

Why public lawyers and political scientists need to talk: the case of Scotland

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For Constitutional Studies
Programme launch 23.01.14

Outline of remarks

- Does theory of UK constitution exist?
 - More among lawyers than pol. scientists
 - Dicey and parliamentary sovereignty (except re Ireland and maybe Scotland)
 - A Scottish blind spot
- Some implications of taking 1707 seriously
 - *MacCormick v. Lord Advocate* 1953 SC 396
- If Scotland leaves, can rUK remain uncodified?

Scotland's senior judge...

*The Treaty [of Union 1707] and associated legislation ... contain some clauses which expressly reserve powers of subsequent modification; and other clauses which either contain no such power, or emphatically exclude subsequent alteration by declaration that the provision shall be fundamental and unalterable in all times coming ... I have never been able to understand how it is possible to reconcile with elementary canons of [statutory] construction, the adoption by the English constitutional theorists of the same attitude to these markedly different types of provision. Cooper LP in *MacCormick v. Lord Advocate* 1954*

Scottish Govt manifesto *Scotland's Future* Nov. 2013

- There will be a Constitutional Convention
 - Good, reflects Cooper / MacCormick / US / Australian ideas of popular sovereignty
- But it will, inter alia
 - *Provide for the continuity of the monarchy in Scotland*
- So the people are to be partly sovereign
 - Is that like being partly a virgin?
 - No clear ratification procedure

A dose of Marxist realism: *the constitution is what happens* (J.A.G. Griffith)

- Demands for popular sovereignty
 - To fill gap left by intellectual collapse of Diceyanism
 - It might be nice if rUK elected its legislature, like Scotland
 - Bishops??!!
 - Col. Rainborough's challenge
- Demands for rights entrenchment
 - ECHR and HRA 1998
 - Effect on judges' behaviour

Thomas Rainborough at Putney, October 1647

The poorest he that is in England hath a life to live as the greatest he, and therefore truly, sir, I think it is clear to every man that is to live under a government ought first by his own consent to put himself under that

- Only rediscovered in 1890s
- Recently retweeted by History of Parliament

But popular sovereignty and rights protection may be incompatible...

- Political pushback against ECHR regime
- Driven by fear of UKIP – well founded in rUK, not in Scotland
- Rights are inherently counter-majoritarian
- Should the UK have an entrenched Bill of Rights?

If Scotland leaves, can rUK remain uncodified?

- One source of Dicey's contradiction ('unrepealable' clauses of Acts of Union) repealed
- But both 'popular sovereigntists' and 'rights protectors' will continue to argue:
 - ps want an elected legislature
 - rp want rUK to stay in the ECHR
 - Many (not all) senior UK judges are rights-protecting