



## The Sovereignty of the People of Scotland

The Parliament of Scotland met on 25 March 1707 to give final approval to the Treaty of Union with England, which came into force on 1 May 1707 under the terms of the two enabling Acts of the Scottish and English parliaments. Article 1 of the Treaty and Acts - which remains to this day the constitutional basis of the UK, united the crowns of the two independent kingdoms of Scotland and England (which since 1603 had been held simultaneously by one and the same monarch in a purely personal union) into a single United Kingdom of Great Britain. Having passed the enabling Act of Union, Scotland's Parliament was "adjourned to 22 April next". Fixing a date for its next meeting was the Scottish Parliament's last decision to date, because we are still awaiting the opening of that session that was adjourned *ad interim*.

Article 3 of the Treaty of Union and its two enabling acts - which, unlike Article 1, is a non-entrenched clause that can be altered at any time - created the new joint Parliament to legislate for the affairs of the new United Kingdom. Like the legendary but in reality non-existent "Union of the Crowns" in 1603, the so-called "Union of Parliaments" in 1707 is pure mythology. What Article 3 did was to set up a totally new legislature. It is certainly not the English Parliament continuing. Just as important is the fact that neither the Scottish nor the English Parliament was formally abolished; there is not a single word in the treaty and the acts to this effect. They both simply stopped meeting after the new Union Parliament at Westminster started legislating for the Union. In modern terms, therefore, there would be no constitutional obstacle to recalling the Scottish Parliament to deal with exclusively Scottish affairs, as distinct from those of the Union. This could be done without one word of alteration to the union agreement - if the will were there!

Opinion polls and other evidence demonstrate that the will to recall the Scottish Parliament clearly exists amongst the Scottish population, but it is conspicuous by its absence amongst leading figures - Scottish and English alike - who wield political power at UK level. The basically unionist and centralist Labour Party, alarmed by the potential disappearance of its power base in Scotland, and in an attempt to forestall this through a sop to the will of the Scottish people, proposes to introduce a measure of devolution after its hoped-for election victory in 1997. In doing so, however, the Labour Party has made it clear that it regards the Westminster Parliament as having unlimited sovereignty over the result of the Party's proposed referendum on the devolution plan, which amounts to a proclamation of the sovereignty of the Westminster Parliament over the Scottish people.

This is an extremely serious situation with wide-ranging implications. If this wholly new principle of the sovereignty of a legislature over the people who elect it is allowed to become established in our country, it could affect the entire European Union and not least those states that are presently applying for membership after emerging from decades of autocratic and undemocratic government. It is therefore necessary to examine this question of sovereignty in some detail:

## **What is Sovereignty?**

In the modern political context a sovereign is *the ultimate resting place of legitimate authority*. Sovereignty means the supreme and controlling power of an absolute and independent master. It is the place where arbitration stops; it is the source of final decisions from which there is no further appeal.

Sovereignty is frequently equated with naked power, but this is untenable in a democratic society. It is true that power may be either exercised directly or delegated by a sovereign authority, but power is all too frequently exercised *without* such legitimisation, or even against the will of the sovereign authority, on the principle of “might is right”.

Such exercise of power is merely a usurpation of the rights of the genuine sovereign authority and it remains illegitimate, null and void, even when it is superficially successful and backed up by the institutions of state. The fact that it may not be possible or expedient in a practical sense to oppose such exercise of power effectively does not legitimise it in the slightest. This is also the case when reasoning fails to have an effect on the usurper, and the people either do not understand the principles involved, are simply too civilised to resort to violence against the illegal regime, or fear disruption of the complex functions of the modern state. Sovereignty remains the one and only source of *legitimate* authority and exercise of power at all levels.

## **Who is the Sovereign?**

In whose hands does this ultimate and unchallengeable authority called sovereignty lie? To this there can be only one answer. The people are the sovereign authority in the state. All governmental authority derives from the people, and to them the rulers are responsible. This is now the established constitutional norm throughout the entire world. It has been formally written into the constitutions of innumerable countries; it is the basis of international law, including the international codes of human rights.

This principle of the sovereignty of the people is a very ancient one in Scottish constitutional law, with roots going back to our emergence as a nation in early mediaeval times. The famous Declaration of Arbroath of the year 1320, one of our major constitutional documents, established the principle that the Community of the Realm of Scotland (which, even in the sense in which it was then understood, can be taken to include all the politically enfranchised members of the population) is sovereign over the head of state and executive (at that time King Robert I) and has the right to depose a ruler who defies the will of the people. That document expressly refers to “our kingdom”, and not “the king’s kingdom”.

The Scottish constitutional writers down through the centuries, for example the internationally famous Professor George Buchanan in the 16th century, have stressed the principle that the rulers are subject to the will of the people, and may be deposed by the people.

### **Who are “The People”?**

Political philosophers have debated this question for centuries. In a modern political context, however, the expression must be taken to include every one of any age and condition who is entitled to citizenship of a particular political unit. It is obvious, however, that many of these people are incapable of exercising the responsibilities of citizenship. Babies, immature young people, the insane, convicted prisoners and others are all citizens, but they are excluded from the process of political decision making. The remaining enfranchised citizens - still a substantial majority of the total population - exercise the sovereign power of the people on behalf of everyone. For political purposes, therefore, the sovereign authority can be defined as *“the people, represented by a qualified and registered electorate”*.

In the modern Scottish context of a pluralist and multi-ethnic society, the Community of Scotland consists of those people who live within and/or were born within the geographical and maritime borders of those land and sea areas internationally recognised as Scotland - i.e. where Scots law applies. The people of Scotland residing within these well-defined borders hold themselves to be a nation, as is their undoubted and inalienable right under international law as defined by the United Nations and other international authorities.

### **Is the Queen not our Sovereign?**

This is a loose and inaccurate use of the word, derived from the English constitutional tradition of autocratic monarchy. A head of state (president, king, queen, prince, etc.) is the servant of the people, not their master. One does not require a degree in logic to appreciate that the Queen and the Westminster Parliament cannot both be sovereign. The 19th-century English constitutional writer Dicey got round this with the nebulous concept of “the Queen in Parliament” as the source of all authority to pass laws (thereby denying the constitutional authority of the people). What this boils down to in reality under present conditions is the dictatorship of a single political party leadership with a minority share of the vote over a managed Parliament, with the Queen, if she is wise, keeping her mouth shut and signing the bills presented to her.

The Scottish kings and queens were never sovereign within their country. As the Declaration of Arbroath makes clear, they were subject to the will of the people, and they were also subject to the law, not above it. The English legal principle that “the king can do no wrong” was never accepted in Scotland. In 1599 King James VI was actually thrown out of the Court of Session for trying to dictate to the judges how they were to decide a case (upon which “the king raged marvellously”, but the Court remained unimpressed).

So there is no question of the Queen (in or out of Parliament) being the sovereign authority in Scotland. One of the functions of a head of state in any country, acting in the name of the people, is to appoint the government - and ensure that all of its actions remain within the limits permitted by the constitution, including respect for the sovereignty of the people in elections and referendums. The Queen is therefore our Head of State acting on our behalf – that, and no more.

## **What about the “sovereignty of Parliament”?**

This notion was more or less coined by the English writer Dicey in the 19th century. At that time direct democracy was not possible, since there was no way the people could arrive at any decision except through their elected representatives - and when Dicey was writing these represented a very restricted electorate compared with the present one (women were excluded, the voting age was much higher, etc.).

Once again, “sovereignty” (ultimate legitimate authority) is the wrong word in relation to the Westminster or any other parliament, but the expression “supremacy” can be used in a political context so long as its restricted meaning is clear. In a practical sense, what it means is that decisions of the Westminster Parliament rank higher than those of the other institutions of state (courts of law, civil service, etc.). This is legitimate in theory, even if it is not true in reality (superiority of international law, overriding power of the Scottish courts in certain circumstances, etc.). There is no way, however, that the concept can be stretched like elastic to cover the supremacy of Parliament - the elected servants of the people - over the people themselves. All constituted power is subordinate and inferior to the power constituting. And when the sovereign people arrive at a decision, then that decision ranks higher than any decision of the Westminster Parliament.

The illogical and indeed lethally dangerous notion of the sovereignty of Parliament over the people could be used to justify virtually any act of dictatorship, even to the extent of abolishing elections and perpetuating the rule of an authoritarian political regime indefinitely. Modern history presents us with a whole range of frightening examples of such a situation. No doubt the UK political leadership would not in practice go to such an extreme (for one thing, they would be flying in the face of European and international law, to say nothing of provoking civil war), but it must be made clear to them from the start that they do not possess even the theoretical right to do so in terms of national law.

The Scottish constitutional writers are in any case unanimously of the opinion that the alleged supremacy of the Westminster Parliament does not apply in Scotland - quite irrespective of the position in England. To quote only the most prominent and representative examples, there is Lord Cooper’s famous dictum in the Court of Session, with the concurrence of his fellow judges, that “the unlimited sovereignty of Parliament is a distinctively English principle which has no counterpart in Scottish constitutional law”. Professor T.B. Smith has pointed out that neither the Scottish Crown nor the Scottish Parliament ever had unrestricted powers before the union with

England, and that therefore they could not transfer to the newly created United Kingdom Parliament any more powers within Scotland than they themselves could legitimately exercise there.

The Westminster Parliament is therefore emphatically *not* politically supreme within Scotland, let alone constitutionally sovereign. It acts under the law of the Scottish constitution – written and unwritten – and exercises authority over the other state institutions subject to the will of its masters – the sovereign Scottish people, who must be obeyed!

### **Are the Scots not simply part of a British people?**

For the purposes of deciding their constitutional future, emphatically not! One does not need to be a lawyer to realise that the identity of the Scottish constitutional, legal and political unit was not extinguished in 1707, as the most superficial knowledge of the Acts of Union makes clear. The entrenched protection for the Scottish courts and legal system contained in the union agreement in itself suffices to demonstrate this. And the Court of Session has established that Scottish constitutional law – written and unwritten – is by no means identical to its English counterpart.

For example, under the terms of the union agreement, the Scottish judges retain the power to declare legislation by the Westminster Parliament to be null and void if it is not in the evident interest of the people of Scotland. Furthermore, according to Lord Stair's *Institutions of the Law of Scotland* – one of the fundamental sources of Scots law – the Scottish courts have the power to “derogate” an act of Parliament if it is found to be in conflict with the fundamental principles of Scots law. The fact that these powers have not been used to date – although the threat to do so has been made on several occasions – does not alter the situation. The powers are there and can be invoked by the Scottish courts at any time.

International law, as defined by the United Nations, the Conference on Security and Co-operation in Europe and others, clearly recognises the right of national entities such as the Scots to determine their internal and external political status “in full freedom” and “without external interference”. The UN General Assembly has declared the self-determination of peoples to be a fundamental and inalienable collective human right. Furthermore, this internationally guaranteed right is expressly possessed by “peoples”, and not by their governments and legislatures. The United Nations has defined such a “people” as a social entity possessing its own characteristics, a lengthy shared history, and an association with a territory. The Scots meet this definition many times over, which under international law entitles them to exercise and enjoy the right of self-determination without interference from London or anywhere else.

Irrespective of the above, it is clear that the constitutional sovereignty of the people, represented by a qualified and registered electorate, implies the sovereignty of any part of that people and electorate in matters that concern that part alone. This must be particularly the case when, as in this instance, the “part” (Scotland) is in fact an integral whole, a distinct legal and constitutional entity in its own right with its status entrenched in the union agreement. It is clear that no referendum on devolution for Scotland alone could be conducted on an all-United Kingdom basis, unless one can

explain how matters fundamentally affecting the indigenous law of Scotland could be decided by an electorate resident under and subject to a totally different legal jurisdiction in what, for legal purposes, is a foreign country.

Therefore, on matters concerning their political and constitutional status, including devolution, independence, etc., the Scots have the inalienable right to make their own autonomous decisions - “without external interference”, including hostility by London-controlled media, grossly unbalanced campaign budgets, manipulation of electoral registers and all the other tricks that were used to distort the 1979 result.

## **How is the will of the people expressed?**

In an age of mass communications there are no excuses for politicians being unaware of the will of the ultimately sovereign people, which is volubly expressed in the media, opinion polls and other research results, as well as demonstrations, etc. To take only some of the many examples over the past one and a half centuries, the National Association for the Vindication of Scottish Rights was formed in 1853, with cross-party support and the affiliation of many local authorities and the Convention of Royal Burghs. A meeting held that year in Glasgow, attended by five thousand people, asked for a separate Scottish Assembly for the direction of those matters that are exclusively Scottish. As early as 1886 the Scottish Home Rule Association was founded, a precursor of the Scottish National Party.

In the early 1930s a whole series of surveys carried out by two popular newspapers revealed a 23 to 1 majority of Scots in favour of recalling the Scottish Parliament. This pattern has never varied right up to the present day. In 1950-51 a National Covenant requesting the setting up of a domestic legislature for Scotland was signed by almost two and a half million Scottish electors – an enormous majority of those entitled to vote. The petition was taken to London by a delegation of prominent Scots, but the government of the day refused to accept the signature sheets, with a complete disregard of standards of common courtesy let alone democratic sense.

Over the past century there have been around 36 formal attempts in the Westminster Parliament to have the Scottish legislature recalled to deal with Scottish affairs. The 20th-century Scottish self-government proposals that actually came to a vote were all supported by the Scottish MPs, over 80 per cent, and often over 90 per cent, of whom voted in favour. Yet all of these proposals foundered on procedural sabotage or by being “democratically” voted down by the huge English majority at Westminster - in defiance of overriding international law.

On 1st March 1979 a national referendum was held in Scotland to allow the constitutionally supreme Scottish people to decide whether the Scotland Act of 1978 was to be implemented. Although this inadequate measure by no means satisfied the aspirations of the Scottish people as regards their right to self-government, it was adopted for implementation by a clear and adequate majority of those voting, in full accordance with every constitutional principle and precedent at national, European and international level. That ultimate and binding decision has yet to be implemented, and remains the only constitutional justification which is necessary for implementing

devolution proposals. Its so-called “repeal” by a subordinate authority is simply political bluff and constitutionally irrelevant nonsense.

## **What are the Scots entitled to do?**

We have the internationally guaranteed right to decide our political and constitutional future ourselves without requiring permission from anyone else. The possible decisions range from retaining the present set-up through devolution to complete constitutional independence. In practice, although the power of final decision on whether to make the change is ours alone, it would be only sensible to negotiate a mutually agreed settlement, especially since we have powerful bargaining tools in our hands, mostly of an economic nature.

If reason fails, however, then there is nothing in any statute that prevents the Scots from implementing their own democratic decision themselves. Nowhere is it laid down that such implementation must be carried out by the London authorities and by no one else. Unilateral action has its difficulties and disadvantages, but in the final analysis it might be the only way forward. What is necessary is the will and the commitment. If the national leadership fails to rise to the occasion, then – as has happened so often throughout Scottish history – others must take the initiative.

## **So where do we go from here?**

The first step is to acknowledge unequivocally the sovereign right of the Scottish people to decide their own political and constitutional future, without interference by anyone in London or elsewhere. This has long since been recognised by the Campaign for a Scottish Parliament, the Constitutional Convention and other parallel organisations. It must now be translated into a widespread public consciousness. The so-called “repeal” of the Scotland Act in 1979 would never have been accepted had the baseless mythology of parliamentary sovereignty not been so widespread. The Scottish people were simply ignorant of their rights. That must not happen again.

The ancient Scottish constitutional principle of the sovereignty of the people is one of the gifts willed to us by our ancestors. It is not merely part and parcel of our inheritance, however, for it is also in complete harmony with the modern worldwide constitutional norm that is expressed in international law and the constitutions of innumerable other countries. The ultimate source of political power in Scotland is the people of Scotland, whose will may not be contradicted or opposed. This must be emphasised time and again on every suitable occasion in the media and elsewhere.

Inalienable rights may not be taken away by any means or by any institution, nor can they be diluted or compromised in any shape or form. It is our responsibility to ensure that this inalienable right of sovereignty is passed on to future generations of Scots as yet unborn. This lays a particular responsibility on our parliamentary representatives (and servants), who have no freedom of action whatever in the matter. The will of the Scottish people being plainly manifest, it is their duty as the servants of the people to

ensure that this will be translated into action with the recall of the Scottish national legislature and the end of the present travesty of democratic government in Scotland.

There is actually no need for another referendum on devolution (as distinct from independence), since the 1979 poll resulted in a clear majority in favour of the implementation of the then proposals for reconstituting the Scottish national legislature, *thereby approving the principle of devolution itself*. That majority, and the subsequent vote in favour by well over two thirds of the Scottish elected representatives, constituted the final legitimisation required by international law.

If, however, an incoming Labour government insists on going ahead with another referendum, then it is imperative that it be held under the supervision of the United Nations, the Council of Europe and/or the Organisation for Security and Cooperation in Europe (OSCE). A refusal to allow this would be tantamount to an announcement of an intention to manipulate the poll. International diplomatic supervision of constitutional referendums is now everyday diplomatic practice, and is the most effective method of eradicating the corruption that characterised the 1979 poll.

Above all, there must be no question this time of passively accepting manipulation of the referendum and its outcome by subordinate constitutional authorities such as Government, Parliament and Head of State. If there is any dragging of feet on drawing up proposals, if the conduct of the referendum campaign and the poll itself is not absolutely beyond reproach, and if prompt and appropriate action is not taken to implement the result, then other and more direct forms of action will require to be taken by the people of Scotland, whose will is paramount in this matter.

The present system of governing Scotland must go, not because any individuals, groups or parties say so, but because it has served its day – well, badly or indifferently according to one's point of view – and is no longer capable of providing good government for Scotland under conditions which are vastly different from those prevailing when it was set up. Breathtakingly rapid developments at global and regional (European) level have now overtaken the archaic United Kingdom structure for the purpose of the efficient government of Scotland within its global environment. And the sovereign people of Scotland have a perfect and inalienable right to adapt their system of government to these new conditions in a form that offers them the greatest advantage under the prevailing circumstances.

The Scotland-UN Committee presents this summary of the situation in the light of its 18 years of experience of presenting Scotland's case for self-determination at international diplomatic level. In doing so we would point out that widespread support for Scotland can confidently be expected from the international community worldwide, but it will not be forthcoming until the Scots themselves invoke their existing sovereign rights and take the initiative on their own behalf.

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