SUGGESTED TITLE: "Subsidiarity in the nationality law of the United Kingdom"

INTRODUCTION

1. I would like to thank the Constitution Committee for the opportunity to contribute to their inquiry into the Union and devolution.

2. The scope of this inquiry is broad, and proportionately complex: firstly, to identify the principles underlying the Union between the constituent nations and sub-nations of the United Kingdom, and second, from these to derive consistent principles and practical measures so that the Union, and its central and devolved governance, might be not merely preserved but systemically maintained and strengthened.

3. The focus of this submission is on subsidiarity in the nationality and immigration law of the United Kingdom, including the development of sub-national status or regional citizenship among several of the constituent polities, its place in the constitutional system, and the likely consequences of devolution.

4. I have previously submitted written evidence on this subject and related matters to the Scottish Affairs Committee, the Scottish Parliament's Devolution (Further Powers) Committee, and the Smith Commission, with particular emphasis on the Acts of Union of 1706-1707 and other statute and case law, and the place of the 'reserved powers' of immigration and nationality in both the Scottish settlement and the wider context of constitutional (d)evolution. The first and second submissions appear at the respective Committee websites; other sources in addition to these will be indicated in the course of my argument, but I will here acknowledge a particular debt to several online resources, including the BAILII and AUSTLII websites, the United Kingdom Nationality Instructions, and the "Records of the Parliaments of Scotland to 1707" website.

5. I shall begin by considering how the United Kingdom is to be defined in constitutional or juridical terms, in the current context, and some of the consequences for the constitutional basis of its nationality law; I shall then discuss the place of subsidiarity or sub-national status, especially Scottish nationality law, within the tradition of British citizenship, and then conclude with several observations as to the possible inter-action between sub-nationality and the devolutionary process.

6. I write, not from an academic or legal, or, for that matter, a political perspective, but as a private individual with an interest in the devolution process and its outcome. No opinion is expressed here as to whether the present Union can or should be preserved; but it can be said that, even in the event of the independence or near-independent autonomy of Scotland or Northern Ireland, given the degree of inter-connection or of integration with England, the respective governments would need to reach agreements on a wide range of issues, amounting almost to a new Union.
DEFINING THE UNITED KINGDOM

7. A conventional definition, in territorial, or constitutional and juridical terms, of the United Kingdom would usually include the nations of England and Wales, Scotland, and Northern Ireland. Such a definition may (like the current Immigration Bill) go further and include the crown dependencies, that is, the Isle of Man and the Channel Islands; these are not, strictly speaking, an integral part constitutionally of the United Kingdom, but sub-national polities affiliated to it through a common head of state and, to some extent, common government (albeit mediated through orders in council) and with a measure of parity with the United Kingdom. This inclusion appears reasonable enough, given historical and geographical considerations, the community of governance and legal tradition, and, with qualifications to be explored, a common citizenship. "The Overseas Territories", to quote a 2008 Foreign Affairs Committee report, "are not constitutionally part of the United Kingdom"; but, given the criteria applied above to the dependencies, the inclusion appears warranted, if the potential consequences of devolution are to be considered, as sub-nations of the United Kingdom, of some of the overseas territories, in particular Gibraltar, Bermuda and the Caribbean islands, and the Falkland Islands and Saint Helena, the inhabitants of which since the British Overseas Territories Act 2002 have largely been British citizens.

8. In defining the United Kingdom reference could also be made to, for example: the holders of British Overseas and other 'residual' categories of British nationality, given the Goldsmith Report; the Republic of Ireland, on account of Northern Ireland; the 'right to reside' in the United Kingdom derived from Irish citizenship, and also held by some citizens of other member states of the European Economic Area and Switzerland and their relations, as well as European citizenship itself; and the Commonwealth, on account of 'Commonwealth citizenship', as originally envisaged, and the shared legal tradition and current legal influence. I shall make further reference to several of these aspects.

9. It is to be noted that, for each nation or sub-nation or territory, the basis of the Union is a different constitutional document, or a range of constitutional documents and conventions specific to each polity, in some cases of very long standing.

10. In the case of Scotland and England (including Wales), the basis of their union could be regarded as commencing with the 1603 Union of the Crowns and the constitutional parity between England and Scotland, the Scottish Claim of Right 1689 (recent Church of Scotland written evidence to the Devolution Committee relates to both this and subsidiarity), the English and Scottish Acts of Union of 1706-1707, and concluding with the Scotland Act 1998, the current Scotland Bill, and the proposed Full Fiscal Autonomy Commission. For Northern Ireland, there is the other Act of Union of 1800, the Government of Ireland Act 1920, and subsequent Constitution and Northern Ireland Acts. For the dependencies and the overseas territories there is a range of separate constitutional ordinances "set out in Orders in Council". In some cases, such as the British Indian Ocean Territory, or Gibraltar, these are still based ultimately on conquest or cession, as noted in Bancroft v Secretary of State for Foreign and Commonwealth Affairs, [2008] UKHL 61 (22 October 2008), paragraph 31 and following; compare also, for example, Molloy, de jure maritimo et navali, 1682, page 376, and Davis v Lynch, Irish Reports
1869-1870, 570, on the historical distinction between the status of Ireland, as a dependency of, and Scotland, as equal to, England, and the legislative consequences for the application of English law, including nationality law.

11. In the case of the European Union, there is a range of treaties and agreements comparable to those listed above; with regard to the Commonwealth, and the process (to which the term 'devolution' could be reasonably applied) by which the United Kingdom and certain affiliated external territories were finally distinguished from the former dominions and other territories, the relevant constitutional instruments include the Statute of Westminster 1931 and the related post-war arrangements which envisaged an equal partnership between the constituent nations, and the relinquishing Canada, Australia and New Zealand Acts in the 1980s. Some authorities seem to have understood the dominions and colonies to have been integral parts of the United Kingdom (their citizens are still regarded as not being aliens in United Kingdom); such is the view put forward in White v Busby [1859] NZLostC 69, where New Zealand, by virtue of the cession effected by the Treaty of Waitangi in 1840, became 'a portion of the realm, as formerly happened in the case of the northern counties of England, of Wales, of Berwick on Tweed, and of Calais'; and Scotland is described as being as much a part of the United Kingdom 'as Middlesex'.

SUB-NATIONAL STATUS

12. The variegated basis of the Union in the United Kingdom is reflected in its nationality and immigration law, above all in its tendency to sub-nationality or regional citizenship, separate immigration rules, and the local "right of abode" or "belongership" of the overseas territories. Belongership is conveniently defined in the 2008 Foreign Affairs Committee report already cited, as "a status which indicates freedom from any immigration restriction and also confers rights usually associated with citizenship including the right to vote".

13. The constitutional basis for the citizenship of the United Kingdom has been held to lie in the Act or rather Acts of Union between Scotland and England, in particular the reference in Article IV to the "subjects of the United Kingdom of Great Britain". Some authorities have gone further and advanced the claim that there was neither English nor Scottish nationality law before 1707; this position, however, is contradicted by the Act of Union itself, given its references to the "subjects of either kingdom", and the existence and formative influence of at least English nationality law in the development of British citizenship is acknowledged in the current United Kingdom Nationality Instructions; a more complex understanding, to be discussed below in connection with Scottish nationality law and the interpretation of Articles IV and XV of the Act of Union, has been held by the United Kingdom government in legislation and litigation since 1707.

14. Both the crown dependencies and the overseas territories have each their own local status and immigration systems; although, as might be expected, the Islander status associated with each of the dependencies at present merely distinguishes between those British citizens from the Isle of Man and the Channel Islands who have employment and establishment rights in the European Union, and those who do not, and the Immigration Rules of the Isle of Man are very
similar to those of the United Kingdom. The basis of the sub-nationality or regional citizenship of each of the overseas territories, namely the "right of abode" or "belongership", are the separate constitutional ordinances, for the most part recent, including, for example, the Falkland Islands Constitution 2009, section 22(5), whence "Falkland Islands Status"; the provisions of the Gibraltarian Status Act 1962 appear to be the most elaborate.

15. As a general observation, diversity appears to be inherent in the current citizenship legislation of the United Kingdom, given the several types of British citizenship, quite apart from the local rights of abode and other forms of regional status; and full British citizenship is not only defined by the 1981 Act but by subsequent legislation in connection with Hong Kong and other former and current territories, and by parts of the British Nationality Act of 1948 and the Immigration Act 1971. There are similar situations with regard to the nationality or citizenship, including sub-nationality and regional citizenship, legislation of other Commonwealth countries, of which perhaps the nearest parallel to the United Kingdom's course of development and hence best example is Australia. For mainland Australia, in a single long lifetime, there has been an evolution from the common 'imperial' British subject status, often acquired under the laws of individual colonies and subsequently states of the Commonwealth of Australia after Federation in 1901, combined with "Australian domicile" or "right of abode"; then the system under the Statute of Westminster and the Australian Citizenship Act 1948, which conferred both Australian and Commonwealth citizenship; followed by the subsequent decline in the importance of the Commonwealth citizenship, most notably with regard to the present alienage of British subjects and Irish citizens as a result of the High Court's interpretation of constitutional evolution, especially after the Australia Act 1986. With regard to the former external or acquired territories, it is perhaps sufficient merely to refer to the Australian citizenship, with or without the right of abode in mainland Australia, attached to the territory of Papua, and the Australian Protected Person status attached to the Trust Territories of New Guinea and Nauru, and the introduction of the Special Circumstance Visa to resolve the status of certain persons resident in Australia after the independence of Papua New Guinea, together with McDermott's essay, "Australian Citizenship and the Independence of Papua New Guinea", [2009] UNSW LawJl 50, and litigation, including the Walsh case, [2002] FCAFC 205, and Re MIMA; ex parte Ame, [2005] HCA 36. Since 1979 the 'devolved administration' of Norfolk Island has had its own immigration law, under which permanent residence is conferred, as it is in New Zealand's Cook Islands, another "devolved administration", in much the same way as "belongership" is conferred in each of the British overseas territories, or citizenship is elsewhere. It may be added that Commonwealth countries have recognised persons as British subjects who had no claim to any form of British nationality under the British Nationality Act 1948 and subsequent legislation, as will appear from, for example, the Australian Citizenship Instructions on the 1949-1987 transitional provisions; indeed, New Zealand citizenship legislation continues to recognise the British subject status of New Zealand and other Commonwealth citizens.

16. Reference could also be made to the concurrent immigration powers held by the federal and provincial governments of Canada under section 95 of the 1867 Constitution Act. Apart from the "French citizenship which appears formerly to have been associated with Quebec, and
the proposed Quebec Identity Act 2007 (Mme Marois' Bill 195) defining provincial or Quebec citizenship, there is the Quebec Residence status, used to determine individual eligibility for tertiary education support.

17. Regional citizenship is not unknown in the European Union: there is recognition, of a kind, in the Spanish Constitution, section 2, and an assertion in the Catalan Statute, article 7; France has similarly recognised a New Caledonian citizenship; Bavaria has issued its own 'Blue Card'; as pointed out in my unpublished submission to the Smith Commission, Denmark's separate immigration systems for Greenland and the Faeroe Islands; and lastly, Finland and the Aland Islands' 'right of domicile'. Conversely, it is possible European citizenship, which today stands in the same relation to British citizenship as Commonwealth citizenship did in 1949, may evolve beyond its initial definition in the Maastricht treaty of 1993 and become independent of national citizenship law, either by decision of a British or a European court; see further Pham v Secretary of State for the Home Department, [2015] UKSC 19 (25 March 2015), [2015] 1 WLR 1591.

SCOTTISH NATIONALITY LAW

18. In other submissions I have examined at length the evidence for the existence of Scottish nationality law at the time when the Act of Union came into effect; it is therefore appropriate here simply to state that Scottish subject status appears then to have been acquired either (under common law) by birth in Scotland itself, or by birth or residence in Nova Scotia or other external territories designated by charter or legislation; by birth outside Scottish and English territory to a father born in Scotland; possibly by marriage, by natural or moral law; by compliance with the last clause of the Bank of Scotland charter, or possibly under the reciprocal legislation with France; or by individual Acts of naturalisation or denisation. I note that under the Nova Scotia charter of 1621 (the first of several) those who settled in or were born there were not only Scottish, but English subjects, and subjects of all other territories under the Crown; with regard to other Scottish colonies, the Africa and Indies Act of 1695 seems to provide only for Scottish subject status.

19. At somewhat greater length I shall now review the evidence for the continued existence of elements of Scottish nationality and of Scottish subject and denizen status after the Act of Union came into effect, and to what extent it has, perhaps, been preserved by the Act.

20. Either on the basis of Articles IV and XV of the Act of Union, which, in addition to the common citizenship of the United Kingdom, can be read to imply the continued existence of Scottish subject status after the Act came into effect (and the reciprocal extension to English subjects), or from the general preservation of private and some public rights under Articles XVIII and XXV, or for some other reason, the old Scottish Parliament's last legislative activity includes, with other naturalisations, the Huguetan Act, which, in language borrowed from the 1705 Act naturalising the Electress of Hanover and her family as English subjects, confers Scottish subject status on Huguetan 'and the children of his body, and all persons lineally descending from him'; this perpetual entitlement also appears in the Graham Act of 1641, and was perhaps modelled on English usage. The Sophia Act was repealed in 1948 by the British Nationality Act, which
presumably implies that it was part of British nationality law; the Nationality Instructions still contain guidelines, based on the Hanover litigation of 1956, for assessing claims ultimately based on it. It seems possible to infer that the unrepealed Huguetan Act remains part of British nationality law; and that, in accordance with either the Sophia guidelines or those relating to denization, Scottish subjects whose claim is derived from Huguetan, or another beneficiary of naturalisation or denization, with no closer connection to the United Kingdom would either be British Overseas citizens or "accorded administrative recognition".

21. The Attorney-General (Manningham-Buller) in the Hanover case made several interesting observations with regard to English and Scottish nationality law from 1707 (HL [1957] 436, especially 443-444), which could provide the interpretative basis for a prospective Scottish nationality law:

(i) article IV of the Act of Union assumes Scottish subjects are to be subjects of the United Kingdom;

(ii) 'the Act of Union must not be treated as repealing all the statutory provisions in England and Scotland providing for English or Scottish nationality';

(iii) unless pre-Union English (and Scottish) nationality law applied after the Union, so as to govern British nationality, there was no British nationality at all in existence when the Act of Union took effect';

(iv) pre-Union nationality law was 'regarded as still in force after the Union';

(v) those who became English (or Scottish) before or after the Union 'automatically became citizens of the United Kingdom by virtue of the Act of Union';

(vi) subsequent common law did not necessarily cease Scottish subject status.

It is possible that Scottish subject status, at least for those who are natural born Scottish subjects, retains the 'indelible' character formerly attached to British nationality (Singh v Commonwealth of Australia [2004] HCA 43).

22. In earlier submissions I have cited Dr Talbott's research into Franco-Scottish relations, including the apparent French recognition of Scottish nationality until at least 1907, and Dr Fahrmeir's research into the Bank of Scotland charter, which, including the famous or notorious last clause interpreted until 1820 as conferring Scottish subject status on investors, was confirmed by the United Kingdom parliament on several occasions in the 18th century and again in 1802; I have not been able to trace further details of the Scottish Denizen Bill mentioned in the Scottish press in 1822, which was presumably connected to the Bank of Scotland charter; Mr White's 1999 Scottish Law Times article I have not seen. Among other examples of the recognition of Scottish nationality by the United Kingdom and other governments, there is a range of legislation, relating to the registration of births, deaths and marriages, some of which was not repealed until the 1980s. The most important legislation appears to be section X of the Registration of Births, Deaths and Marriages Act (Scotland) 1854, which provided for a Foreign Births Register for the children of Scottish subjects, registration
being undertaken by the British consular network; I understand some English births were so registered, but of course England was no more foreign than the dominions were, at least until the Statute of Westminster or equivalent legislation came into effect in the 1930s and 1940s. It is possible, therefore, that a person born in, for example, a former dominion before the Statute of Westminster came into effect, with at least one parent born in Scotland, is also a Scottish subject and hence a British citizen by birth rather than by descent, and presumably allowing the next generation to claim British citizenship with the right of abode; other permutations can be considered.

23. Some of the legislation refers to not only Scottish but Irish subjects; for the latter, there is perhaps case law in Davies v Lynch, Irish Reports, 1869-1870, 570, mentioned above, which may indicate the existence of nationality law specific to Northern Ireland.

SOME CONCLUSIONS AND OBSERVATIONS

24. Several principles and observations emerge from this analysis of the reserved powers of immigration and nationality in the United Kingdom and their constitutional basis.

25. Firstly, subsidiarity and a measure of variation are inherent to the United Kingdom's composite constitutional and juridical arrangements, even with regard to reserved matters.

26. Secondly, as demonstrated by the outcomes of the Westminster Statute and the United Kingdom's admission to the European Union, the consequences of what has been called constitutional evolution within the context of devolved governance can diverge greatly from what was originally intended, and no settlement is necessarily conclusive.

27. Thirdly, the constitutional parity of Scotland within the Union gives rise to several jurisdictional questions, especially with regard to the authority of the parliament of the United Kingdom to legislate in matters such as immigration and nationality which may be protected by the Act of Union.

28. Lastly, the consequences of devolution are not limited to the United Kingdom, especially given the possibly indelible character of Scottish subject status, and the interpretation of the citizenship law of several Commonwealth countries.

2 October 2015