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A British Common Law?

Public Law after the 1707 Union between England and Scotland

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Introduction

In the 1953 Scottish case of *MacCormick v. Lord Advocate*,[1] John MacCormick and Ian Hamilton sought to challenge the publication of a proclamation pursuant to the Royal Titles Act 1953 designating the new Queen's royal title as 'Elizabeth the Second of the United Kingdom of Great Britain'. Although there had previously been a Queen Elizabeth, she had reigned only in England, never in Scotland, and crucially before the creation of the Kingdom of Great Britain in 1707 in accordance with the Treaty of Union. According to MacCormick and Hamilton, therefore, the adoption of the numerals 'the Second' was contrary to Article I of the Treaty of Union which, being a fundamental condition of the Treaty, was *ultra vires* of the powers of the Westminster Parliament.[2] The case was dismissed by both the Outer House and Inner House of the Court of Session, albeit on different grounds,[3] with the Lord President (Lord Cooper) in the latter doing so in part on the basis that the Court of

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[1] *MacCormick v. Lord Advocate* 1953 SC 396.

[2] Ibid., 401; 405–409.

[3] Ibid., 402–405 (Outer House Decision); 409–418 (Inner House Decision).

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Session lacked the competence necessary to determine whether or not any governmental acts conform with the terms of the Treaty of Union.[4]

Despite this, however, the Lord President made a number of *obiter* remarks regarding parliamentary sovereignty which stood, and indeed still stand, in stark contrast to constitutional orthodoxy. Parliamentary sovereignty, he argued, 'is a distinctly English principle which has no counterpart in Scottish constitutional law', and he therefore found it difficult to understand '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'.[5] The Lord President also expressed strong support for the claim that some, but not all, provisions of the Treaty of Union are unalterable by Parliament, as well as dismay at 'English constitutional theorists' for viewing all provisions of the Treaty in the same way (and thus presumably alterable) despite some of them expressly stating that they are 'fundamental and unalterable in all time coming'.[6]

The Lord President's remarks regarding the fundamental nature of the Treaty of Union are significant, and as a result will be explored elsewhere. However, this chapter is concerned with what it views as the Lord President's underlying criticism of the post-Union constitution: the apparent conflation of English constitutionalism with British constitutionalism. The thrust of this argument was captured by MacCormick in his subsequent book, where he noted that '[t]hroughout the writings of all the English constitutional lawyers, and particularly those of Professor Dicey, there runs the arrogant assumption that the history of the Kingdom of England has been continuous from the Norman Conquest until the present day.'[7]

The Treaty of Union, which was given effect in both England and Scotland by legislation known as the Acts of Union,[8] was incorporating rather than federal in nature. The Kingdoms of England and Scotland were accordingly unified into the new Kingdom of Great Britain, which was to be governed by a unified Crown and Parliament.[9] Therefore, as a fusion of both England and Scotland, one might legitimately expect to see traces of

[4] Ibid., 413.
[5] Ibid., 411.
[6] Ibid.
[7] J. M. MacCormick, *The Flag in the Wind: The Story of the National Movement in Scotland* (London, 1955), 188.
[8] Union with Scotland Act 1707, 6 Anne, c. 11 (Parliament of England); Union with England Act 1707, *APS* xi 406, c. 7; 1706/10/ (Parliament of Scotland).
[9] Articles I–III.

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both legal traditions reflected in Great Britain's constitutional arrangements. However, instead we find the predominance of the English tradition of public law and, at the very least, the marginalisation of the Scottish.

Some scholars have attributed this predominance of English public law to Article XVIII of the Acts of Union, which they argue preserved Scots private law, but replaced Scots public law with English public law. W. L. Mathieson, for instance, claimed that 'the public law of Scotland was to be assimilated to that of England, but the law as to private right was not to be altered except for the evident utility of Scotsmen'.[10] Andrew Simpson and Adelyn Wilson have also argued the following:

> This new unified state would require a system of public law. This was set down in article eighteen. This new public law would need to apply not just within the borders of the two kingdoms but also in the various colonies. England's colonies already applied English law. In part that contributed to the decision that the public law of the new state would be English law.[11]

Although not explicit, A. J. MacLean's leading work on Scottish appeals to the House of Lords post-Union was similarly concerned only with Scots private law; the work's underlying assumption being that public law posed no difficulties because it had been incorporated.[12]

However, other scholars have outright rejected this reading of Article XVIII, arguing instead that it preserved not just Scots private law but Scots public law also. J. D. B. Mitchell, for instance, argued that the Act of Union 'did not unify even public law, it merely purported to place public law more readily at the disposal of Parliament than private law'.[13] The predominance of English public law is accordingly explained by a desire for uniformity with English law.[14] Aileen McHarg has similarly argued that Article XVIII 'did not actually require assimilation of Scots and English public law, and in fact [the Act of Union] guaranteed the continued existence of certain important Scottish institutions'.[15] As a

[10] W. L. Mathieson, *Scotland and the Union: A History of Scotland from 1695–1747* (Glasgow, 1905), 116.

[11] A. R. C. Simpson and A. L. M. Wilson, *Scottish Legal History Volume One: 1000–1707* (Edinburgh, 2017), 377. See also 381.

[12] A. J. MacLean, 'The 1707 Union: Scots Law and the House of Lords', *Journal of Legal History*, 4(3) (1983) 50, 51.

[13] J. D. B. Mitchell, 'The Royal Prerogative in Modern Scots Law', *Public Law* (Spring 1957) 304, 319.

[14] Ibid., 319.

[15] A. McHarg, 'Public Law in Scotland: Difference and Distinction' in A. McHarg and T. Mullen (eds.), *Public Law in Scotland* (Edinburgh, 2006), 3.

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result, notwithstanding the 'considerable doctrinal assimilation' post-Union by Scottish judges,[16] '[e]lements of a distinct body of Scots public law have persisted ever since the Union with England in 1707'.[17]

Proponents of both accounts seldom, if ever, engage in debate with one another on this important matter. However, taking into account both positions, one would appear to be faced with a stark choice: either Scots public law remains separate and distinct post-Union, or it was replaced with English law. However, it is submitted that neither position alone is satisfactory in explaining the predominance of English public law post-Union. Instead, this chapter will seek to reconcile these opposing positions by presenting a new and original hypothesis of the Acts of Union which, it is submitted, provides a more coherent understanding of the post-Union constitution and the role of both English and Scots public law within it.

It will be shown that, upon the proper construction of its provisions, the Acts of Union, by necessary implication, created a unified British public law, which finds expression in the form of a unified British common law. Crucially, this unified British public law is only partial in nature, applying only to British-wide institutions, namely the Crown and Parliament, thus leaving other areas of public law open to variation between England and Scotland. Although the Acts of Union did not create a unified court system, the retention of the House of Lords (now the UK Supreme Court) as the highest appellate court on public law matters for England and Scotland, nevertheless enabled it to emerge as a de facto constitutional court for Britain, the decisions from which should be understood as binding in both jurisdictions. The content of this partially unified British public law is unquestionably English in nature, the result of a variety of factors, none of which entirely preclude the influence of Scots public law on its continuing development.

A Unified British Public Law?

The starting point for determining the extent to which the Acts of Union sought to unify public law across England and Scotland is Article XVIII, which stipulates the following:

> That the laws concerning regulation of trade, Customs, and such Excises to which Scotland is by virtue of this treaty to be liable, be the same in

[16] Ibid., 4.
[17] Ibid., 3.

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> Scotland from and after the union as in England, and that all other laws in use within the kingdom of Scotland do after the union and notwithstanding thereof remain in the same force as before (except such as are contrary to or inconsistent with this treaty), but alterable by the Parliament of Great Britain, with this difference betwixt the Laws concerning public right, policy and civil government, and those which concern private right, that the laws which concern public right, policy and civil government may be made the same throughout the whole united kingdom, but that no alteration be made in laws which concern private right except for evident utility of the subjects within Scotland.[18]

As noted above, Article XVIII is frequently credited by scholars for preserving Scots private law whilst unifying the public law of Great Britain by replacing Scots law with English law. Although it is clear that, by using the term 'public right', '[t]he commissioners were clearly thinking of what would now be called constitutional law',[19] contemporary sources nevertheless provide little insight into how Article XVIII and its impact on public law was understood at the time of Union.[20] Daniel Defoe, a prominent pamphleteer and spy at the time, in his assessment of the alterations made to Scotland by Union, seems to suggest that the effect of Articles XVIII and XIX was to preserve the private law of Scotland whilst replacing its public law with that of England. As he observed:

> These clauses preserved the ordinary process of law, in case of private right, in the same course and condition as before; but all pleas to the Crown, matters of dispute between the Queen and subject, relating to the revenue and trade, being to be the same as in England; for that reason, there were necessary alterations to be made to the methods, and even new models of proceedings to be formed, special to Scotland.[21]

[18] Act of Union 1707 (*Statutes of the Realm*, VIII, 566–577) as transcribed in D. Douglas and A. Browning (eds.), *English Historical Documents Volume VIII 1660–1714* (London, 1953), 685.

[19] J. D. Ford, 'The Legal Provisions in the Acts of Union', *Cambridge Law Journal* 66(1) (2007), 106, 108.

[20] Scottish parliamentarians were seemingly concerned with other matters, such as tax and the legislative powers of the new British Parliament in relation to changing Scots private law. See Sir John Clerk of Penicuik, *History of the Union of Scotland and England, Extracts from His MS 'De Imperio Britannico' Translated and Edited by Douglas Duncan* (Edinburgh, 1993), 101, 155–156 and 195.

[21] D. Defoe, *The History of the Union between England and Scotland, by Daniel De-Foe: with an Appendix of Original Papers to Which Is Now Added a Copious Index* (London, 1786), 592.

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However, Defoe's interpretation of public law in the context of Article XVIII appears broad, mostly concerned with commercial matters.[22] Furthermore, Defoe draws a distinction between Scotland's constitution and its laws,[23] and argues that Scotland's constitution was not dissolved by Union but only altered,[24] and even then seemingly only in relation to its institutions rather than in the substance of its laws.[25]

It is submitted that, upon close examination of the wording, Article XVIII did anything but create a unified body of British public law by extending English law to Scotland. Under Article XVIII, England's existing laws on trade, customs and excises were to apply to Scotland, thus unifying the law in these areas. However, it appears that the crucial trade-off for the Scottish commissioners in accepting this was that all other existing Scots law was to be preserved post-Union subject only to this difference between public and private law: (1) that public law – 'the laws which concern public right, policy and civil government' – may be made the same throughout the United Kingdom by the Parliament; and (2) that Scots private law was alterable only by the Parliament of Great Britain where for the 'evident utility of the subjects within Scotland'.[26] The Scottish commissioners also required that the Scottish court system be preserved post-Union.[27]

Far from imposing complete legal uniformity, therefore, the Acts of Union in fact secured legal pluralism: Scots private law, and by necessary implication English private law, were to remain separate and distinct. This was further reinforced by Article XIX which expressly preserved the Scottish court system and, again by necessary implication, the English court system also. Only the British Parliament could make any changes to Scots private law, and even then not without limitation – there is a clear threshold test for any such legislative alterations under Article XVIII. The same is not true for Scots public law.

[22] Ibid., 602.
[23] Ibid., 600–602.
[24] Ibid., 600.
[25] Ibid., 600–602.
[26] Act of Union 1707 (*Statutes of the Realm*, VIII, 566–577) as transcribed in Douglas and Browning (eds.), *English Historical Documents Volume VIII 1660–1714*, 685.
[27] Indeed, it was the Scottish commissioners who proposed much of the wording of what became Articles XVIII and XIX, both of which were accepted by the English commissioners. See *The Journal of the Proceedings of the Lds Commissioners of Both Nations in the Treaty of Union, Which began on 16th of April 1706, and was concluded on the 22d of July following. With the Articles then Agreed on* (Edinburgh, 1706), 26–27. See also Defoe, *The History of the Union between England and Scotland*, 148–152.

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Article XVIII, except where 'contrary to or inconsistent with' the Treaty of Union,[28] expressly preserves Scots law in its entirety, including not only private law but also public law. However, in stark contrast to Scots private law, it is clear from the wording of Article XVIII that the new British Parliament has the power to make uniform all of public law, including therefore alterations to Scots public law, without limitation. Had it been the purpose of the Acts of Union to extend English public law to Scotland – an assimilation of a new body of British public law with English law – Article XVIII would likely have said so explicitly. The first part of Article XVIII, for instance, states that 'the laws concerning regulation of trade, Customs, and such Excises to which Scotland is by virtue of this treaty to be liable, *be the same in Scotland from and after the union as in England*'.[29] In stark contrast to public law, therefore, this wording shows a clear extension of England's laws on trade, customs and excises to Scotland, in effect transforming English law into British law.

Crucially, therefore, Article XVIII does not mandate that public law in the new Kingdom of Great Britain is to be made uniform, only that it is capable of being made so. This is further reinforced by the fact that Article XVIII is silent on the nature and content of any such unified British public law.

Furthermore, the continuation of English constitutionalism as British constitutionalism cannot be attributed to the unlimited power of the British Parliament to legislate on public law matters under Article XVIII. According to A. V. Dicey and R. S. Rait, for instance, Parliament, in accordance with the terms of Articles XVIII and XIX, seldom legislated to change Scots law post-Union, noting that 'Scottish opinion condemned the extension of English law to Scotland'.[30] Indeed, very few statutes have ever been passed imposing English law on Scotland generally, with the most notable example being the extension of the English law of treason to Scotland in 1708.[31]

Although certainly not precluded by the wording of Article XVIII, there is accordingly nothing within that Article which necessitates

[28] Act of Union 1707 (*Statutes of the Realm*, VIII, 566–577) as transcribed in Douglas and Browning (eds.), *English Historical Documents Volume VIII 1660–1714*, 685.

[29] Ibid. (emphasis added).

[30] A. V. Dicey and R. S. Rait, *Thoughts on the Union between England and Scotland* (London, 1920), 284.

[31] An Act for Improving the Union of the Two Kingdoms 1708 (The Treason Act 1708), 7 Anne c. 21. See also W. I. R. Fraser, *An Outline of Constitutional Law*, 2nd ed. (London, 1948), 330.

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English public law becoming British public law. The inherently English nature of British public law, therefore, cannot be directly attributed to the wording of Article XVIII. We must accordingly look elsewhere for an explanation.

Partial Unification by Necessary Implication

It is submitted that any uniformity of public law post-Union arose by necessary implication from other provisions of the Acts of Union, specifically those provisions related to the creation of British-wide institutions, and was accordingly only partial in nature.

Article I declares '[t]hat the two Kingdoms of England and Scotland shall upon the first day of May . . . and for ever after, be united into one kingdom by the name of Great Britain'.[32] Furthermore, Article III states '[t]hat the United Kingdom of Great Britain be represented by one and the same Parliament to be stiled [sic] The Parliament of Great Britain'.[33] Both of these provisions created British-wide institutions of government which replaced the pre-existing English and Scottish equivalents, namely the Crown and Parliament. As MacLean observes:

> In 1603 James VI of Scotland succeeded to the English throne. Constitutionally this Union of the Crowns was dynastic only. The crowns of Scotland and England remained separate and sovereign (with the national parliaments) in their respective countries . . . This position was to change in 1707 because by it the sovereign powers of the two nations would be united into a common sovereignty. There would be one Monarchy, one imperial Crown and one parliament of Great Britain which would be the only sovereign power in Great Britain.[34]

The creation of a new Crown of Great Britain was, admittedly, implicit rather than explicit: the unification of the two Crowns of England and Scotland arises by necessary implication from the unification of the two kingdoms under Article I. This certainly appears to be the assumption under Article II, which settled the succession of 'the monarchy of the united kingdom of Great Britain'.[35] Furthermore, following the initial

[32] Act of Union 1707 (*Statutes of the Realm*, VIII, 566–577) as transcribed in Douglas and Browning (eds.), *English Historical Documents Volume VIII 1660–1714*, 680.
[33] Ibid., 681.
[34] MacLean, 'The 1707 Union', 60.
[35] Act of Union 1707 (*Statutes of the Realm*, VIII, 566–577) as transcribed in Douglas and Browning (eds.), *English Historical Documents Volume VIII 1660–1714*, 681.

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approval of Article I by the Parliament of Scotland, George Lockhart, a Scottish commissioner but opponent of Union, noted criticism of what was described as 'an incorporating Union of the Crown and Kingdom of *Scotland* with the Crown and Kingdom of *England*'.[36]

Additional evidence of this unification can also be found with the abolition of the Scottish Privy Council in 1708. Article XIX stated that, 'after the Union, the Queen's Majesty and her royal successors, may continue a Privy Council in Scotland for preserving of public peace and order until the Parliament of Great Britain shall think fit to alter it or establish any other effectual method for that end'.[37] At the meeting of the first British Parliament in 1707, a Bill was accordingly passed abolishing the Scottish Privy Council and replacing it with the Privy Council of Great Britain, a rebranded and expanded English Privy Council,[38] on 1 May 1708.[39]

By contrast, the creation of a new British Parliament was considerably more explicit. For instance, Queen Anne's proclamation for the summoning of the first Parliament of Great Britain in June 1707 declared the following:

> [W]e, for many weighty reasons, have thought fit to declare by our royal proclamation ... that it was expedient that the Lords of Parliament of England, and Commons of the Parliament of England ... should be members of the respective Houses of the first Parliament of Great Britain for and on the part of England; and whereas in pursuance of an Act passed in the Parliament of Scotland ... sixteen peers and forty-five commissioners for shires and burghs, have been chosen to be the members of the respective Houses of the said first Parliament of Great Britain for and on the part of Scotland; we do by this our royal proclamation under the great seal of Great Britain ... declare and publish our will

[36] [G. Lockhart], *Memoirs Concerning the Affairs of Scotland from Queen Anne's Accession to the Throne, to the Commencement of the Union of the Two Kingdoms of Scotland and England, In May, 1707. With an Account of the Origine and Progress of the Design'd Invasion from France, in March, 1708. And some Reflections on the Ancient State of Scotland* (London, 1714), 253. In support, see also Defoe, *The History of the Union between England and Scotland*, 600.

[37] Act of Union 1707 (*Statutes of the Realm*, VIII, 566–577) as transcribed in Douglas and Browning (eds.), *English Historical Documents Volume VIII 1660–1714*, 687.

[38] P. W. J. Riley, *The English Ministers and Scotland 1707–1727* (London, 1964), 28.

[39] An Act for Rendering the Union of the Two Kingdoms more Intire and Complete 1707 (Union with Scotland (Amendment) Act 1707), 6 Anne c. 40. On the passage of the Bill in Parliament, see Clerk, *History of the Union of Scotland and England*, 204–205; and Riley, *The English Ministers and Scotland 1707–1727*, Chapter VII.

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> and pleasure to be, and do hereby appoint, that our first Parliament of Great Britain shall meet.[40]

Correspondence between Sidney, first Earl of Godolphin, and John, first Duke of Marlborough, the leaders of the English Ministry at the time of Union, reinforces this position, with Godolphin noting that: 'Tomorrow, the Queen declares in Counsell [sic] that this present Parliament, shall be the first Parliament of Great Britain which it's generally thought will have the construction of a new Parliament'.[41] Furthermore, it is clear from the Acts of Union that the British Parliament was not only a new institution, but one which was, at least in part, a hybrid Parliament of both its Scottish and English forebears. This is evident from the composition of the British Parliament and the election of its Scottish members.

Under Article XXII, as noted by Queen Anne in her proclamation above, Scotland was to be represented in the Parliament of Great Britain by sixteen peers in the House of Lords and by forty-five representatives in the House of Commons; determining the selection of these representatives was to be left to the Scottish Parliament. Subsequent legislation was accordingly passed which stipulated that the sixteen peers were to be elected from amongst the Scottish peers to represent Scotland in the House of Lords (which persisted until the Peerage Act 1963, section 4); and of the forty-five representatives of the House of Commons, thirty were to be selected from the shires and stewartries, with the remaining fifteen being selected from the royal burghs.[42] Furthermore, the pre-Union system for electing commissioners for the royal burghs largely continued post-Union until the Scottish Reform Act 1832.[43] Crucially, the wording of Article XXII reveals

[40] Proclamation summoning the first Parliament of Great Britain, 1707 (*London Gazette*, 5–9 June 1707) as transcribed in Douglas and Browning (eds.), *English Historical Documents Volume VIII 1660–1714*, 222.

[41] Godolphin to Marlborough [28 April 1707] Blenheim MSS. A2–23. as transcribed in H. L. Snyder (ed.), *The Marlborough–Godolphin Correspondence* (Oxford, 1975), 756–757.

[42] Election Act 1707, *APS* xi 425, c. 8; 1706/10/293. Restated under Article XXV of the Union with Scotland Act 1707, 6 Anne, c. 11 (Parliament of England). See Article XXV(VI) of the Act of Union 1707 (*Statutes of the Realm*, VIII, 566–577) as transcribed in Douglas and Browning (eds.), *English Historical Documents Volume VIII 1660–1714*, 693–695.

[43] Representation of the People (Scotland) Act 1832 (2 & 3 Will. 4), c. 65, s. X, printed under the original title of An Act to Amend the Representation of the People in Scotland 1832 available in *The Statutes of The United Kingdom of Great Britain and Ireland, 2 & 3 William IV 1832* (London, 1832), 387–388. See Dicey and Rait, *Thoughts on the Union between England and Scotland*, 49 and 246. See also R. Sutherland, 'Aspects of the Scottish Constitution Prior to 1707' in J. P. Grant (ed.), *Independence and Devolution: The Legal Implications for Scotland* (Edinburgh, 1976), 20–21.

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another key characteristics of the new British Parliament inherited from its English predecessor: bicameralism. The Acts of Union do not explicitly say that the new British Parliament was to have two houses modelled on the English Parliament, but the reference to both the House of Commons and the House of Lords in Article XXII puts this beyond doubt. Structurally, therefore, the new British Parliament that emerged from the 1707 union between England and Scotland had characteristics of both of its predecessors, albeit to varying degrees.

Legally, therefore, neither the British Parliament nor the British Crown was a mere continuation of their English or Scottish predecessors, but were instead a unification of them resulting in the creation of entirely new institutions. These new institutions, in particular the scope of their powers, would need to be governed, as they always had been, by law. However, it is submitted that, by necessary implication, the creation of new British institutions under the Acts of Union would necessitate the unification of the law relating to them, thus constituting a partial unification of public law post-Union in the form of a new body of British public law. It is through this new body of public law that Britain's new institutions, the Crown and Parliament, would acquire additional characteristics, such as parliamentary sovereignty. It is further submitted that this new British public law would take the form of common law, thus creating a British common law.

A British Common Law

The common law – or judge-made law – is a source of law in all three legal jurisdictions of the United Kingdom. The jurisdiction of England and Wales, which applies English law, is undisputedly a common law system, as is Northern Ireland. Scotland, although a common law system since the twelfth century, is nevertheless considered to be a 'mixed' legal system due to the influence of Roman law, principally from the sixteenth century onwards.[44] Common law in turn is seen as a major source of law for the UK Constitution,[45] including, it is submitted, those laws governing its institutions, namely the Crown and Parliament.

The courts have routinely determined the existence and extent of the prerogative powers of the Crown, from the *Case of Proclamations*[46] in the

[44] See generally Simpson and Wilson, *Scottish Legal History Volume One: 1000–1707*.
[45] P. Leyland, *The Constitution of the United Kingdom: A Contextual Analysis*, 3rd ed. (Oxford, 2016), 27–28.
[46] *Case of Proclamations* (1610) 12 Co. Rep. 74.

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seventeenth century to *Miller (No. 2)/Cherry*[47] in the twenty-first century. It is submitted that, because the Acts of Union unified the Crowns of England and Scotland into a single British Crown, there would have been by necessary implication a partial unification of the prerogative powers of both Crowns, at least in so far as they extended to matters related to the unified Kingdom of Great Britain and its Parliament. Consequently, although it is widely accepted that the law between England and Scotland is now post-1707 mostly the same on the prerogative,[48] minor variations remain possible,[49] especially so in relation to any private law application of the prerogative.[50]

The courts are capable of determining the powers of the British Parliament, most notably the doctrine of parliamentary sovereignty. This major constitutional principle has no statutory basis whatsoever, meaning that its legal basis as a feature of the British Parliament, at least in a formal sense, can only be attributed to the common law: the courts recognise and enforce parliamentary sovereignty, thus giving it its legal force.[51] Indeed, notwithstanding the above observations of the Lord President in *MacCormick v. Lord Advocate*, parliamentary sovereignty has been upheld consistently by both the English and Scottish courts alike.[52] Parliamentary sovereignty, although by no means the exclusive creation of the common law,[53] is nevertheless capable of modification by the courts.[54]

[47] *R (Miller) v. The Prime Minister*; *Cherry v. Advocate General for Scotland* [2019] UKSC 41, [2020] AC 373.

[48] See A. Tomkins, 'The Crown in Scots Law' in A. McHarg and T. Mullen (eds.), *Public Law in Scotland* (Edinburgh, 2006), especially 278–280.

[49] See in particular *Glasgow Corporation v. Central Land Board* 1956 SC (HL) 1, at 16. On this case, see Mitchell, 'The Royal Prerogative in Modern Scots Law', 305; T. B. Smith, *The British Commonwealth: The Development of Its Laws and Constitutions Volume I: The United Kingdom (Scotland)* (London, 1955), 658–659; and Tomkins, 'The Crown in Scots Law', especially 269–270.

[50] See Fraser, *An Outline of Constitutional Law*, 149: 'In so far as the prerogative concerns the public rights and positions of the Crown, it is probably identical in England and Scotland, although in the realm of private law it is not always the same'.

[51] See R. B. Taylor, 'The Contested Constitution: An Analysis of the Competing Models of British Constitutionalism', *Public Law* (July 2018) 500, 519.

[52] See A. Tomkins, 'The Constitutional Law in *MacCormick v. Lord Advocate*', *Juridical Review* 3 (2004) 213, 216–220.

[53] See J. Goldsworthy, 'Abdicating and Limiting Parliament's Sovereignty', *King's College Law Journal* 17(2) (2006) 255, 261. See also Taylor, 'The Contested Constitution', 519–520.

[54] See Taylor, 'The Contested Constitution', 520–521. See also Tomkins, 'The Constitutional Law in *MacCormick v. Lord Advocate*', 216–217.

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Ideally, any such judicial pronouncements on the powers of these British institutions would need to be British-wide in order to ensure uniformity throughout the Kingdom, accordingly producing a new British common law in the field of public law. Otherwise, Britain would risk internal constitutional divergence.

However, there are two potential problems with this hypothesis which need to be addressed if it is to succeed: (1) the absence of a unified court system for Britain following the 1707 Union; and (2) the application of English common law to these British institutions by English and Scottish judges. Both of these issues will be addressed in turn.

No Unified Court System

Article XIX declares the following:

> That the Court of Session or College of Justice do after the Union and notwithstanding thereof remain in all time coming within Scotland as it is now constituted by the laws of that kingdom, and with the same authority and privileges as before the Union, subject nevertheless to such regulations for the better administration of justice as shall be made by the Parliament of Great Britain.[55]

By virtue of this provision, therefore, there is no unified British court system post-Union. Instead, the Scottish court system is expressly preserved, along with the English court system by implication. As a result of the separate court systems post-Union, courts in Scotland do not have to follow decisions of courts in England and vice versa, they are merely persuasive. As Robert Sutherland noted, '[t]he legislative and the executive functions of government may have been substantially merged by the Acts of Union but not the judicial'.[56] Taken in conjunction with Article XVIII, which preserved much of Scots law, the preservation of the Scottish court system makes apt sense: English law and Scots law are separate and distinct, thus necessitating equally separate and distinct enforcement mechanisms. It would make little sense for an English court, with little knowledge or experience of Scots law, to decide a matter of Scots law and vice versa.

However, although particularly applicable to private law, the same cannot be said of public law where the lack of a unified British court

[55] Act of Union 1707 (*Statutes of the Realm*, VIII, 566–577) as transcribed in Douglas and Browning (eds.), *English Historical Documents Volume VIII 1660–1714*, 686.

[56] Sutherland, 'Aspects of the Scottish Constitution Prior to 1707', 19. See also 18–19.

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system risks constitutional divergence, thus undermining the case for a British common law. For this reason, Mitchell has in fact pointed to the lack of a unified court system under the Articles of Union as evidence of the absence of any such unified British public law. As he noted:

> [I]t is . . . true that judicial precedent is of considerable importance, either as an original source of principle or as a secondary source, when the courts are interpreting a statute. Here again problems arise from the fact that the Union of 1707 was in some sense incomplete. Separate systems of courts were then preserved, and thus English decisions (outside revenue matters) are not binding upon Scottish courts, and it is possible for conflicting decisions to be arrived at in the different jurisdictions.[57]

However, it is submitted that Mitchell is mistaken in this view. Despite the Acts of Union not introducing a unified court system for Great Britain, they nevertheless made provision for – or at least did not expressly prohibit – the creation of an apex court for both England and Scotland post-Union: the House of Lords.

Article XIX, in addition to preserving the Scottish court system, also states that 'no causes in Scotland be cognoscible by the Courts of Chancery, Queen's Bench, Common Pleas or any other Court in Westminster Hall'.[58] This crucial element of Article XIX is sadly ambiguous: it is unclear what was intended by the words 'Westminster Hall'. One might conclude that, because it is not mentioned otherwise, it is referring to House of Lords, at the time the highest court in England, which of course sat in Parliament.

However, Dicey and Rait argued that this was not so. Whilst acknowledging that the words of Article XIX 'look full enough to exclude every possible intervention by any English court in any cause tried in Scotland',[59] they have nevertheless argued that the prohibition on appeals from Scotland to Westminster Hall cannot possibly be construed so as to include the House of Lords. As they observed:

> [T]he House of Lords neither was nor indeed is, a Court in Westminster Hall. It is a Court which exists wherever Parliament happens to be sitting, and the men living in 1706 and 1707, could, many of them, remember the meeting of an English Parliament, and a very notable

[57] J. D. B. Mitchell, *Constitutional Law*, 2nd ed. (Edinburgh, 1968), 23.
[58] Act of Union 1707 (*Statutes of the Realm*, VIII, 566–577) as transcribed in Douglas and Browning (eds.), *English Historical Documents Volume VIII 1660–1714*, 686.
[59] Dicey and Rait, *Thoughts on the Union between England and Scotland*, 192.

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> English Parliament, during the reign of Charles II, held not at Westminster but at Oxford.[60]

Dicey and Rait, therefore, concluded that the commissioners had been intentionally ambiguous in their wording, leaving open the question for future generations, in order to ensure the passage of the Act of Union in Scotland.[61] As they noted:

> For on the one hand it would probably be a benefit to Great Britain that it should possess one Court of Appeal to which important cases might be brought from every part of the British Kingdom for decision, whilst on the other hand it must have seemed highly imprudent, while the carrying of the Act of Union was in doubt, to raise a most irritating, though somewhat speculative, question about appeals to the House of Lords.[62]

Dicey and Rait's reasoning seems to be that the Acts of Union, because they did not explicitly preclude appeals from the Scottish courts to the House of Lords, allowed the House of Lords to emerge as Britain's apex court through subsequent practice.

MacLean, however, argues that it would have been 'obvious' to both the Scottish and the English commissioners at the time that the House of Lords would have the jurisdiction to hear appeals from the Court of Session. Had this not been intended, the Scottish commissioners could have remedied the matter during the passage of the Act of Union in the Scottish Parliament of which they were members.[63] According to MacLean, the post-Union writings of Sir John Clerk of Penicuik, one of the Scottish commissioners for Union and later Baron of the Exchequer, also imply that he supported the House of Lords being Britain's highest civil and criminal court.[64] Indeed, the work of Defoe likewise suggests that the House of Lords, as the 'the sovereign judicature of Great Britain'[65] capable of hearing appeals from Scotland, was both discussed and accepted by the English and Scottish commissioners for Union.[66]

Whatever the case may be, it is clear that Article XIX posed no real obstacle to the granting of appeals from the Scottish courts to the House of Lords post-Union.

[60] Ibid., 192.
[61] Ibid., 192–193.
[62] Ibid., 193. See also MacLean, 'The 1707 Union', 52.
[63] MacLean, 'The 1707 Union', 63.
[64] Ibid., 57.
[65] Defoe, *The History of the Union between England and Scotland*, 159.
[66] Ibid., 158–161.

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In the case of civil appeals, and thus private law matters, the House of Lords started hearing appeals from the Court of Session – Scotland's highest civil court – shortly after union in 1707[67] and this has remained the case to this day, albeit now with the House of Lords successor the UK Supreme Court. This seemingly proved uncontroversial as the appeals from the Court of Session to the Scottish Parliament were possible pre-Union.[68]

In the case of criminal appeals, despite early indications to the contrary, the House of Lords by the end of the nineteenth century had established that they did not have the jurisdiction to hear appeals from the Court of Justiciary (this was later put on a statutory footing under the Criminal Procedure (Scotland) Act 1887).[69] This had been decided on the basis that there were no appeals from the Court of Justiciary to the Scottish Parliament in the immediate pre-Union period.[70] The decision was not taken, therefore, on the basis of the wording of Article XIX.

Intriguingly, therefore, the House of Lords quickly emerged as Britain's apex court on civil matters, although not for criminal matters, on the basis of continuity of practice pre-Union to post-Union.

However, the impact of permitting Scottish appeals to the House of Lords is largely unclear. Dicey and Rait, for instance, do not comment on the extent of any changes to Scots law as a result, but were of the view that '[s]uch assimilation as has arisen is one of the beneficial effects of the House of Lords being a final Court of Appeal from decisions both of the Scottish Court of Session and of the English Courts of Common Law and of Equity'.[71] By contrast, T. B. Smith noted that, '[t]hough the House of Lords was almost overwhelmed in the late eighteenth century and early nineteenth century with Scottish appeals, the Lords' decisions had little impact on the content of the law itself'.[72] Whatever the truth, both of these assessments appear restricted to the impact of the House of Lords on private law appeals from Scotland. What then of public law?

[67] See generally MacLean, 'The 1707 Union'.
[68] See Fraser, *An Outline of Constitutional Law*, 223.
[69] See A. J. MacLean, 'The House of Lords and Appeals from the High Court of Justiciary, 1707–1887', *Juridical Review* (1985) 192.
[70] See N. Walker, *Final Appellate Jurisdiction in the Scottish Legal System* (Scottish Government, Edinburgh, 2010), 22–23. For contemporary arguments for and against this position see generally MacLean, 'The House of Lords and Appeals from the High Court of Justiciary, 1707–1887'.
[71] Dicey and Rait, *Thoughts on the Union between England and Scotland*, 330.
[72] T. B. Smith, 'Scottish Nationalism, Law, and Self-Government' in N. MacCormick (ed.), *The Scottish Debate: Essays on Scottish Nationalism* (London, 1970), 40.

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Constitutional matters tend to be discussed as part of judicial review (although they are certainly not limited to this court action). Judicial review is a civil court matter and thus subject to appeal to the UK Supreme Court (formerly the House of Lords) in both England and Scotland. On matters of public law, therefore, the UK Supreme Court is the highest court for both jurisdictions. As argued above, the Acts of Union, in creating British institutions, by necessary implication unified the law governing such institutions, thus creating a British common law. Accepting this, it logically follows that the post-1707 decisions of the House of Lords (and later the UK Supreme Court) on such public law matters should be treated as equally binding in both England and Scotland, no matter which jurisdiction the action originates from. This suggests, it is argued, that the House of Lords, now the UK Supreme Court, has in fact been a de facto constitutional court for Britain since 1707.

However, Neil Walker has argued that 'in formal terms, even the Supreme Court itself, like the predecessor House of Lords, is not one court but many, its umbrella status speaking not only to its functional versatility but to its variety of formal identities as an English, Scottish and Northern Irish court'.[73] In reaching this conclusion, he relies on section 41(2) of the Constitutional Reform Act 2005, which states that '[a] decision of the Supreme Court on appeal from a court of any part of the United Kingdom, other than a decision on a devolution matter, is to be regarded as the decision of a court of that part of the United Kingdom'.[74] According to Walker, '[t]his suggests that, when read properly, the section provides that the new Supreme Court should be seen as a Scottish court applying Scottish law'.[75] However, although section 41(2), along with the recognition of a distinct devolution jurisdiction for the UK Supreme Court,[76] might appear to support such a conclusion, it is submitted that this is not the case.

Section 41(1) states that '[n]othing in this Part is to affect the distinction between the separate legal systems of the parts of the United Kingdom'. Walker has noted that this provision 'can be interpreted differently',[77] meaning that, whilst it is clear the UK Supreme Court sits

[73] Walker, *Final Appellate Jurisdiction in the Scottish Legal System*, 19.
[74] Ibid., 23–24.
[75] Ibid., 24.
[76] Constitutional Reform Act 2005, s. 41(3).
[77] Walker, *Final Appellate Jurisdiction in the Scottish Legal System*, 25.

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as a Scottish court in cases brought from Scotland, 'what is less clear is the extent to which and the circumstances under which it will apply Scottish law as a distinct body of law'.[78] According to Walker, this is due to the considerable similarities in substantive law between Scotland and the rest of the United Kingdom, whether by the influence of English common law on Scottish cases, or through imposition by UK-wide statute.[79] Following this, it is submitted that the same would naturally be true of any unified British public law arising by virtue of the Acts of Union: the UK Supreme Court, sitting as the highest Scottish court in civil matters, applying not Scots public law but British public law. It is nevertheless conceded that any such determinations by the UK Supreme Court would not, under Walker's reading of section 41(2) at least, make them binding precedent in the United Kingdom's other jurisdictions, although it is submitted that they would likely be so persuasive as to make the distinction largely academic.

However, as confirmed by the Explanatory Notes, it is important to stress that section 41 is concerned primarily with ensuring that the decisions of the UK Supreme Court have the same effect within the different legal jurisdictions of the United Kingdom as the previous decisions of the House of Lords and the Judicial Committee of the Privy Council.[80] Section 41(2) achieves this with regard to the House of Lords by stating that decisions of the UK Supreme Court on appeal are 'to be regarded as the decision of a court of that part of the United Kingdom'. However, although this guarantees that decisions of the UK Supreme Court appealed from Scotland are binding in Scotland, they are crucially not jurisdictionally limited; section 41(2) is silent on whether the UK Supreme Court in making such a decision is sitting as a Scottish court only, or as a UK-wide court with jurisdiction in Scotland. This will vary, it is submitted, depending on the area of law being determined.[81]

When determining a matter of either private law or public law, as per Articles XVIII and XIX of the Acts of Union, the UK Supreme Court's jurisdiction will rightly be restricted to the place from which the case was

[78] Ibid., 24–25.
[79] Ibid., 24.
[80] Constitutional Reform Act 2005, Explanatory Notes, para. 162.
[81] See Walker, *Final Appellate Jurisdiction in the Scottish Legal System*, Appendix III, especially 67–68. Walker acknowledges that s. 41(2) is vague on whether the UK Supreme Court sits as a Scottish court or a UK Court but leaves open the question of what impact either interpretation could have on precedent.

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appealed.[82] However, when determining a matter of public law which relates to the Crown and Parliament, by necessary implication from Articles I and III of the Treaty of Union, the UK Supreme Court's jurisdiction will be wider, meaning that the decision should be binding in the other jurisdiction also.

Consequently, because section 41 is concerned with preserving the pre-UK Supreme Court jurisdiction of the House of Lords, and in the absence of any express or implied intention to the contrary, it is submitted that section 41 likewise preserves, as part of the UK Supreme Court, the constitutional jurisdiction of the House of Lords arising from the Acts of Union. For these reasons, therefore, section 41 of the Constitutional Reform Act 2005 is no barrier to either the existence of British public law or indeed to the role of the UK Supreme Court as a de facto constitutional court.

Indeed, the UK Supreme Court has certainly in recent times increasingly found itself making decisions about the constitutional arrangements of the United Kingdom regardless of which jurisdiction the case originated from. For instance, in *Miller (No. 1)*, concerning an appeal from England and a referral from Northern Ireland, the UK Supreme Court held that the UK government could not trigger Article 50 of the Treaty on European Union (TEU) using the royal prerogative without first receiving authorisation from Parliament in the form of an Act of Parliament.[83] In so doing, the Court noted that '[s]ome of the most important issues of law which judges have to decide concern questions relating to the constitutional arrangements of the United Kingdom'.[84] Likewise, in *Miller (No. 2)/Cherry*, on appeal from both England and Scotland, the UK Supreme Court held that the Prime Minister's prorogation of Parliament was unlawful, with the Court stating the following:

> Although the United Kingdom does not have a single document entitled 'The Constitution', it nevertheless possesses a Constitution, established over the course of our history by common law, statutes, conventions and practice. Since it has not been codified, it has developed pragmatically, and remains sufficiently flexible to be capable of further development. Nevertheless, it includes numerous principles of law, which are

[82] Constitutional Reform Act 2005, Explanatory Notes, para. 164. The example given here to illustrate the effect of s. 41(2) is clearly one of a purely private law nature.

[83] *R (Miller) v. Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61.

[84] Ibid., at [4].

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> enforceable by the courts in the same way as other legal principles. In giving them effect, the courts have the responsibility of upholding the values and principles of our constitution and making them effective. It is their particular responsibility to determine the legal limits of the powers conferred on each branch of government, and to decide whether any exercise of power has transgressed those limits.[85]

It therefore seems likely that, by virtue of the Acts of Union, the House of Lords (now the UK Supreme Court) has become a de facto constitutional court, creating binding precedent for both England and Scotland. Despite this, the arrangement is still not without its challenges. Crucially, the UK Supreme Court can only determine matters which are appealed to it, and not every constitutional case brought in either England or Scotland is appealed to the UK Supreme Court for final determination.[86] This means that variations in the application of British public law between England and Scotland remains possible.

English Public Law as British Public Law

Accepting that a body of British common law on public law matters emerged post-Union, and that the House of Lords (now the UK Supreme Court) emerged as Britain's apex court capable of ruling on this body of public law for the whole country, we must now seek to understand why this new body of British law is seemingly indistinguishable from English law, accepted and applied by English and Scottish courts alike.

It is submitted that there would have been a strong compulsion towards uniformity of public law post-Union. Although Mitchell attributed much of the adoption of English rules in Scotland to a 'desire for uniformity',[87] he was nevertheless of the view that this went beyond the terms of the Acts of Union themselves. As he noted: '[T]here has been some readiness to concede too great a scope to the Act of Union . . . It is certainly not possible to regard that Act as compelling uniformity though clearly the circumstances which resulted from it would tend to induce that result'.[88] Indeed, although the terms of Article XVIII did not unify

[85] *R (Miller) v. The Prime Minister*; *Cherry v. Advocate General for Scotland* [2019] UKSC 41, [2018] AC 61 at [39].

[86] See for example *Wightman v. Secretary of State for Exiting the European Union* [2018] CSIH 62.

[87] Mitchell, 'The Royal Prerogative in Modern Scots Law', 319.

[88] Ibid., 319. See also 308: 'It is . . . arguable that the effect of this legislation [Act of Union] has been greater than its terms warrant'.

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public law, some have suggested that the provision was nevertheless relied upon by Scottish judges to extend English public law to Scotland.[89]

However, as demonstrated above, the Acts of Union by necessary implication unified public law in relation to Britain's shared institutions. As a consequence of this, and contrary to the view taken by Mitchell, it is submitted that the Acts of Union themselves would have compelled greater uniformity of law in relation to those shared institutions. This, it is argued, is precisely what occurred in the case of *Macgregor v. Lord Advocate* in relation to the Crown, where Lord Justice-Clerk stated the following:

> We have had no argument as to what was the effect of the Union of the two Kingdoms in 1707; but it seems to me that the legislation that then took place almost necessarily resulted in this, that the position of the Crown in such matters must be the same on both sides of the Border. Accordingly, although few questions have arisen, the English decisions have been accepted as correctly expressing the law of Scotland.[90]

The consequence of this uniformity was predominantly the extension of English rules to Scotland. Smith, for instance, argued that English law had a major impact on the development of constitutional law in Scotland since Union,[91] 'especially in questions which affect the United Kingdom as a whole'.[92]

Although a compulsion towards partial uniformity of public law can be attributed to the Acts of Union, uniformity of this law along English lines cannot be. Why then did both English and Scottish judges, in a desire for uniformity, adopt English rules in relation to Britan's shared institutions?

England was, and indeed remains, a bigger legal jurisdiction to that of Scotland. It seems likely, therefore, that England, as the larger of the two legal systems, on matters of shared interest such as the British Crown and Parliament, would exert the greatest influence on the development of British public law.

Smith has argued that the influence of English law on Scots law has been both direct and indirect.[93] The House of Lords, he argues, where

[89] See A. O'Neill, 'Parliamentary Sovereignty and the Judicial Review of Legislation' in A. McHarg and T. Mullen (eds.), *Public Law in Scotland* (Edinburgh, 2006), 197.
[90] *Macgregor v. Lord Advocate* 1921 SC 847, at 851–852. See also 852–853 per Lord Salvesen.
[91] T. B. Smith, *Studies Critical and Comparative* (Edinburgh, 1962), 129–130.
[92] Ibid., 129.
[93] Ibid., 116–136.

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English peers greatly outnumbered Scottish peers, would have exerted a direct influence over the law of Scotland in those cases brought before it.[94] Indeed, it was not until the nineteenth century that lay peers were prohibited from hearing appeals to the House of Lords,[95] with expertise in Scots law prior to this also lacking.[96] As a result, it is perhaps unsurprising that such a historically English-dominated court would apply English public law on British matters, in turn creating binding precedent for England and Scotland which is English in nature.

By contrast, Smith argues that the use of English precedent in Scottish courts post-Union will have given English law an indirect influence over the law of Scotland also.[97] It is submitted that, in a public law context, this should only have been the case in relation to decisions not originating from the House of Lords; decisions from the House of Lords, as argued above, should be treated as binding in both England and Scotland, although it is conceded that Scottish judges may not have been conscious of this, instead treating such authority as highly persuasive. As Smith argued: 'Since there is a common court of appeal from the civil courts of England and of Scotland to the House of Lords, it is natural enough that, when the English courts have pronounced upon a problem which later arises in Scotland, the English solution will in many cases be listened to with respect'.[98]

However, it is submitted that the adoption of English public law by both English and Scottish judges would have been the natural choice based, at least for a time, on its merits. Unlike Scotland, which is a mixed legal system, England is a purely common law one, which even by 1707 was stable and well-established. English constitutional principles were likewise well-established both politically and legally, including, for instance, the doctrine of parliamentary sovereignty, which also had no clear Scottish alternative.[99] This was in large part due to the fact that it was the English courts rather than the Scottish courts which, before Union, had the opportunity to hear and decide such matters. This was due to the Union of the Crowns in 1603, whereby King James VI of Scotland, in also becoming King James I of England, moved from

[94] Ibid., 122–125. See also MacLean, 'The 1707 Union', 68.
[95] Fraser, *An Outline of Constitutional Law*, 223–224.
[96] Smith, *Studies Critical and Comparative*, 122–123.
[97] Ibid., 125–127.
[98] Ibid., 126.
[99] See C. Kidd, 'Sovereignty and the Scottish Constitution before 1707', *Juridical Review* 3 (2004) 225.

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Edinburgh to London. James, and his successors, remained in England thereafter, and as a result had questions over the scope of the Crown's prerogative powers determined by English rather than by Scottish courts. As Mitchell has noted: 'Differences in history have meant that the general issues of prerogative did not come before the courts in Scotland in the same way and at the same time as they did in England, and the conflicts of opinion were resolved by other means and in other places'.[100] The net result of this, it is submitted, was that English law had answers to constitutional questions which Scots law did not, hence their adoption post-Union by both English and Scottish courts in response to questions concerning the British Crown and Parliament.

However, it must be stressed that the adoption of English constitutionalism as British constitutionalism is neither permanent nor indicative of the demise of Scottish constitutionalism. Any British common law is in effect a shared legal space where its content could, and indeed should, be shaped by the legal traditions of its constituent jurisdictions. There is accordingly nothing preventing the Scottish courts from contributing to the continuing evolution of the law governing Britain's shared institutions. As demonstrated above, Scots public law, so far as it was not inconsistent with any of the terms of the Acts of Union, survived post-Union. Although it will ultimately be up to the UK Supreme Court to make the final determination, there is nothing preventing the Scottish courts from revisiting such law, or indeed from developing new law post-Union.

Furthermore, it should be stressed that the body of British common law advanced here, although dealing with constitutional matters of fundamental importance, is nevertheless limited in scope to the law governing Britain's shared institutions only. Scots public law can therefore develop differently to that of English public law in all other matters, and indeed already has.

Judicial review, for instance, is the most notable area of divergence between England and Scotland in the field of public law. Historically, the test for standing in Scotland had been title and interest rather than sufficient interest as in England; sufficient interest only became the test in Scotland following the 2011 decision of the UK Supreme Court in *Axa General Insurance v. Lord Advocate*,[101] which was subsequently put on a statutory footing in the Courts Reform (Scotland) Act 2014. Although the test under English law and Scots law is now sufficient interest, and

[100] Mitchell, 'The Royal Prerogative in Modern Scots Law', 307.
[101] *Axa General Insurance v. Lord Advocate* [2011] UKSC 46, [2012] 1 AC 868.

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both are focused on interests rather than rights, each are capable of independent development, and thus divergence. In stark contrast to England, Lord Hope's tripartite test in *West v. Secretary of State for Scotland*[102] also means that private bodies, and not just public bodies, can fall under the supervisory jurisdiction of the courts in Scotland. Furthermore, the Scottish courts have also recently developed a new and distinct public law action of declarator.[103]

It is submitted that the reasons for this divergence between English law and Scots law can be clearly attributed to the Acts of Union. As argued above, Scots public law was explicitly preserved post-Union by Article XVIII. Because the courts were also preserved and not unified under Article XIX, they could still develop their own rules, both private and public, post-Union. Consequently, this divergence provides clear evidence of there being a distinct body of Scots public law post-Union, but one which crucially does not extend to Britain's shared institutions, thus also providing further evidence, it is submitted, of a unified body of British public law.

Conclusion

The above analysis has shown that, upon the proper construction of the Acts of Union, public law after 1707 was partially unified under a British common law in relation to the Crown and Parliament, which the House of Lords (now the UK Supreme Court) was empowered to make determinations on for the whole of Britain; public law was otherwise kept separate and distinct in England and Scotland, subject only to the sovereignty of Parliament. In so doing, this chapter has presented a more coherent understanding of the post-Union constitution and the role of both English and Scots public law within it. This in turn provides a clearer framework from which Scots public law may continue to develop independently of English public law, but where it may also contribute to the continuing development of British common law which, although traditionally influenced by English public law, is nevertheless a shared legal space which can be shaped by both legal traditions.

[102] *West v. Secretary of State for Scotland* 1953 SC 396.

[103] See R. B. Taylor, 'Preserving the Rule of Law in Public Law Cases: *Keatings v Advocate General for Scotland and the Lord Advocate*', *Edinburgh Law Review* 25 (2021) 231 and R. B. Taylor, 'Public Law Declarators, the Jurisdiction of the Court, and Scottish Independence: *Keatings v Advocate General*', *Edinburgh Law Review* 25 (2021) 362.

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