European and External Relations Committee
The EU referendum and its implications for Scotland
Written submission from Ian Martlew

Introduction

(1) I thank the European and External Relations Committee for the opportunity to contribute written evidence to their inquiry into the EU referendum and its implications for Scotland.

(2) The focus of this paper is on Scottish nationality, as a regional citizenship or subnational status in private international and municipal law, and its relevance after the EU referendum.

(3) Paragraphs 7-8 address the definition of Scottish nationality; 9-24 outline the history and nature of Scottish nationality law; 26-55 consider the current environment; 56 to 61 identify key points and offer recommendations.

(4) This paper is based, in part, upon written evidence on the 'reserved powers' of immigration and nationality I have submitted to (a) the recent inquiry into the Scotland Bill by the former Devolution (Further Powers) Committee of the Scottish Parliament, and (b) the current inquiries into 'The demography of Scotland and the implications for devolution' by the Scottish Affairs Committee, and 'The Union and devolution' by the Constitution Committee, and published on their respective websites.

(5) References to other sources, which are generally available online, have been included at relevant points in the course of my argument; Fransman's British Nationality Law is cited from the third edition.

(6) I write from the perspective of a private individual, without political or academic affiliation, or legal qualification.

Defining Scottish nationality

(7) The term regional citizenship or subnational status is here used in the conventional sense of the legal recognition of a class of real persons, with a territorial connection definable from domicile, habitual residence, jurisdiction or other grounds, and therefore accorded rights and subject to obligations, and often comparable to national citizenship; see e.g. the definition in Kochenov, Regional Citizenship and EU law: The Case of the Åland Islands and New Caledonia, (2010) 35 ELRev 307 note 2, and Suksi, Sub-State Governance through Territorial Autonomy: A Comparative Study in Constitutional Law of Powers, Procedures and Institutions, 2011.

(8) From statutory and common law examples of 'Scottish subject', 'the subject in Scotland', and 'Scottish domicile', some of which are examined in this paper, I assume either the current existence in UK law of Scottish nationality, or its potential development as a civil status, in response to both devolution and the referendum. I also assume that domicile, or a comparable status arising from habitual residence
and the exercise of 'social citizenship', as well as allegiance, has been, and is likely to be again, the usual foundation of citizenship law; my understanding is based on e.g. Blackstone, Commentaries, i.1 and 10, 1765-1769, 117, 354; the EUDO Citizenship Observatory Country Reports; Potter v Minahan [1908] HCA 63, (1908) 7 CLR 277, on 'Australian domicile' within British nationality; the Irish Law Reform Commission's Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws (working paper, 1981; report, 1983); the joint UK and Scottish Law Reform Commissions' Private International Law: Law of Domicile (consultative memorandum, 1985; report, 1987); the UK Nationality Instructions sv Domicile; and the European Convention on Nationality.

Scottish nationality law before and after the Union

(9) Such expressions as "the law knows no such thing as Scottish nationality" (Attwool, The Tapestry of the Law: Scotland, Legal Culture and Legal Theory, 1997, 25) must not be understood apart from the context in which they occur; and the position that "there is no historic starting-point or baseline" from which a law of Scottish citizenship can be derived, there being no "precursor law on Scottish or English citizenship" in 1707 (Home Office, Scotland analysis: borders and citizenship, 2014, 61, paragraph 4.5) appears premised on there being no Scottish or English equivalent to the UK nationality legislation of 1870, 1914, 1948 and 1981.

(10) Others have argued e.g. that the inevitable Calvin does not imply recognition, at least before the Act of Union, in English law of Scottish nationality law (Parry, 'The duty to recognise foreign nationality law', ZaöRV, 1958, 338); but it is possible, however, to derive a law of Scottish nationality, from both Scottish and UK antecedents, and to place it as an existing subdivision within the tradition of British nationality law.

(11) The most common means of acquiring Scottish nationality has been either (a) by birth, or by descent from a person born, in Scotland (discussed in paragraphs 12-17) or (b) by statutory conferment (paragraphs 18-24).

(12) Before the Union, the common and statute law of Scotland recognised the natural born subject; and 'by the common law of Scotland, the son of a natural born subject of Scotland born abroad was deemed in law a natural born subject' (Leslies v Grant, [1763] UKHL 2 Paton 68, 71 and 73).

(13) The Scottish Act of Union and the English Act of Union, in addition to the Claim of Right (article 2), refer to the subjects of either kingdom as existing at the Union, and in such a way as to allow the inference that, as well as the common citizenship of the United Kingdom (article 4), the status of English subject and Scottish subject would be maintained (articles 6, 15, 18 and 25).

(14) Subsequent common law, Scottish and UK, has continued to recognise, or to allow the inferred existence of, the Scottish and English subject, as in: Roxburgh v Home [1774] UKHL 2 Paton 358, 361, 363; Stanley v Bernes (1829) 3 Hag Ec Rep 373, 409; White v Briggs (1843) 5 Dunlop 1148, 1158; Stuart v Bute [1861] HLC 439, 441 ('domiciled Scotch subject'); Inland Revenue Commissioners v Glasgow Police Athletic Association [1953] AC 380, [1953] UKHL 1, 3 (09 March 1953) ('Scottish subjects'); Gibson v Lord Advocate 1975 SC 136, 1975 SLT 134, [1975] 1 CMLR
563, [1975] ScotCS CSOH 3 (‘subjects in Scotland’, ‘subjects within Scotland’, after article 18). Compare the use of 'Scottish citizenship' in reference to persons, real or legal, domiciled or with 'corporate residence' in Scotland, by the chief law officer of Scotland, as reported in HC Deb 31 July 1974 vol 878 c794: 'I do not think that anyone in the Law Society of Scotland or in my Office has any difficulty about knowing what determines whether a person enjoys Scottish citizenship.'

(15) UK statutes, presumably in accordance with the undertaking to maintain the private rights of Scottish and English subjects in article 6 of the Act of Union have also referred to the continued existence of Scottish subjects, and provide for the consular registration of births, marriages and deaths, as in (as originally enacted) the Registration of Births, Deaths and Marriages Act (Scotland) 1854, section X (‘Scottish subjects’); and the Registration of Births and Deaths Act 1874, section 37, Registration of Births, Deaths, and Marriages (Army) Act 1879, section 2, and the Merchant Shipping Act 1894, section 254 (‘Scotch or Irish subjects’). Some of this legislation, although amended or repealed in terms of UK law, and the recognition of Scottish status arising from it, may still be part of Irish and Commonwealth law, and perhaps influenced the occasional reference to the status in e.g. US law.

(16) The Legitimacy Declaration Act 1858, section 9, originally provided that 'any person domiciled in Scotland, or claiming any heritable or moveable property situate in Scotland, may raise and insist in an action of declarator before the Court of Session, for the purpose of having it found and declared that he is entitled to be deemed a natural-born subject of Her Majesty'; after the British Nationality Act 1948 and the British Nationality Act 1981, 'Commonwealth citizen' was substituted. Given the context, the Court of Session may have authority to determine which British or Commonwealth citizen is a Scottish subject. Compare the certificates confirming Scottish domicile issued under the Administration of Estates Act 1971, section 1.

(17) Reference should also be made to the definitions of 'United Kingdom national' and 'United Kingdom resident' in UK and Scottish law: the former is either a British citizen, a British Overseas Territories citizen, a British National Overseas, a British Overseas Citizen, a British subject from Ireland, or a British Protected Person; the latter is a person with indefinite leave to remain or who has applied for it, or the holder of a student or work visa, or has applied for asylum. Neither status is defined in or for the purpose of nationality or immigration law (UK Nationality Instructions sv Defining a British citizen, and contrast the HMRC usage); their definition presumably falls outside the 'reserved powers', and within the competence of a (d)evolving Scottish administration, which is also currently an authorised sponsor in terms of UK temporary and permanent residence visas.

(18) Conferral of Scottish nationality has been either by compliance with the provisions of legislation, or specific grant, such as the numerous Acts of naturalization before the Scottish Act of Union came into effect.

(19) Dr Talbott’s 2012 IHR article, “If you were hier you could gaine what you please, for Thereis many English and severall Scots that you might deal with”: British Commercial Interests on the French Atlantic Coast, c. 1560-1713, attracted media interest in connection with the existence of the joint Franco-Scottish nationality under the "Auld Alliance", especially the claim that 'a Scotsman born before 1907 still possesses the full rights and privileges of Franco-Scottish nationality' (Manchester
University press release of 12 August 2011); compare Moncreiff's *Memoirs concerning the ancient alliance between the French and Scots*, published in 1751, and reprinted in 1819 as part of Wylie's *Miscellanea Scotia* series, and the Parliamentary Register under 29 November 1558, 'Anent the naturalizatioun', from which it would appear that France certainly recognised Scottish nationality after the Union of the Crowns in 1603.

(20) The *Nova Scotia Charter* of 1621 provided that all subjects of the Crown ‘who shall proceed to the said Nova Scotia, or shall inhabit it, and all their children and posterity who shall chance to be born there, and all others adventuring thither, shall have and possess all liberties, immunities and privileges, of free and natural subjects of our kingdom of Scotland, or of our other dominions as if they had been born there’ (translation in Alexander and Lockhart, *Narrative of the Oppressive Law Proceedings*, 1836, 67). Compare the *Act for a company trading in Africa and the Indies* of 26 June 1695, under which ‘all persons concerned or to be concerned in this company, are hereby declared to be free denizens of this kingdom, and that they, with all that shall settle to inhabit, or be born in any of the foresaid plantations, colonies, cities, towns, factories and other places that shall be purchased and possessed by the said company, shall be reputed as natives of this kingdom, and have the privileges thereof’, and the last provision in the *Act for erecting a publick bank* of 17 July 1695, ‘that all foreigners who shall join as partners of this bank shall thereby be and become naturalized Scotsmen to all intents and purposes whatsoever.’ This is the last clause, once well-known, indeed notorious, of the Bank of Scotland charter, which was confirmed by Westminster on several occasions in the 18th century and again in 1802, and the focus of much political and legislative activity from 1818 when it was rediscovered as a means of evading restrictive naturalization policy, see Dr Beerbühl in *The Forgotten Majority: German Merchants in London, Naturalization, and Global Trade 1660-1815*, 2014, 16, and *Migration Control in the North Atlantic World: The Evolution of State Practices in Europe and the United States from the French Revolution to the Inter-War Period*, 2005, 65.

(21) The *Act of naturalisation in favour of John Henry Huguetan* of 25 March 1707 provides 'that the said John Henry Huguetan, and the children of his body, and all persons lineally descending from him, born or hereafter to be born, be and shall be to all intents and purposes whatsoever held and reputed, taken and esteemed natural born subjects of this kingdom, as if the said John Henry Huguetan, and the children of his body and all persons lineally descending from him, born or hereafter to be born, had been born within this nation, and shall enjoy all benefit and privileges of natural born subjects of this kingdom’. The Act can be compared with its apparent model, the *Act for the Naturalization of the Most Excellent Princess Sophia, Electress and Duchess Dowager of Hanover, and the Issue of Her Body 1705*, which similarly provides 'that the said Princess Sophia, Electress and Duchess Dowager of Hanover, and the issue of her body, and all persons lineally descending from her, born or hereafter to be born, be and shall be, to all intents and purposes whatsoever, deemed, taken and esteemed natural-born subjects of this kingdom, as if the said Princess, and the issue of her body, and all persons lineally descending from her, born or hereafter to be born, had been born within this realm of England; any law, statute, matter, or thing whatsoever to the contrary notwithstanding.'
The remarks of the Attorney-General (Manningham-Buller), in *Attorney-General and Prince Ernest Augustus of Hanover*, [1956] HL 436, especially 443-444, can properly be applied to the operation of Huguetan's *Act*, and perhaps other legislation, after the Union:

1. 'The *Act of Union* does not in terms provide that after the Union all subjects of England and all subjects of Scotland are to be subjects of the United Kingdom, but by article IV of the Treaty set out in the *Act* that is assumed';

2. 'The *Act of Union* must not be treated as repealing all the statutory provisions in England and Scotland providing for either English or Scottish nationality,' as this would imply, for example, the repeal of the *Act* naturalising the Electress;

3. 'Unless pre-Union English' (and presumably Scottish) 'nationality law applied after the Union, so as to govern British nationality, there was no law of British nationality at all in existence when the *Act of Union* took effect'; earlier legislation was however 'regarded as still in force after the Union, and those who became English' (or Scottish) 'subjects, whether before or after the Union, automatically became citizens of the United Kingdom by virtue of the *Act of Union*.'

4. 'As to *Macao v. Officers of State for Scotland*, [(1822) 1 Shaw's App. 138, 139, 141, 142-145, 146, 148, 148-149]' on the Bank of Scotland charter 'that decision did not go so far as to hold that the *Act of Union* repealed earlier statutes of naturalization in Scotland.'

The *Sophia Act* was repealed by the *British Nationality Act 1948*, whereas the *Huguetan Act* was not, and presumably remains valid; the British Nationality Instructions sv Denization, and Hanover (Electress Sophia of), suggest Scottish subjects under the *Huguetan Act* with no closer association to the United Kingdom would either be accorded 'administrative recognition' or the status of British Overseas citizens. Reference should also be made to the *Ratification in favour of Sir Richard Graham* of 17 November 1641, 'naturalising ... the said Sir Richard and his heirs ... and making them able to succeed to any lands or conquest any lands within whatsoever part of this kingdom of Scotland in the same way and as freely as if he had been born within this kingdom, and making him and his said heirs free denizens and natural Scotsmen forever'.

The authorities differ as to whether Scottish or Irish naturalizations were recognised in England before their respective Unions: Cawley, *Laws ... concerning Jesuites*, 1680, 189, held that they were not, but Molloy, *de jure maritimo et navali*, 1682, page 376, and *Davis v Lynch*, Irish Reports 1869-1870, 570, distinguish 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 the application of nationality law in Ireland, and the recognition of Scottish and Irish naturalizations in England ...

Having outlined the current legislative basis of Scottish nationality, this paper will now address the place of Scottish nationality in the current environment, given the *Scotland Act 2016* and the 'Brexit' referendum, and identify likely precedents or parallels.
SCOTTISH NATIONALITY AND THE EU REFERENDUM

(26) There is already an extensive literature on both devolution and the EU referendum and their probable consequences; perhaps the most useful, as far as the referendum is concerned, is the series of research briefings by the House of Commons Library, including *Brexit: some legal and constitutional issues and alternatives to EU membership* and *Brexit: what happens next?* With regard to the former, the writer of this paper, in written evidence submitted to inquiries by the Devolution (Further Powers) Committee (Scotland), and the Scottish Affairs and Constitution Committees (UK), has attempted to outline aspects and the implications of Scottish nationality law.

(27) From this literature five outcomes can be identified in the current environment (with due allowance for the "absence of certainty"):

(a) 'Brexit' does not occur, or there is 'regulatory equivalence'

(b) 'Brexit' occurs in a modified form ('the Norway model', 'the Swiss model')

(c) 'Brexit' is limited to England and Wales ('reverse Greenland')

(d) an independent Scotland remains in or is admitted to the EU, EEA or EFTA

(e) 'Brexit' occurs and Scotland has no association with the EU, EEA or EFTA.

(28) The definition of a Scottish civil status is relevant to each outcome.

THE UK CITIZEN ‘FROM’ SCOTLAND

(28) If Scotland remains a Home Nation within the UK, it will be as 'one of the most powerful devolved administrations in the world', and as a separate jurisdiction, undergoing constitutional evolution, including the effects of 'English Votes for English Laws'. Former UK powers may be returned from the EU not to Westminster but to Scotland and the other devolved administrations, which, to quote a commentator on *Country Focus* on Radio Wales, 'will then have to work out what to do with them'. Lundborg's remark that, with the constitution granted Iceland in 1874, 'a *de facto* separate citizenship was established' (cited by Petursson and Jóhannesson, in their EUDO Citizenship Observatory *Country Report* for Iceland, 2013, 4) could well become applicable to the consequences of the *Scotland Act 2016*, given a preexisting law of Scottish nationality.

(29) The administrative arrangements for defining the UK citizen 'from' Scotland in UK and Scottish law can be drawn from either the existing law of domicile, or the related administrative arrangements for defining the UK citizen 'from' the Channel Islands or Isle of Man for EU purposes (UK Nationality Instructions sv *Defining a British citizen*, and Fransman, 3.6.2).

(30) Given allegiance and domicile have been the usual basis for the ultimate development of a statutory nationality or citizenship law, in time, the distinction between the UK citizen 'from' Scotland and the other Home Nations, or the Channel Islands, or Gibraltar and the other Overseas Territories, could bear comparison with the evolving distinction between the British subject 'from' the UK and the British
subject or Commonwealth citizen ‘from’, for example, Australia, in the periods 1901-1938, 1939-1948, 1949-1982 and 1983 to the present; see Fransman, 3.3.2 and 3.3.9. Other periods can be suggested, based on changes to UK immigration law, or the divergence in alienage between the British subject in Australian law (since Shaw v MIMA [2003] HCA 72; 218 CLR 28; 203 ALR 143; 78 ALJR 203) and the Commonwealth citizen in UK law (UK Nationality Instructions sv Alien).

(31) Reference should also be made to the history of Canadian citizenship and the status of Canadian national, within the wider status of British subject as provided for in imperial legislation. Before the Canadian Citizenship Act 1946, the Immigration Act 1910 provided for the status of ‘Canadian citizen’, and the Canadian Nationals Act 1921 provided for the status of ‘Canadian national’, in both cases on the usual ground of being either a British subject by birth in Canada or a British subject domiciled there; the status of ‘Canadian national’ however was not intended to address immigration purposes, but was a requirement for “participation in the League of Nations and membership of the International Court of Justice” (Citizenship and Immigration Canada, Forging Our Legacy: Canadian Citizenship and Immigration, 1900–1977, especially chapter 5). The constitutional and legislative provisions which give Quebec powers with regard to immigration, 'Quebec Residence Status', which is used in determining eligibility for educational benefits, and Mme Marois’ Bill 195, the proposed Quebec Identity Act 2007, may indicate the comparable incremental development of a Quebec civil status recognisable as a regional citizenship.

(32) If Scotland remains in the UK, and 'Brexit' does not occur, or occurs in a modified form, or is limited to England and Wales ('reverse Greenland'), EU law may evolve to the consistent recognition of a Scottish status or Scottish nationality, given especially the parallel process of constitutional (d)evolution within the UK. EU law already distinguishes between the UK citizen ‘from’ Scotland and the other Home Nations in certain cases under EU succession regulation 650/2012, and it is already permissible in this limited sense to speak of EU recognition of Scottish nationality.

(33) In the event of 'reverse Greenland’, which seems politically improbable, England and Wales would presumably be classified in EU law as ‘Overseas Countries and Territories’ with respect to Scotland and Northern Ireland; and persons of English or Welsh domicile or nationality would be in the same position with respect to the EU as UK citizens ‘from’ the Isle of Man and the Channel Islands are now. This parallel suggests that, even without ‘regulatory equivalence’, UK legislation could again unilaterally distinguish between Scottish nationals, and nationals ‘from’ the other Home Nations (compare Fransman, 3.5.2 and following, 3.6.2 and following, especially 3.6.2.3).

(34) EU recognition of Scottish nationality is also possible in the event of a complete ‘Brexit’. EU citizenship, as presently understood, is usually contingent on holding the citizenship of a member state, but compare the conflict between national and Union law identified in Pham v Secretary of State for the Home Department [2015] INLR 593, [2015] 2 CMLR 49, [2015] UKSC 19, [2015] 1 WLR 1591, [2015] WLR 1591, [2015] Imm AR 950, [2015] 3 All ER 1015, [2015] WLR(D) 166, and Ruiz Zambrano (European citizenship) [2010] EUECJ C-34/09, as well as the relation between the pre-1948 status of British subject and local British nationality law. In addition, it may not be considered desirable to establish a precedent potentially allowing citizens of,
for example, the Comoros to regain French and hence EU citizenship. Nevertheless, ECJ, ECHR or other litigation may result in real or legal persons 'from' Scotland either retaining EU citizenship as an 'acquired right' or being accorded comparable status within the EU or by individual EU states.

(35) Furthermore, assuming Scotland lacks authority to negotiate on its own account with the EU, the latter, presumably after informal discussions with the Scottish authorities and formal consultation with the UK, is able to allow persons who have an appropriate association with Scotland to retain existing or modified EU rights as part of a 'Brexit' settlement. Scotland's position in such a case will, no doubt, be "constrained by treaty and reality"; but the convenience of the Republic of Ireland, given the land border with Northern Ireland, and the proximity to the rest of the UK, and general administrative convenience within the wider EU, may be sufficient grounds to make such a concession. Perhaps the more important question is not whether the concession will be made, but by which authority, and on what basis. It is also interesting to contrast the international engagement of, for example, the individual US states, which may also retain the capacity to ratify or reject international agreements or treaties signed by the federal government.

(36) Reference also needs to be made to the reciprocal problem of the future status of UK citizens now residing in the EU under 'free movement', and of EU citizens who have not yet acquired formal permanent residence in the UK. Given the reported absence of ingoing movement records for this category of immigrant, the law of domicile or an administrative arrangement analogous to it will almost certainly be prominent in formulating any 'Brexit' settlement within the UK and regularising the civil status of UK citizens in the EU, including UK citizens 'from' Scotland.

(37) Recognition of Scottish nationality, as an identifiable civil status to which definite rights and obligations could be attributed, in consequence of the 'Brexit' referendum, would not be an anomaly with regard to either the EU/EEA or the UK, as regional citizenship or subnational status already exists in territories associated with or integrally part of EU/EEA states (paragraph 38), the UK (paragraphs 39 to 40) and the Commonwealth (paragraphs 41 to 45.).

(38) From the EU/EEA can be cited as examples of regional citizenship and subnational status: the Danish consultative immigration arrangements for Greenland and the Faeroes; the hembygdsrätt or right of domicile for Åland (Fagerlund and Brander, EUDO Citizenship Observatory, Country Report: Finland, 2013, 31); the role of the länder in German nationality law (Hailbronner and Farahat, EUDO Citizenship Observatory, Country Report: Germany, 2015); Catalan nationality (as a survival from the 18th century, or a construct from the Spanish and Catalan constitutional documents); and the 1955 and 1992 legislation, literally municipal, for nationalité genevoise (Achermann, EUDO Citizenship Observatory, Country Report: Switzerland, 2013, 2). There are also the French Polynesian and New Caledonian citizenships, "citizenships within French nationality", referred to in Oakes and Warren, Language, Citizenship and Identity in Quebec, 2007, 36; a 2014 OHCHR report on New Caledonia mentions three types of civil status recognised there, "civil status under ordinary law, customary civil status (for Kanaks) and specific civil status (for Wallisians and Futunans)"; see Marrani, "Asia Pacific: Will New Caledonia Be Another Tokelau? Autonomy or Independence?" [2006] AltLawJl 27; (2006) 31(2) Alternative Law Journal 102, and Chauchat and Cogliati-Bantz, "Nationality and

(39) Gibraltar and the other British Overseas Territories are "not constitutionally part of the United Kingdom"; their 'nationals', with some exceptions who hold British Overseas Territories citizenship only, have however been British citizens since the British Overseas Territories Act 2002 (Fransman 3.6.2 note 167). Underlying this legislation is the local Belonger or Islander status peculiar to each territory, a 'status which indicates freedom from any immigration restriction and also confers rights usually associated with citizenship including the right to vote' (Foreign Affairs Committee Report, Overseas Territories, 2008, paragraphs 147, 269-275), and often derived from conquest or cession (compare Bancroft v Secretary of State for Foreign and Commonwealth Affairs, [2008] UKHL 61, and Molloy, de jure maritimo et navali, 1682, page 376). The regional citizenship of each Overseas Territory is governed by individual (and differing) constitutional ordinances 'set out in orders of Council'; the Gibraltarian Status Act 1962 is the most elaborate.

(40) British immigration and nationality law affords other examples, some historic, others current, of subsidiarity and variation, comparable to the Scottish nationality suggested: the 'administrative recognition' of denization in UK nationality law (UK Nationality Instructions, sv Denization); the status of persons 'from' the Isle of Man, and Jersey and Guernsey, for EU purposes; the 'right to reside' accorded all Irish citizens as part of the CTA arrangements, the British subject status held by some citizens of the Republic of Ireland (House of Commons Library, The Common Travel Area and the special status of Irish nationals in UK law, UK Nationality Instructions sv British subjects), and the Irish subject status apparently held by UK citizens 'from' Northern Ireland There is an interesting acknowledgement of this tendency in the use of 'species' and 'genus' of the several subdivisions of British nationality under the British Nationality Act 1948 and its equivalents in the former dominions in the debate reported at HL Deb 21 June 1948 vol 156 cc992-1083.

(41) The local administrative and regulatory arrangements relating to civil status and naturalization in the former colonies and dominions before the Statute of Westminster 1931 or section 1(3) of the British Nationality Act 1948 came into effect, or independence occurred, also merit attention.

(42) Willard's monograph, Naturalization in the American colonies, with more particular reference to Massachusetts, Boston, 1859, is still useful, showing that several of the colonies enacted their own legislation, rather than relying on the Acts of the imperial parliament. The local legislation can be regarded as underlying the concept of state citizenship after independence.

(43) The 'subjects in Canada' who were domiciled in Quebec effectively had their own civil status given the concessions under the Quebec Act 1774 and subsequent legislation; compare the persons of 'French nationality' referred to in the Statutes of Quebec: Orders in Council, 1920, 457 and 458, where the term must indicate not French citizens who were residing in Quebec, but British subjects and Canadian citizens, as then defined for nationality and immigration purposes, who were born and usually resident in Quebec.
(44) The Australian colonies had each their own legislation governing denization and naturalization, such as the New South Wales *Naturalization and Denization Act 1898* and the Western Australian *Naturalization Act 1871*, which remained in effect after Federation in 1901. The individual provisions of this legislation, and the competence of the states to legislate, were preserved by sections 107 and 108 of the Australian Constitution, until the enactment of the relevant legislation of the Commonwealth of Australia, such as the *Naturalization Act 1903*. Elements relating to denization in the New South Wales *Act* may therefore still be valid, in the absence of federal legislation to replace them; it is interesting to compare the recognition of 'letters of denization' in section 25 of the New Zealand *British Nationality and Status of Aliens Act 1923*, more than fifty years after the Tadema case. The Western Australian *Act* was purportedly repealed by the local *Miscellaneous Repeals Act 1986*, and it is possible that sections 12 and 13, providing for the automatic acquisition of local British subject status, recognised only within Western Australia, by the wives and children of naturalized persons, had remained in effect up to that time; see further *Selected Opinions of Attorneys-General of the Commonwealth of Australia*, with *Opinions of Solicitors-General and the Attorney-General's Department, 1901–50*, numbers 339 of 6 July 1909 and 1119 of 24 August 1921. Section 12 of the South Australian *Aliens Act 1864*, which, apparently uniquely, recognised naturalizations in other colonies, may still be valid.

(45) Other examples can be drawn from the modern Commonwealth: 'Canadian citizenship' and the status of 'Canadian national' have already been mentioned; Australian law has similarly recognised British subjects with 'Australian domicile', and distinguished between Australian citizenship with the right of abode in mainland Australia, Australian citizenship for nationals from the former territory of Papua, Australian Protected Person status for persons from the trust territories of New Guinea and Nauru, and, until recently, Norfolk Island status; the administrative arrangements for New Zealand Protected Person status have evolved into the citizenship laws of Western Samoa, the Cook Islands, Nive and Tokelau.

(46) The remaining outcome to be considered is Scottish independence, or, at least, a sufficient degree of autonomy as would require the formulation of legislation governing the local 'right of abode' and naturalization.

(47) The outline proposed in the then Scottish Government's 2013 white paper, *Scotland's Future*, 271-273, for the citizenship of an independent, or at least highly autonomous, Scotland, is inherently conservative. UK citizens born in Scotland and UK citizens "habitually resident" or domiciled there, would be regarded as Scottish citizens at independence; after independence acquisition became possible by grant and by descent.

(48) Similar provisions, defining an 'internal' Irish citizenship within British nationality, appear in article 3 of the 1922 Irish Constitution, and in the *Irish Nationality and Citizenship Act 1935* (Handoll, EUDO Citizenship Observatory, *Country Report: Ireland*, 2012; Ó Caoinealbháin, IBIS Working Paper 68, *Citizenship and Borders: Irish Nationality Law and Northern Ireland*, 2006); but comparison can also be made with dominion legislation and its transitional arrangements, especially, to draw on their full titles, the *British Nationality and Australian Citizenship Act 1948* and the *British Nationality and New Zealand Citizenship Act 1948*, which were enacted in conjunction with the UK *British Nationality Act 1948*. The proposed eligibility by
descent from a grandparent born in Scotland can no longer be regarded as controversial, given the interpretation in Romein [2016] CSIH 24 of section 4C of the British Nationality Act 1981, and the entitlements in section 2(1)(b) of the Immigration Act 1971 (as originally enacted).

(49) This comparison suggests a solution to the problem raised during the 2014 referendum, the potential loss of British citizenship at independence.

(50) For many years after 1948, a citizen of Australia, for example, who was not already a UK citizen, was a British subject with the 'right to reside' in the UK and the ability to acquire UK citizenship after a prescribed period of residence; UK citizens and other British subjects, and Irish citizens, could as 'non aliens' in Australian law, live and work in Australia, and acquire Australian citizenship by registration rather than naturalization; even now, Commonwealth citizens are not aliens in UK law, and the alienage of UK citizens in Australian law, at least as far as federal law is concerned, is a recent development. The citizenship law of an autonomous Scotland would, in the nature of things, be a subdivision of British nationality law, and in all likelihood be framed on similar lines to the 1948 legislation, and make similar concessions. In the event even of full independence, it is probable that there would in general be 'regulatory equivalence' or reciprocity in immigration and nationality law between Scotland and its neighbours, just as 'regulatory equivalence' has been suggested as part of the new relationship between the UK and the EU, as a necessary concession to a common travel or trade area; compare the Nordic legal unity in citizenship legislation, discussed in Ersbøll, EUDO Citizenship Observatory Report on Citizenship Law: Denmark, 2015.

(51) Reference should also be made to Scotland's place in the Commonwealth, especially if, under "Boris' bilateral"s or the "Commonwealth visa"', the 'right to reside' in the UK, and hence in Scotland, is restored to citizens of Canada, Australia and New Zealand; see the 2014 Commonwealth Exchange paper by Hewish, How to Solve a Problem like a Visa: the unhappy state of Commonwealth migration in the UK.

(52) The Commonwealth can be regarded as the "legacy of a shrunken and dismantled empire" (compare Sawyer and Wray in their EUDO Citizenship Observatory Country Report: United Kingdom, 2014), but imperial legislation and the common law as it has developed within the Commonwealth are both still relevant to the construing of the British Nationality Act 1981 and the Immigration Act 1971, and will, in all likelihood, continue to be relevant in the development and operation of any Scottish specific legislation. Two examples will suffice to establish the point.

(53) Firstly, the Statute of Westminster 1931 may govern the definition of domicile of persons resident in the then dominions; and it could be argued that a British subject 'from' Scotland retained their Scottish domicile and was effectively 'in Scotland', at least until the local enactment or the repeal: in the case of South Africa, the relevant date is 1931; Canada, the relevant dates are 1931 and the Canada Act 1982; Australia, 1939 and the Australia Act 1986 (the 1933 referendum complicates the status of Western Australia, as well as the separate relationship of each state with the Crown); New Zealand, 1947 and the New Zealand Act 1986; Newfoundland, possibly 1949. Compare the equivalence of domicile in another Nordic country with residence in Iceland in Icelandic citizenship law (Petursson and Jóhannesson,
(54) Secondly, immigration and citizenship case law impacting the Commonwealth may be relevant to the administration of UK and Scottish legislation. Perhaps the best instance is the history of the nationality law of Western Samoa. The inhabitants, for the most part, ceased to be German nationals in 1923, and, under the League of Nations Mandate and UN Trusteeship, were regarded in New Zealand municipal law, initially as British and then New Zealand Protected Persons, until independence in 1962. The Privy Council decided in the New Zealand case of *Lesa v Attorney-General* [1982] 1 NZLR, 165, 169, that, regardless of the *Western Samoa New Zealand Protected Persons Order 1950*, 'many thousands of Western Samoans', under the transitional and descent provisions of the *British Nationality and New Zealand Citizenship Act 1948*, were in fact New Zealand citizens; in response, the New Zealand government passed the *Citizenship (Western Samoa) Act 1982* (Brookfield, "New Zealand Citizenship and Western Samoa: A Legacy of the Mandate" [1983] OtaLawRw 2; (1983) 5 Otago Law Review 367).

(55) Similarly, German New Guinea, including Nauru, ultimately became a Trust Territory under the administration of Australia, and its inhabitants Australian Protected Persons until the independence of Papua New Guinea in 1975. The existing case law does not appear to address this point, but it is pertinent to ask whether, given *Lesa*, Australian Protected Persons were ever Australian citizens, even in the limited sense of the citizenship, generally 'without the right of abode in mainland Australia', accorded the non-European inhabitants of the former Territory of Papua, and whether this status, at least by birth, in common with other forms of British nationality, was 'indelible' (compare *Singh v Commonwealth of Australia* [2004] HCA 43). Australian citizenship law at one time also acknowledged as 'protected' a wide range of persons from the Commonwealth, including British and New Zealand Protected Persons. Given the above, *Lesa* may also be relevant to the interpretation of UK law regarding British Protected Person status.

**KEY POINTS AND RECOMMENDATIONS**

(56) I have attempted in this paper to (a) establish the existence and current legislative basis for Scottish nationality, and (b) contextualise Scottish nationality within the post-referendum environment.

(57) Scottish nationality law existed at the time of the Union, and has continued to exist and develop up to the present, within British nationality law, and there are precedents to suggest it could well be the precursor to a Scottish citizenship law; alternatively, Scottish domicile, habitual residence, succession and other law may provide a sufficient foundation.

(58) Recognition of Scottish nationality or even citizenship need not imply the end of the Union.

(59) Scottish nationality has apparently been and continues to be acquired by birth in Scotland, or by birth abroad to a parent born in Scotland (with the usual exceptions), or pursuant to specific legislation. Some Scottish nationals or Scottish subjects will be Commonwealth, rather than UK, citizens.
(60) Given the outcome of the EU referendum, the existence of Scottish nationality may facilitate the preservation of the obligations and rights currently held by UK citizens 'from' Scotland as EU citizens.

(61) The Scottish Government may wish to explore available options, perhaps through the Court of Session or through the EU, in addition to its own existing powers, for recognising and defining Scottish national or Scottish subject status, given that immigration and nationality are 'reserved powers' in UK law.

(61) The legislative definition of Scottish national or Scottish subject should be as plain as possible, and framed by Scottish authorities.