitutionally, it is an ordinary unremarkable Act of Parliament and should be interpreted as such.

### 3) *The Scottish Parliament*

Finally, we turn to the Scottish Parliament. Given the democratic legitimacy inherent in a representative Parliament, should the Scottish Parliament be regarded as more than a mere statutory body? The establishment of the Parliament is clearly of great political significance: <sup>73</sup>Constitutionally the Scottish Parliament will clearly be subordinate. Politically, however, it will be anything but subordinate. For the Scotland Act creates a new locus of political power. Its most important power will be one not mentioned in the Act at all, that of representing the people of Scotland.

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<sup>66</sup> *Ibid*, para 72.

<sup>67</sup> *Ibid*, para 181.

<sup>68</sup> *Ibid*, para 179.

<sup>69</sup> *Imperial Tobacco Ltd v Lord Advocate* [2012] UKSC 51.

<sup>70</sup> *Ibid*, para 10.

<sup>71</sup> *Ibid*, para 15.

<sup>72</sup> *Martin v Most* [2010] UKSC 10.

<sup>73</sup> V Bogdanor, *Devolution in the United Kingdom* (Oxford University Press, 1999), 288.



Despite creating ‘a new locus of political power,’ legal power remains with Westminster. The creation of the Scottish Parliament does not affect Westminster’s power to make laws for Scotland,<sup>74</sup> thus parliamentary sovereignty is preserved.

In *Whaley v Lord Watson*<sup>75</sup> reference is made to the ‘fundamental character of the [Scottish] Parliament as a body which – however important its role – has been created by statute and derives its powers from statute. As such, it is a body which, like any other statutory body, must work within the scope of those powers.’<sup>76</sup> A similar approach has been adopted in relation to the Northern Irish Assembly in the aforementioned case *Robinson*. In this case, all but one<sup>77</sup> of the Justices states, in varying terms, that the Assembly is ‘a body created by a Westminster statute and it has no powers other than those given to it by statute.’<sup>78</sup> Despite this consensus, only Lord Hutton and Lord Hobhouse apply the statutory time limit imposed on the Assembly.<sup>79</sup> Notwithstanding the result of the case, Robinson echoes the view that the devolved legislatures are merely creatures of statute. This sentiment is endorsed by Lord Reed in *Imperial Tobacco*:<sup>80</sup>

‘The democratic legitimacy of the Scottish Parliament does not in itself warrant a different approach to interpretation from that applicable to Acts of Parliament... nor does it impinge upon the fact that the power of the Scottish Parliament to legislate is limited by the Act of Parliament which established it.’

Like any other statutory body, the Parliament is limited by the legislation that created it; the Court must ensure these limits are respected. The democratic legitimacy of the Parliament does not change this, nor does it justify any special treatment or interpretative liberalism.

However, such liberalism is demonstrated in the case *AXA General Insurance Ltd v HM Advocate*.<sup>81</sup> Due to the democratic legitimacy of the Scottish Parliament, the Supreme Court held that Acts of the Scottish Parliament cannot be reviewed on common law ground of irrationality. Lord Hope observed that, because prior to devolution common law review of an Act of Parliament was impossible, we are in uncharted territory and ‘the issue has to be addressed as one of principle.’<sup>82</sup> Lord Hope held that the Scottish Parliament’s ‘judgment that asbestos-related pleural plaques should be

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<sup>74</sup> Scotland Act 1998 s28(7).

<sup>75</sup> *Whaley v Lord Watson* 2000 SC 340.

<sup>76</sup> *Ibid*; at 348.

<sup>77</sup> Lord Bingham doesn’t deny that the Assembly is a statutory body, however nor does he expressly state that it is one.

<sup>78</sup> *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32 at para 54 per Lord Hutton. Lord Hoffmann expresses a similar sentiment at para 22, Lord Hobhouse at para 66 and Lord Millet at para 86.

<sup>79</sup> Lord Bingham, Lord Hoffmann and Lord Millet recognise a general/implied right to hold elections after expiry of the time limit, at para 16, 24 and 92 respectively.

<sup>80</sup> *Imperial Tobacco Ltd* 2012 SLT 749 at para 58.

<sup>81</sup> *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46.

<sup>82</sup> *Ibid*; at para 48.

actionable cannot be dismissed as unreasonable.’<sup>83</sup> This was because the issue was ‘a matter of respecting on democratic grounds, the considered opinion of the elected body by which these choices are made.’<sup>84</sup> For the avoidance of doubt, we are reminded that the Scottish Parliament does not enjoy the sovereignty of the Crown in Parliament and that ‘Acts of the Scottish Parliament are amenable to the supervisory jurisdiction of the Court of Session at common law.’<sup>85</sup>

However, ‘the judges should intervene, if at all, only in the most exceptional circumstances’<sup>86</sup> Lord Hope concludes that it would be ‘quite wrong for the judges to substitute their views... for the considered judgment of a democratically elected legislature.’<sup>87</sup> Lord Reed reaches substantially the same conclusion,<sup>88</sup> however his reasons for reaching such a conclusion differ from those advanced by Lord Hope. Lord Reed places a great deal more emphasis on the fact that the Parliament is an elected body and therefore accountable to the electorate, not the courts:

‘[The Parliament is] in principle accountable for the exercise of its powers, within the limits set by section 29(2), to the electorate rather than the courts... Law making by a democratically elected legislature is the paradigm of political activity, and the reasonableness of the resultant decisions is inevitable a matter of political judgment. In my opinion it would not be constitutionally appropriate for the courts to review such decisions on the ground of irrationality.’<sup>89</sup>

Therefore the Scottish Parliament is afforded a special hybrid status; it is not a sovereign parliament like Westminster, however it is also not subject to the same grounds of review as other statutory bodies or public officials. Due to the democratic legitimacy inherent in a parliament and the nature of the constitutional framework created by the Scotland Act, Holyrood enjoys a degree of autonomy from the jurisdiction of the courts. However this autonomy only relates to common law review on irrationality, the Parliament is still restricted by the legislative limitations imposed by the Scotland Act. In determining such limitations, the Scottish Parliament is, however, given the benefit of the doubt: Acts of the Scottish Parliament are to be ‘read as narrowly as is required for it to be within competence, if such a reading is possible.’<sup>90</sup>

Moreover, the Court in *AXA* was cautious to ensure a residual common law review function was reserved for the unlikely situation that the Parliament violates fundamental rights or the rule of law. Lord Mance uses the example of a blatantly discriminatory decision directed at red-headed people: ‘If a devolved Parliament or Assembly were ever to enact such a measure, I would have thought it capable of

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<sup>83</sup> *Ibid*, para 33.

<sup>84</sup> *Ibid*, 32.

<sup>85</sup> *Ibid*, para 47.

<sup>86</sup> *Ibid*, para 49.

<sup>87</sup> *Ibid*, para 52.

<sup>88</sup> *Ibid*, para 148.

<sup>89</sup> *Ibid*, para 147 and 148.

<sup>90</sup> Scotland Act 1998 s101(2).

challenge, if not under the Human Rights Convention, then as offending against fundamental rights or the rule of law, at the very core of which are principles of equality of treatment.<sup>91</sup> Similarly, Lord Reed expressly recognizes that where fundamental rights or the rule of law are at stake, common law review may be appropriate. This is because the UK Parliament 'cannot be taken to have established body which was free to abrogate fundamental rights or to violate the rule of law.'<sup>92</sup>

Therefore the Scottish Parliament is a limited legislature, limited by both the Scotland Act and the common law where fundamental rights or the rule of law are concerned, and is kept within the parameters of those limits by the Courts. However, in declaring that the Parliament is immune from irrationality review and recognizing its democratic legitimacy, the Court in *AXA* recognized that the Parliament is not the same as any other statutory body.

#### ***4) Conclusion***

With the impending independence referendum, these issues are unlikely to become clearer. In the event of a No vote, the status quo will persist. No doubt piecemeal reform will follow, but major changes are unlikely. In the event of a Yes vote, a new state will be on the brink of creation, pending formalities and preparations. This will involve a break in the constitutional order creating an even greater degree of uncertainty. However, for the time being, based on the relatively few cases and the secondary literature dealing with these issues, it could be said that Scotland is an independent entity within the UK, although not an independent State. The Scotland Act is a historic piece of legislation with great political significance, however constitutionally it is little more than an ordinary Act of Parliament, and the Scottish Parliament is a limited legislature regulated by the courts, enjoying a status above statutory body due to its inherent democratic legitimacy, but below that of the sovereign Westminster.

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<sup>91</sup> *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46 at para 97.

<sup>92</sup> *Ibid*, para 153.