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ARTICLE

The Union and the law

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On the 300th anniversary of the 1707 Union, an argument that its legal basis is often misunderstood and that its reconsideration would be far from simple

by David Walker

After three centuries, the Union of Scotland and England and the creation of the new state of Great Britain, or the United Kingdom of Great Britain, may again give rise to legal argument.

The subject is considerably more complicated than has always been appreciated. From the outset the true legal nature of the Union of 1706-07 has not been properly understood, particularly in England, and there have been consequential mistakes in talking and writing about it, evidenced particularly by the way in which Scottish historians normally refer to the Treaty of Union, and English historians, and most politicians and members of the general public, normally speak of the Act or Acts of Union. Even the Royal Mint commemorative £2 coin of 2007 is advertised as marking the “Act” of Union.

A true treaty

The proper understanding of the legal nature of the Union is that it was an agreement made in 1706-07, not by the parliaments of Scotland and England, but by commissioners appointed by the heads of the executive of the independent states of Scotland and England (both of which offices were then vested in Queen Anne but acting in different capacities). The agreement was stated in 25 articles, signed and sealed by almost all of each set of commissioners, with a copy being presented by each set to Queen Anne and accepted by her with warm thanks, in both her capacities.

That it was a treaty in international law is amply evidenced by the terms of preceding legislation (e.g. Treaty with England Act, APS XI, 295, c 50), by the fact that Queen Anne twice visited the negotiations and enquired for progress with "the Treaty" (D Defoe, History of the Union (1709), Part 2, pp 47, 88), the fact that the Articles themselves (e.g. articles XIV, XV, XVIII, XXII) refer repeatedly to "this Treaty", and that it is so referred to in other related legislation. The word "article" is the proper technical term for a part of a Treaty, whereas "section" is proper for a part of an Act in domestic law. The agreement conformed to all requisites for a treaty in international law (Lord McNair, Law of Treaties (1961), 40; also T B Smith, "The Union of 1707 as Fundamental Law" [1957] Public Law 99, reprinted in his Studies Critical and Comparative, 1; Walker Trs v Lord Advocate 1912 SC (HL) 12). Neither parliament had participated in discussing the terms and conditions of the agreement. It was not given Royal Assent.

The ratifying Acts

The Treaty was then put before the Scottish and English parliaments in succession and ratified, confirmed and approved by each separately by its own Act. The Scottish Act (Union with England Act 1706, APS XI, 406, c 7), bears to be an Act Ratifying and Approving the Treaty of Union of the Two Kingdoms of Scotland and England. It enacted that the parliament "Doth Ratifie Approve and Confirm the [Articles of Union, with some additions and explanations contained in the said Articles]". While ratification was being discussed, both parliaments, at the behest of their respective established churches, passed Acts securing the Presbyterian Church in Scotland and the security of the Church of England, and declared that these Acts should for ever be held and declared to be essential and fundamental parts of the Articles and Union. The English ratifying Act approved the Articles and the Scottish Act without further amendment, and enacted that "the said articles of union so as aforesaid ratified approved and confirmed by Act of Parliament of Scotland and by this present Act… are hereby enacted and ordained to be and continue in all times coming the complete and intire union of the two kingdoms of England and Scotland". This did not however and could not make the English Act the sole constituent of the Union, as the parliament of England had no legislative power in relation to Scotland.

Ratification did not convert the Treaty into an Act or Acts, nor are there words in either Act which incorporated the Treaty or any part thereof into Scots or English domestic law, as is now sometimes done with international conventions. Ratification implies that the Treaty had been made already and expressed that it had been finally accepted and was

beyond alteration.

Perpetual settlement

The documents as at 1 May 1707 were accordingly (1) the Articles contained in the Treaty accepted by Queen Anne, an inter-state agreement within international law; (2) the Acts of the Scottish and English parliaments, each ratifying and approving the Articles with the additions and explanations made in the course of ratification by the Scottish parliament; and (3) the Acts passed during the ratification processes for the protection of their respective churches and in each case declared to be fundamental and essential conditions of the Treaty in all time coming and to be repeated and in fact incorporated in the ratifying Acts 1. The terms and conditions were stated in the 25 articles with the additions and explanations. The tenor of the Treaty was included in both ratifying Acts, but neither of them professed to incorporate the text in domestic law.

The Treaty was entered into without limitation of time and some articles express quite plainly that they were intended to be perpetual. Thus the Union (article I) was to be effective on 1 May 1707 “and forever after”. Article II provided that the monarchy was to be Protestant and stated that papists and persons marrying papists were to be “excluded from and for ever incapable to inherit” the Imperial Crown of Great Britain. (Any proposal to alter this article would raise the problem of its consistency with other legislation settling the constitution of the Church of England, notably the Act of Settlement 1700 (c 2), ss 2, 3.) Article XIX laid down that the Court of Session “remain in all time coming in Scotland”, and so too the Court of Justiciary and some other courts were to remain in all time coming.

Provision for amendment

Some of the articles made various provisions for their subsequent amendment in the light of changed circumstances. Article I empowered the Queen to appoint the new ensigns armorial of the United Kingdom and a new Great Seal of Scotland. Article XVIII provided that the laws, other than concerning the regulation of trade, customs and some excises, remain in the same force in Scotland, except such as were contrary to or inconsistent with the Treaty, but alterable by the Parliament of Great Britain “with this difference betwixt the Laws concerning publick Right, Policy and Civil Government, and those which concern private Right: That the Laws which concern publick 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".

This limited the legislative power of the united parliament, but raised many problems: who was to decide what was "publick Right" and what was "private Right"; by what criteria; what was "evident utility"; and by what procedure? This provision seems to have been intended to protect Scots from having English law imposed on them, but has been rarely invoked and, so far as known, has never been given effect. (In Gibson v Lord Advocate 1975 SC 136, 144 Lord Keith observed that "evident utility" was not a justiciable matter.)

Article XIX authorised the united parliament of Great Britain to make new regulations for the better administration of justice by the Court of Session, Court of Justiciary and all other courts then in being in Scotland. Article XXV laid down that all laws and statutes in either kingdom so far as they were contrary to or inconsistent with the terms of the Articles or any of them, were from and after the Union to cease and become void and be so declared by the respective parliaments of the kingdoms. No action seems to have been taken by either parliament under this power.

But some articles include words which expressly or by clear implication exclude their subsequent amendment or repeal. This includes all articles containing words such as "forever after", "in all time coming". The Protestant Religion and Presbyterian Church Act 1706, incorporated in the Treaty by the ratifying Acts, excludes its amendment or repeal. It must be accepted that the two sets of commissioners who negotiated the Treaty, and the two parliaments which discussed and ratified the Treaty, intended such words to have effect.

Legislative errors

It must be conceded that since 1707 Parliament has sometimes purported to "repeal" articles or parts of them. It does not follow that Parliament was entitled to do so (K W B Middleton, "New Thoughts on the Union" (1954) 66 JR 37, 43). Parliament commonly thought that the Articles were, or were part of, an English Act. Scottish representation in both Houses of the Westminster Parliament has always been heavily outnumbered, and for long few were concerned with Scottish rights and wrongs.

An obvious mistake in legislating is not a good reason for following the practice. Conversely article XX, continuing the heritable jurisdictions of

superiors of land, was superseded by the Heritable Jurisdictions (Scotland) Act 1746, passed in the anti-Scottish frenzy provoked by the Jacobite rebellion of 1745-46, but does not seem to have been expressly repealed.

The most serious infringement of the principle of protection of a provision introduced in the Treaty was the repeal by the Universities (Scotland) Act 1853 (c 89) of the provision in the Protestant Religion and Presbyterian Church Act 1706, incorporated on ratifying the Treaty as a fundamental and essential condition, that all professors in the (then four) Scottish universities should subscribe the Confession of Faith. Repeal or at least disregard of that provision had probably become reasonable, or at least desirable, as enforcement could have excluded some persons suitable for appointment. It is not clear whether this was done by Parliament deliberately in the knowledge of wrongdoing, or in the hope that nobody would cause an uproar, or by simple ignorance.

Treaties and domestic law

It cannot, however, be conceded that because Parliament has purported to do something, it had legal power to do so. It is submitted that Parliament did not have legal power to amend or repeal a provision of an international treaty, unless the treaty gives power to do so. It can repeal parts of its own legislation or subordinate legislation authorised by it. Thus it could repeal the Human Rights Act 1998, but not the Convention on Human Rights. There appears to be neither authority nor precedent for Parliament interfering with an international treaty, particularly where under the treaty the consenting states had ceased to be independent states and had merged their personalities in a new state by an incorporating union.

The idea that any provision of Scottish or English legislation cannot be entrenched or protected against amendment or repeal has sometimes been asserted as nullifying provisions such as that of the Protestant Religion Act declaring it fundamental and essential. But that provision was incorporated in an international treaty which is not amendable or repealable by a mere domestic statute.

In his judgment in McCormick v Lord Advocate 1953 SC 396 Lord President Cooper, admittedly obiter, observed that the principle of the unlimited sovereignty of the Westminster Parliament was a distinctively English principle which had no counterpart in Scottish constitutional law. In particular the Lord Advocate had conceded in that case that the

Parliament of Great Britain could not repeal or alter fundamental and essential conditions of the Treaty and associated legislation: these included the union of the two kingdoms on 1 May 1707 “and forever after” (article I), the succession to the monarchy in the Protestant line (article II), the single parliament (article III), freedom of trade for all subjects of the United Kingdom (article IV), the preservation of Scots law, though subject to amendment (article XVIII), the continuance of the Scottish courts, though subject to amendment (article XIX), and the continuance of the Church of Scotland (by Act incorporated in the Treaty).

The Scotland Act 1998 provided (sched 4) that an Act of the new Scottish Parliament could not modify, or confer power by subordinate instrument to modify, inter alia, articles 4 or 6 of the (English) Union with Scotland Act 1706 (c 11), and of the (Scottish) Union with England Act 1707 (c 7), so far as they related to freedom of trade. That does not imply power to modify any other articles of the Treaty. Schedule 5, part I reserved from the legislative power conferred on the new Scottish Parliament, inter alia, “the Union of the Kingdoms of Scotland and England” and a wide range of other topics.

Time for thought

The fundamental cause of the continued misunderstandings since 1707 has been the continuing failure of the Westminster Parliament, and its advisers and draftsmen, to appreciate that the Union was made by a treaty within international law and merely ratified by the parliaments of the two uniting states under their domestic laws, so as to put themselves out of existence and create a new sovereign state in lieu. The Westminster Parliament could possibly repeal parts of the two ratifying Acts, but that would leave the Treaty standing because it is part of international law affecting Britain and the whole world, and not merely part of domestic law.

It is clear that any political development which requires reconsideration of the Treaty and relative Acts of 1706-07 will require careful and anxious thought to avoid repeating or compounding mistakes of the past. It is not at all a simple matter.

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