

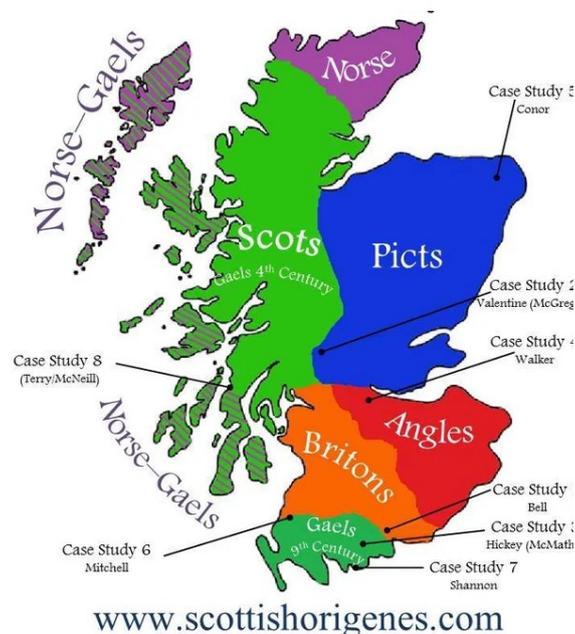
A Real and Ancient Constitution

(A brief timeline of Scotland's constitutional development)

Sara Salyers 20221.

Celtic Political System Pre-history - 12th Century

Despite the Norse and Angle settlements, (in the north and south east of Scotland and the western fringes), the predominant political and legal system across the British islands until the arrival of the Romans and in Scotland until the introduction of feudalism in the 12th century, was Celtic. The Life of Columba describes the court of the Pictish king, Bruce as organised in much the same way as the courts of Irish/Scottish kingdoms - a Celtic system. 'Britons' were also Celts, their language being P-Celtic rather than Q-Celtic¹. The 'Gaels' and the Scots were also Celtic peoples² And the 'clan' or kin system operated among all those peoples.



Horizontal rather than vertical, this was a system of reciprocal rights and obligations based on extended kinship, including kinship to the land. It came to be known as 'the Duchthas'. Although David I (1124–53) introduced feudalism, 'The *Laws of the Brets and Scots*', probably compiled in his reign, *underlines the continuing importance of the kin group and its system of reciprocal rights and obligations*. This remained deeply rooted in both practice and worldview until long after a recognisable constitution had developed. The practice of Galanas, (a compensatory payment to the whole kinship of a murdered person), was explained to the emissaries of Elizabeth I in 1587, when she offered James VI recompense for the execution of his mother, Mary Stewart.

¹ Thus the P-Celtic word for 'head' is pen (as in Pentland hills or Forth) while the Q-Celtic word is 'ceann' (ken) as in Kenmore (big headland) Kinlochleven (head of Loch Leven) and Kinross (big wood).

² Celtic influence on the political and constitutional development of the Scottish nation must have been profound. At present, however, you would imagine that the only two influences on our political and legal history have been the feudal system and Canon law.

It was the ancient 'Duthchas' that gave Scotland these constitutional principles: **that power is vested in the community of the nation, in the people and only delegated or loaned to the monarch or government, exists in service to the common good and may be revoked at the will of that community. We can call these principles, the doctrine of popular sovereignty and the primacy of the common good.**

A related principle is the equality of all by which a monarch is only 'the first among equals'. These have been explicitly expressed over the past 700 years.

2. 1286 Guardians of the Realm - Popular Sovereignty

A non-parliamentary body representing neither monarch nor the monarch's government but the 'community of the realm' can be traced from the time of the Guardians of the Realm in 1286, through the period of the General Council, (from the late 1300's), to its final expression as the Convention of the Estates, (meaning 'assembly of the communities') in the late 1400's.

The parliament of 'Estates, later 'Three Estates' developed from the king's court, advisers and council and separately from the Guardians, the General Council and Convention of the Estates.

The General Council, like the Guardians of the Realm could govern in the absence of a legitimate monarch as it did in the minority of four Scottish kings. It was therefore a continuation of the idea in practice of a body representing the community of the realm from which the power of government in Scotland stemmed. The Convention of the Estates similarly might approve or withhold approval for taxes, instruct parliament, pass legislation (thereafter ratified by parliament) or conclude international treaty or, as in 1689, depose a government.

3. 1200's Court of the Four Burgh's

This evolved into a "parliament of the four burghs" by c.1450 and into a wider "Convention" of royal burgh representatives from 1487. By the middle of the 16th century (1552),^[30] the Convention met regularly *as a separate assembly to decide on a common policy for adoption by Parliament - Popular Sovereignty/Common Good*

4. Declaration of the Clergy of 1310 - Popular Sovereignty:

The people, therefore, and commons of the foresaid Kingdom of Scotland, ... agreed upon the said Lord Robert, the King who now is, in whom the rights of his father and grandfather to the foresaid kingdom, *in the judgement of the people*, still exist and flourish entire; and *with the concurrence and consent of the said people* he was chosen to be King, that he might reform the deformities of the kingdom, correct what required correction, and direct what needed direction; *and having been by their authority set over the kingdom*, he was solemnly made King of Scots...

5. 1312 Scotland's early parliament 'the Estates', began to represent the full community of the realm. In an acknowledgment of the equality of the 'estates',

Bruce summoned a small number of burgesses from each royal burgh to attend sessions in 1312 and 1326, after which it became normal practice. This is the earliest representation of the 'commons' in a UK parliament. England followed suit in 1327 when burgesses became a permanent feature in the English parliament - Popular Sovereignty

6. 1319 The Charter of Stocket - Common Good:

The first Common Good fund was established - without parallel in England - by which the Burgh of Aberdeen, and later all the burghs of Scotland, were made independent and enabled to provide for the 'common good' of the residents. This benefit was extended to all Scottish burghs in the 1500's. The Common Good fund remains in place today across the councils of Scotland. The famous grammar schools which flourished in every burgh of Scotland and where the sons of any freeman might learn Greek, Latin, mathematics, philosophy, theology and more were enabled by this fund.

Robert, by the grace of God King of Scots, to all good men of his whole land, greeting. Know ye that, with the advice and approval of the good men of our kingdom, we have granted and set to feufarm, and by our present charter confirmed to our burgesses and community of our burgh of Aberdeen, our foresaid burgh of Aberdeen and our forest of the Stocket with the pertinents; to be held and had by the foresaid burgesses and community, their heirs and successors, for ever ... We have likewise granted to the same our burgh, the burgesses and community thereof, their heirs and successors... our infeftment remaining in full force strictly and forever.

7. Declaration of Arbroath 1320 - Popular Sovereignty:

Him, too, (King Robert) divine providence, the succession to his right *according to our laws and customs which we shall maintain to the death, and the due consent and assent of us all* have made our prince and king. To him, as to the man by whom salvation has been wrought unto our people, we are bound both by his right and by his merits that our freedom may be still maintained, and by him, come what may, we mean to stand. *Yet if he should give up what he has begun, seeking to make us or our kingdom subject to the King of England or the English, we should exert ourselves at once to drive him out as our enemy and a subverter of his own right and ours, and make some other man who was well able to defend us our King*

8. 1450: Equality of Justice Regardless of Station - Laws protecting Rights and Liberties/Primacy of the Common Good (see Claim of Right Act 1689):

Also, it is ordained that general peace be proclaimed and kept throughout the realm, that all men may travel surely and securely in merchandise and in other ways in all places through the land, so that no man needs to have assurance from another, but the king's peace be sure to all men. And whoever offends therein is to be punished by the king and his officers. And that the king make such officers that can and may well punish such trespass. And also, if any person dreads another, that he go to the sheriff or to the officers that it pertains to and make known or swear that he dreads him, and they shall take a pledge of peace after the act made thereupon before. *And that just men be made justices that know and minister justice evenly, to the great as well as to lesser [people]. And likewise of other officers. And if they are negligent in the ministration of their office, that they be punished by the king.* And that the justice pass twice through the country in the year, according to the old laws.

9. Security of Tenure 1450 - Laws protecting Rights and Liberties/Primacy of Common Good:

Item, it is ordained and decreed that for the security and favour of the poor people that labour the ground, that they and all others that have taken or shall take lands in time to come from lords, and have terms thereof, that, suppose the lords sell or alienate those lands, the takers shall remain within their 'tacks' until the issue of their terms, regardless of whose hands those lands come to, for the same mail as they took them previously.

10. 1450 Prevention of famine, hunger and exploitation of food scarcity - Primacy of Common Good:

Item, it is ordained for the avoidance of dearth in the land that the sheriff, bailies and officers both in burghs and in the land shall always take inquiry at each court that they hold [to find] which persons within their bounds buy any vittles and hold them until a dearth. And if any such [persons] are found, that the sheriffs officers make it known at each market cross to [and] to the king which persons that they are, and they be reputed as usurers. And that they be reputed, punished and treated as usurers should be. And that the vittles that they have be escheat to the king.

Item, And also that neither burgess nor any other person that buys any corn or vittles [on order] to sell [them] again hold vittles within or outwith a burgh greater than they need to sustain them and their men until new corn, under the pain of escheat of the vittles to the king's use, but rather that vittles be put to the markets and sold according to the [market] price. And also that the king's lieges in all places throughout the realm have power to buy and sell vittles at their liking, both on the north half and south half of the Forth, each one to others without any hindrance or impediment. And that no man hold old stacks in his yard longer than Yule, under the pain of escheat thereof to the king.

9. Rebellion Act 1450 - lawful rebellion under parliamentary authority - right to rebellion, Popular Sovereignty:

Item, it is ordained that if any man, as God forbid, commits or does treason against the king's person or his majesty, or rises in fear of war against him, or lays hands on his person violently... or that assails castles or places where the king's person shall happen to be, *without the consent of the three estates*, [he] shall be punished as a traitor.

10. 1491 Common Good (fund) Act (repealed by Westminster Statute Law Revision (Scotland) Act 1906.) - Primacy of Common Good:

Item it is statut and ordinit that the commoune gud of all our souerane lordis burrowis within the realme be obseruit and kept to the commoune gude of the toune and to be spendit in commoune And necessare thingis of the burght be the avise of the consale of the toune for the tyme and dekkynniss of craftis quhare thai ar .

11. 1567 Burgh Rights Act - Primacy of Common Good

...this act, ratifies and approves all acts and constitutions of parliament made by whatsoever our sovereign lord's predecessors of before in favour of the burghs and burgesses of this realm and inhabitants of the same, with all privileges, freedoms, immunities and liberties granted and given to them, and every one of them, in any time past; and decrees and declares the same to have full strength, force and effect in all times hereafter, so that the same may be put to full and due execution in all points, and to stand as a perpetual law to them and their successors.

12. 1579 George Buchanan (tutor to Mary Stewart and her son James VI and I) 'De Jure Regni apud Scotos' - Popular Sovereignty:

Were all to acknowledge the justice of killing tyrants, it would open a wide inlet for the diffusion of light upon the subject. But some men there are, and those of no contemptible authority, who, though they subject legal sovereigns to penal laws, contend for the sacredness of tyrants; and, though their decision is certainly in my opinion absurd, yet they

are ready to fight for their government, however extravagant and intolerable, as for their own altars and hearths.....

B.—Now, I imagine that the intention of the ancients in creating a king was, according to what we are told of bees in their hives, spontaneously to bestow the sovereignty on him who was most distinguished among his countrymen for singular merit, and who seemed to surpass all his fellows in wisdom and equity.

M.—That is probably the fact.

B.—But what must be done, if no such person can be found in the community?

M.—By the law of nature mentioned before, an equal has neither the power nor right of assuming authority over his equals; for I think it but justice that among persons in other respect equal, the returns of command and obedience should also be equal.

B.—But, if the people, from a dislike to an ambitious canvass every year, should choose to elect as king an individual not possessed indeed of every regal virtue, but still eminent for nobility, for wealth or military glory, might not he, with the greatest justice, be deemed a king?

M.—Undoubtedly; for the people have a right of investing whom they please with the sovereign power.

13. Salvo in practice from 1592 and Act of Salvo 1663 - Popular Sovereignty

After the Act of Union was passed on the 16th of January 1707 there was one further item of business, as there was at the end of every session of the Scottish parliament and that was the Act of Salvo (*salve jure cujuslibet* - let whosoever sue the Crown). This was a gesture respectful of the Scottish constitutional arrangement whereby the People are sovereign and every subject of the kingdom must be respected both as an integral and individual unit of sovereignty... Every subject was thus left with the means of escape, the private right to contract out if they felt they had been wronged... The English parliament, in 1689 having reduced its subjects to citizens behoven to the sovereign court of Westminster gave no such opportunities for redress and still does not, but the parliament in England cannot claim now to have inherited powers over the subjects of Scotland that the Scottish Parliament did not have. (Attributed to Willie MacRae)

12 . 1643 Convention of the Estates draws up the arms of the Treaty with the English Parliamentary forces known as 'The Solemn League and Covenant', later ratified by the Scottish Parliament (Three Estates).

Claim of Right Act 1689 Popular Sovereignty, Constitutional Rights and Primacy of the Common Good:

The Claim of Right Act, like all constitutional documents, has to be read in two ways. First is the action or effect, the reason for which it was passed. Second is the set of principles which legally justified its actions. It was passed in order to depose King James VII and II, to uphold the constitutional rights and principles of Scotland and to impose Presbyterianism on Scottish life. (With James, the parliament was also 'deposed', because the passage of laws and statutes is accomplished by the 'crown in parliament' so that without a legitimate monarch there could be no legitimate parliament.) It based all these actions on the existence of a "fundamental constitution" in Scotland which protected certain rights and liberties of the people and limited the power of the monarchy.

The religious provisions included in the Claim are based on the constitutional right of the people to determine their own religious laws and liberties and do not detract in any way from the constitutional grounds on which these are based.

The passing of this Act by the Convention of the Estates, “a free and full expression of the nation” and *not* the parliament, means that the Claim of Right establishes: a. the continuing authority of a body representative of the community of the realm and b. the transferable sovereignty of the people to that (partially elected) body. This Convention should, therefore, be understood as the expression of popular sovereignty in a body representing the lenders of power, the people, in its capacity as the final authority over the borrowers of power, the ruling government.

The Claim of Right thus established, incontrovertibly, that the power loaned to a ruling government can be withdrawn by the people should that government violate its prescribed limits and that government declared ‘forfeit’, without the involvement of any parliament .

The Claim of Right Act explicitly enacts and establishes:

- a ‘fundamental constitution’ in Scotland by which the power of government is legally limited,
- the final authority of the people of the nation to grant or remove power from the ruling government
- the protection under the constitution of civil rights and liberties
- and the debarment of the government from any right to alter or rescind these or to claim an ‘absolute’ sovereignty over the laws and rights of the people on pain of forfeiture.

13. Constitutional Application of Claim of Right 1699 - Popular Sovereignty, Scottish Constitution:

Used in 1699 to prevent William breaking his contract and trying to limit the right to petition in Scotland. The Privy Council refused to sign the king’s ‘act’, parliament reminded him of the oath he had taken to uphold the Claim of Right and 21,000 people signed a petition in support of the Company of Scotland. It was thus well understood as constitutional

1703 High Treason and Ratification of Convention of the Estates: Act ratifying the turning the meeting of the estates in the year 1689 into a parliament - Popular Sovereignty, Scottish Constitution:

William’s attempts to have the CoR rewritten were directed through the ‘Court faction’ which began arguing from 1699 onwards that: a. The Convention of the Estates wasn’t a parliament so the CoR didn’t really count as binding and b. the Convention of the Estates *was* a parliament and so parliament could just rewrite it. A year and a half after William’s death, the parliament of Scotland put a period on the end of that sentence by passing an act which ratified the standing of the Convention of the Estates as a parliament in its own right and made it high treason to so much as suggest attempting to alter the Claim of Right. Here is CoR as a constitution and *not* as religious provision.

“Our sovereign lady, with advice and consent of the estates of parliament, ratifies, approves and perpetually confirms the first act of King William and Queen Mary’s parliament, dated 5 June 1689, entitled act declaring the meeting of the estates to be a parliament, and of new enacts and declares that the three estates then met together the said 5 June 1689, consisting of noblemen, barons and burghs, were a lawful and free parliament, and it is declared that it shall be high treason for any person to disown, quarrel or impugn the dignity and authority of the said parliament. And further, the queen’s majesty, with consent foresaid, statutes and declares that it shall be high treason in any of the subjects of this kingdom to quarrel, impugn or endeavour by writing, malicious and advised speaking, or other open act or deed, to alter or innovate the Claim of Right or any article thereof.