

# Forms of Union: Britain and Spain, a Comparative Analysis

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*Ingalaterraren eta Eskoziaren arteko batasunaren harira, hainbat azterketa teoriko eta kontzeptual egin izan dira, hala 1603an nola 1700 eta 1707 artean. Horietako zenbait azterketa Britainiar Uharteetan egin zituzten, eta Espainiako monarkia hartu zuten eredu gisa. Bi aldeek elkarri buruz zer iritzi zuten azalduko da artikulu honetan, hurbilketa nola lortu zen, harremanetan nola jarri ziren eta osotasun baten partaide izatearen sentimenduak nolakoak ziren. Horrez gain, Alberico Gentiliren eta Arthur Ducken ekarpenak ere jaso dira artikuluan, orain arte ez baitiete merezi duten arretarik eman.*

*Giltza-Hitzak: Batasun-moduak. Espainiako monarkia. Espainiako Ondorengotza Gerra. 1707ko Britainiako Batasuna. Alberico Gentili. Arthur Duck.*

*La unión de Inglaterra y Escocia fue objeto de numerosos análisis teóricos y conceptuales tanto en 1603 como entre 1700 y 1707. Algunos de estos análisis se realizaron en la Islas Británicas y tomaron la monarquía española como referencia. Este artículo describirá cómo se percibían entre sí ambas partes y se centrará en el modo en que se produjo su acercamiento, en cómo se relacionaron y funcionaron sus sentimientos de pertenencia a un todo. Asimismo, el artículo analizará las contribuciones de Alberico Gentili y Arthur Duck, que hasta ahora no han recibido la atención que merecen.*

*Palabras Clave: Formas de unión. Monarquía española. Guerra de Sucesión española. Unión británica de 1707. Alberico Gentili. Arthur Duck.*

*L'union de l'Angleterre et de l'Écosse fit l'objet de nombreuses analyses théoriques et conceptuelles, tant en 1603 qu'entre 1700 et 1707. Certaines de ces analyses furent réalisées dans les Îles Britanniques avec la monarchie espagnole comme référence. Cet article décrit la perception mutuelle des deux parties concernées et notamment leur rapprochement, leurs relations et sentiments d'appartenance à un même tout. L'article fait également référence aux contributions d'Alberico Gentili et d'Arthur Duck, qui n'ont pas reçu à ce jour toute l'attention qu'ils méritent.*

*Mots Clé : Formes de union. Monarchie espagnole. Guerre de Succession d'Espagne. Union britannique de 1707. Alberico Gentili. Arthur Duck.*

## 1. CONCEPTUAL AND TERMINOLOGICAL ASPECTS: UNION AS A PROCESS

Any approach to the study of different types of unions between kingdoms should take into account the fact that the formation of the kingdoms in question will almost certainly have been the result of a previous process of unification between other kingdoms. It is highly likely that demarcation lines are drawn or redrawn during the process of the formation of bodies that comprise diverse components. As Pocock has stressed<sup>1</sup>, all this implies a certain indeterminacy: an expanding monarchy will consist of diverse elements which in themselves create a lack of definition.

When we actually correlate the union and separation of countries and their rapprochement and estrangement with the co-ordinates of space and time we come up with History itself. Wars, peace agreements, treaties, territorial reorganizations that give rise to new legal rulings and historical readings that may become genuine national ideologies, are frequently related to the processes of national unification. The very universality of the phenomenon obliges us to adopt a broad perspective when studying the formation of unions. When studying unions between kingdoms in Europe we inevitably reach the conclusion that the only valid approach to the subject is to consider the continent as a whole<sup>2</sup>.

Historical interpretations of the unification of each country or the processes that have led to unification are often heavily influenced by local factors; such interpretations have often ignored the parts that go to make up the whole<sup>3</sup>. It is indeed surprising that European historiography has treated composite monarchy almost as a novelty. The only explanation is that such interpretations are based on monist principles: composite monarchies are usually classed as such by definition, one might say; thus they are inherently composite. The expression "composite monarchy" is almost a redundancy. And yet, the facts seem to show that it has proved necessary to demonstrate this<sup>4</sup>.

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1. POCOCK, John. "Empire, State and Confederation: the war of American Independence as a crisis in multiple monarchy". In: *A Union for. Political thought and the British Union of 1707*, Cambridge: Cambridge University Press, 1995; pp. 318-348; p. 319; "British History: A Plea for a New Subject". In: *Journal of Modern History*, 47, 1975; pp. 601-628.

2. ROBERTSON, John. "Empire and Union: two concepts of the early modern European political order". In: *A Union for Empire. Political thought and the British Union of 1707*. Cambridge: Cambridge University Press, 1995; pp. 3-36; p. 4.

3. MORRILL, John. "The British Problem, c. 1534-1707". In: *The British Problem, c. 1534-1707. State Formation in the Atlantic Archipelago*, ed. by Brendan Bradshaw and John Morrill, London: MacMillan Press, 1996; pp. 1-38 (passim); WORMALD, Jenny, "James VI, James I and the Identity of Britain". In: *The British Problem, c. 1534-1707. State Formation in the Atlantic Archipelago*, ed. by Brendan Bradshaw and John Morrill, London: MacMillan Press, 1996; pp. 148-171; pp. 160-161-162; POCOCK, J.G.A. "Two kingdoms and three histories? Political thought in British contexts". In: *Scots and Britons. Scottish political thought and the union of 1603*, edited by Roger A. Mason, Cambridge: Cambridge University Press, 1994; pp. 293-312; p. 311; MASON, Roger A. "Imagining Scotland: Scottish political thought and the problem of Britain 1560-1650". In: *Scots and Britons... Op. cit.*; pp. 3-13, p. 12.

4. ELLIOTT, J.H. "A Europe of Composite monarchies". In: *Past and Present*, 187 (1992) pp. 48-71. In Spanish In: *España, Europa y el mundo de ultramar, 1500-1800*. Madrid: Taurus, 2010.

## 2. UNION, THE WORD AND THE CONCEPT

The above statements highlight the fact that the relationship between the idea of union and the word we use to describe it is not always clear. The word in itself and the range of ideas it embodies often imply a number of determinants and limitations that are difficult to avoid. Linguistically speaking, the original Latin term alludes to the idea of transforming many into one. The exclusionist and monist use of the term is quite frequent and usually associated with examples of unions that are perfect, complete and mature. In non monist terms, "union" also describes the process that leads to a number of individuals no longer being separated, perhaps without actually forming a single new entity. In such cases there is in turn a range of possibilities that correspond to different forms, degrees and intensities of union<sup>5</sup>.

Whilst it may seem perfectly obvious, we should remember that the unions of kingdoms are usually studied after they have taken place. As experience has demonstrated when studying an already consummated union it is difficult to maintain a totally clinical point of view. The culmination of the process almost inevitably becomes a point of reference and the ground covered tends to be assessed in terms of the goal achieved. Both the teleological effects and what we might call the anticipatory associations of the word come into play: the effect that referring to previous events has on the outcome when this is already known. A number of authors, Goldie amongst them, have identified this problem in the case of the Anglo-Scottish union. As Goldie indicates, if indeed it is possible to identify up to five significant factors that distanced and differentiated the English and the Scots there are no grounds for assuming that there was some kind of "gravitational" pull towards the union of 1707. In other words, the Act of 1707 was not a preconceived objective<sup>6</sup>.

In theory the Spanish and the Anglo-Scottish unions share geographical or spatial demarcation factors: the content in each case comes in its own container, one in a peninsula and the other in an island. Enlarging the scope of the study from an island to an archipelago creates significant differences, as can be seen by looking at the latest writings on the subject; they have shifted attention to the British Isles as a whole<sup>7</sup>. However, at the time, the fact that events took place on an island was of crucial importance; the Scottish and

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5. HODGES, George. *The Rights and Interest of the two British Monarchies, with a Special Respect to an United or Separate State. Treatise III*, London, Printed in the Year, 1706.

6. GOLDIE, Mark. "Divergence and Union: Scotland and England, 1660-1707". In: *The British Problem, 1534-1707. State Formation in the Atlantic Archipelago*, edited by Brendan Bradshaw and John Morrill, London: 1996; pp. 220-245; p. 226, 230; MORRILL, John. "State formation and nationhood in the Atlantic Archipelago, 1500-1720". In: *Identities: Nations, provinces and regions, 1550-1900*, Ed. Isabel Burdiel, James Casey, School of History, Norwich: University of East Anglia, 1999; pp. 135-170, p. 143.

7. KEARNEY, Hugh. *The British Isles. A History of two Nations*, Cambridge: Cambridge University Press, 1989. Spanish edition, *Las Islas Británicas. Historia de cuatro naciones*, Madrid, 1999. MORRILL, J. "State formation ..." (cit); See Andrew Fletcher's geographical consideration in 1703, FLETCHER, Andrew. "An account of a conversation ...". Edited by John Robertson, *Andrew Fletcher. political works.*, Cambridge: Cambridge University Press, 1997; pp. 176-215, p. 203.

English appeared to be directly at loggerheads and there were no other visible enemies. Thus union would seem inevitable where peace is the object<sup>8</sup>.

British historians have presented the issue faithfully by identifying brief expressions coined during the process of rapprochement between the two kingdoms in 1603. They prove to be highly significant. One such example is the phrase "King of all, King of each"<sup>9</sup> which came from the new and inevitable relationship between the whole and the parts. For the parts, the new whole of which they were going to become components became an inevitable point of reference from then on. A duality emerged and usually led to one of two things: either the parts lost their individual identity because the new whole changed their nature or, on the other hand, union did not obliterate the essential distinguishing features of the individual parts and they remained identifiable as such<sup>10</sup>.

The ascent of a Scottish dynasty to the English throne led to a process of constitutional analysis. Comparisons were made with similar processes in Europe such as the Spanish and the Polish-Lithuanian ones<sup>11</sup>. The English and Scottish observers who turned to the Spanish model as it stood in 1603 were met with a united Spain that at that time included Portugal. One of the issues we shall examine in this article will be how these insular observers examined and assessed the unity of the components of the Iberian Monarchy. We shall also look at other issues as well: whether or not the above mentioned observers bore in mind the history and conditions of the union; and whether or not they were aware that the process of unification was a very graphic illustration of how the relationship between the territories and communities in Spain developed as it did.

### **3. AN UNUSUALLY REWARDING SOURCE: THE ENGLISH AND SCOTTISH TREATISES ON UNION**

When endeavouring to respond to these questions, we are able to draw on a rich and varied body of English and Scottish treatises, expert opinions and reports of diverse quality, length and accuracy. Gallway and Levack,

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8. WORMALD, Jenny. "James VI, James I and the Identity of Britain", cit.; p. 160; LEVACK, Brian. *The Formation of the British State. England, Scotland, and the Union, 1603-1707*, Oxford: Clarendon Press, 1987; p. 216.

9. WORMALD, Jenny. "The union of 1603". In: *Scots and Britons. Scottish political thought and the union of 1603*, by Roger A. Mason, Cambridge: Cambridge University Press, 1994; pp. 17-40, pp. 32-33; MASON, Roger A. "Imagining Scotland ..." cit.; p. 8.

10. WORMALD, Jenny. "James VI, James I and the Identity of Britain", cit.; p. 165; MORRILL, John. "The British Problem, c. 1534-1707", cit.; pp. 11-12.

11. RIDPATH, George. *Considerations upon the Union of the Two Kingdoms: With an Account of the Methods taken by Ancient and Modern Governments, to effect an Union, without endangering the Fundamental Constitutions of the United Countries*. Printed in the Year 1706; pp. 21-24.

publishers of the major part of these texts, describe them as “tracts”<sup>12</sup>. In all they mention a total of twenty eight, of hugely diverse lengths, depths, approaches, motivations and intentions. Some of these works are brief essays, whilst others are no more than articles expressing an opinion. The ones that were commissioned and purpose written –some were prepared for use in the parliamentary debate that was being held at the time– can be classed as reports whilst the others seem to have been proposals for facilitating the process initiated in 1603. This article does not seek to provide an analysis of these texts; their publishers have already done so. Instead it will look at how and why the texts dealt with the Spanish monarchy, and, above all at those that dealt with the idea of union and its different forms and conditions.

If we reserve the term “treatise” for works that provide a broad, penetrating, thorough and comprehensive treatment of the matter, the only text worthy of the name would be Thomas Craig’s, *De unione regnorum Britanniae tractatus* (1605), the most mature and thorough work to appear<sup>13</sup>. Craig treats Spain as a case in point as he starts out by tackling the question of an appropriate name for the kingdom formed by a united England and Scotland. In this instance, the author believed that Spain provided the best solution precisely because no-one questioned the name, he insists, despite the fact that the country was comprised of a number of “provinces” that, according to him, did not possess the status of kingdoms. In Craig’s opinion, the Spanish kingdom was the world’s leading nation because of its power and expanse; France and England followed it. Thus it would be absurd, he said, for Scotland to put itself on the same level as its neighbouring southern kingdom. We can assume that whilst acknowledging Spain’s dominance, Craig was aware of its complex make up, including Portugal, and also that Castile was the nucleus of the country.

Another Scot, Robert Pont, a Calvinist clergyman and mathematician who died in 1606<sup>14</sup>, was a staunch supporter of union on equal terms; he set out his views in his tract *Of the Union of Britayne*<sup>15</sup>. He frequently uses Spain as a point of reference, possibly more than anyone else; he was clearly aware of the long history of Iberia as a single unit and provides a penetrating insight

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12. GALLOWAY, Bruce R.; LEVACK, Brian P. *The Jacobean Union. Six tracts of 1604*, Edinburgh: Scottish History Society, 1985.

13. LEVACK, Brian P. “Law, sovereignty and the union”, *Scots and Britons. Scottish political thought and the union of 1603*, edited by Roger A. Mason, Cambridge: Cambridge University Press, 1994; pp. 213-237, p. 214; CRAIG, Thomas (Sir). *De Unione Regnorum Britanniae Tractatus* (1605), Edinburgh: 1909, ed. of the manuscript of Advocates’ Library, by C. Sanford Terry.

14. ROBERTSON, John. “Empire and Union: ...”, cit.; p. 16.

15. *Of the Union of Britayne, or conjunction of the kingdoms of England and Scotland, with the bordering British Ilands into one monarchie, and of the manifold commodities proceeding from that Union. A dialogue composed in Latin by R. P., dedicated to the most excellent prince, James, of England, Scotland, France and Ireland, King*, edited by GALLOWAY, Bruce R. and LEVACK, Brian P. *The Jacobean Union. Six tracts of 1604*, Edinburgh: 1985; pp. 1-38; *A Treatise about the Union of England and Scotland*, *ibid.*; pp. 39-74.

into the withdrawal to the North that the Muslim invasion caused within the peninsula. Pont demonstrates great familiarity with the history of Castile, Leon, Navarre and Portugal as well as their expansion. He was aware that the rise of the Kingdom of Aragon came about through marriage and was able to cite the Compromise of Caspe, an Aragonese town where a commission of six persons decided in 1412 the Succession of the Crown of Aragon in favour of Ferdinand of Antequera, as an example of the resolution of a conflict over succession<sup>16</sup>. He also regards Spain as an example of a complete territory, peninsular in this case. Thus the use of a single name such as Spain for the entire area seems logical to him, just as to the old term “Iberia” was.

John Russell, a Scottish jurist who worked in Edinburgh as a lawyer and died there in 1613, was, just like Pont, a supporter of a union on equal terms. He believed that neither of the parties should be subordinate to the other but rather that both should be “mutuall and reciproque ... not of Scotland as subalterne (accessor) to Ingland (principall)”. He regarded this as an essential condition for the achievement of a genuine union of “hairtis and myndis”<sup>17</sup>. To prove his point he provides a long list of logical arguments full of syllogisms. He considers Spain to be the worst enemy of the new Anglo-Scottish monarchy; this is hardly surprising coming from someone who placed the Papists, led by Spain, and the Turks and the Mohammedans in the same bag. This possibly explains the absence of any further references to Spain<sup>18</sup>.

John Doddridge is a different kettle of fish<sup>19</sup>. He was English and a distinguished jurist of the times, possessed a detailed knowledge of both English and European law and was an example of a happy combination of lawyer, teacher and judge. He wrote some legal text books and sat on the King’s Bench as a judge from 1612. In his *A Breif Consideracion of the Unyon of twoe Kingedomes in the handes of one Kinge*<sup>20</sup>, Doddridge dedicates ample attention to the Spanish monarchy which he regards as a prototype for the shape and size that a composite structure could acquire. His legal expertise enabled him to identify the true importance of the diversity of sources of law, which I shall be looking at in detail a little later on; he was one of the

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16. *Of the Union of Britayne*, cit. pp. 40-41; 42; 46; *A Treatise about the Union of England and Scotland*; p. 70.

17. *A Teatise of the Happie and Blissed Unioun betuixt the tua ancienne realmes of Scotland and Ingland*, edited by GALLOWAY, Bruce R.; LEVACK, Brian P. *The Jacobean Union. Six tracts of 1604*, Edinburgh: 1985; pp. 75-142, pp. 84-85; LEVACK, Brian P. “Law, sovereignty and the union”, cit.; p. 215.

18. *A Teatise of the Happie and Blissed Unioun*, cit.; p. 82; 111.

19. LEVACK, Brian P. *The Formation of the British State. England, Scotland, and the Union, 1603-1707*, cit. p. 47. Quoted by GIL PUJOL, Xavier. “Ecos de una revuelta: el levantamiento foral aragonés de 1591 en el pensamiento político e histórico europeo de la Edad Moderna. In: *La Corona de Aragón y el Mediterráneo, siglos XV-XVI*. Esteban Sarasa y Eliseo Serrano (coord.), Zaragoza, 1997; pp. 295-332; p. 301.

20. Edited by GALLOWAY, Bruce R.; LEVACK, Brian P. *The Jacobean Union. Six tracts of 1604*, Edinburgh, 1985; pp. 143-160.

few commentators to realize its importance. He referred to the case of the relationship created between Castile and Navarre. He was aware of the difference between Castile and Navarre and Aragon but was way off track when he cited the Laws of Toro (*Taurinae Constitutiones*) as being the ones that gave rise to the union of the kingdoms of Navarre and Aragon with Castile<sup>21</sup>. Like all the other authors who wrote unionist texts at the beginning of the reign of James I, he regarded Spain as a *peninsula-wide* unit, of which the Kingdom of Portugal formed a part. It was held together by a body of regulations, these being the ones approved in the *Cortes* held in Tomar in 1581, in order to establish the constitutional basis of the relation with the new king Philip of Austria; he reproduces them in detail<sup>22</sup>.

Henry Savile (1549-1622), a historian educated as a humanist who rose to be warden at Merton College, also identified the importance of these *Cortes* of Tomar. He enjoyed the confidence of James I and was made a noble in 1609. This relationship explains why his purpose was to provide helpful information. The title of the work itself announces his intention of providing a model: *Historical Collections left to be considered of, for the better perfecting of this intended union between England and Scotland*<sup>23</sup> ...The work sought to provide solid historical background information<sup>24</sup>, so the author was obliged to include the Spanish model to which he devoted a great deal of attention. As was common practice, he stressed the importance of the marriage between the heirs to the thrones of Castile and Aragon<sup>25</sup>. Savile was one of the few commentators, perhaps the only one, who was aware that Ferdinand of Aragon had to withdraw to his hereditary dominions on the death of Isabella of Castile. He did however claim that Fernando died of poisoning induced by his second wife, Germaine de Foix. Nevertheless, he adds his voice to those of other contemporary authors who stressed the importance of the conditions established during the Tomar *Cortes* in the incorporation of the Kingdom of Portugal in the Hispanic Monarchy<sup>26</sup>.

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21. *Ibid.*; pp. 153-154.

22. *Ibid.*; pp. 154-157.

23. Edited by GALLOWAY, Bruce R.; LEVACK, Brian P. *The Jacobean Union. Six tracts of 1604*, Edinburgh: 1985; pp. 185-239. This tract was requested as "consilium" or special advice to act Union (LEVACK, Brian P. *The Formation of the British State. England, Scotland, and the Union, 1603-1707*, cit. p. -). Savile is quoted by GIL PUJOL, Xavier, "Ecos de una revuelta ..." cit. [fn. 19]; p. 301.

24. ROBERTSON, John. "An elusive sovereignty. The course of the Union debate in Scotland, 1698-1707". In: *A Union for Empire. Political thought and the British Union of 1707*, Cambridge: Cambridge University Press, 1995; pp. 198-227, p. 16.

25. RIVERO, Manuel. "De la separación a la unión dinástica". In: MARTÍNEZ MILLÁN, J. (dir.). *La Corte de Carlos V, Sociedad Estatal para los centenarios de Felipe II y Carlos V*, 5 vols., Madrid: 2000, vol. I, p. 90 and following pages. ASEÑO GONZÁLEZ, María. "Ciudades y oligarquía urbana en Castilla en los años de la 'Gobernación' de Fernando el Católico (1506-1516)". In: *Sardegna, Spagna e il Mediterraneo. Dai Re Cattolici al Secolo d'Oro*, ed. by Bruno Anatra e Giovanni Murgía, Roma: Carocci editore, 2004; pp. 291-333.

26. GALLOWAY, Bruce R.; LEVACK, Brian P. *The Jacobean Union*, cit.; pp. 185-239, p. 229.

Other texts from these initial years of the seventeenth century explicitly devoted to creating a suitable climate of opinion employ a predominantly admonishing tone typical of religious discourses. Such is the case of John Gordon, author of a number of tracts written in this style<sup>27</sup>. His *A Panegirique of Congratulation for the Concord of the Realmes of Great Britaine in Unitie of Religion, and under One King* is a religious discourse that focuses on the Roman era and the problem created by the appearance of Arianism. Only at the end does a contemporary topic appear; addressing himself to his sovereign, he takes his predecessor, Elizabeth I, as an example<sup>28</sup>. He offers no juridical assessment of the situation and the few times he refers to Spain it is as an example of an extensive and well endowed entity. A person as influential on a religious and moral level as John Thornborough, Bishop of Bristol, puts it in the following terms:

Do we not see that the enlargine of the dominions of Spaine, in uniting and establishing diverse kingdomes, and territories, as those of Aragon, Castile and that of Portugal with others, hath so enlarged that kingdome, as that the like hath not before other Christian Potentates?<sup>29</sup>

Along the same lines, we should quote Sir William Cornwallis, who in his *The Miraculous and Happie Union of England and Scotland* (London and Edinburgh, 1604) captures the feeling of the times when he stresses that Spain's pretensions and the consequences of a possible change in its "humour" because of differences of opinion with France should be treated with great care<sup>30</sup>.

#### 4. ALBERICO GENTILI (1552-1608)

The views of Alberico Gentili could not be more appropriate in a study on the forms of union such as this one. He was an Italian jurist who rose to be a Regius Professor at Oxford and is considered one of the greatest figures of International Law for his contributions to the discipline at its birth and during its development. His views are inherently comparative: he was an Italian

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27. *Enotikon or A Sermon of the Union of Great Brittainie, in antiquitie of language, name, religion and Kingdome*, London, 1604.

28. London, 1603. It was published again in 1604 with a new title: *England and Scotlands Hapinesse. In being reduced to unitie of Religion, under our invincible Monarke King James*, London, 1604.

29. *A Discourse plainly proving the evident Utilitie and Urgent Necessitie of the desired happie Union of the two famous Kingdomes of England and Scotland: by Way of Answer to certain objections against the same [By Bishop Thornborough]* London: Printed by Richard Field for Thomas Chard, 1604. In: *The Harleian Miscellany*, vol. IX, London, 1812; pp. 95-105. He is the author of *The Joiefull and Blessed Reuniting the two mighty and famous kingdomes, England and Scotland, into their ancient name of Great Brittainie*, Oxford, n.d.

30. D2 r.; E 1 v. About his nephew Charles, see THOMPSON, I.A.A. "Sir Charles Cornwallis y su 'Discurso sobre el Estado de España' (1608)". In: *La Monarquía Hispánica en tiempos del Quijote*, Porfirio Sanz Camañes (Coord.). Madrid: Silex ed., 2005; pp. 65-101.



trained in *Ius Commune* which functions according to principles different from British law. Three of his “disputations” were published in London in 1605<sup>31</sup>. The first was no more than a brief treatise on the *Lex Regia*<sup>32</sup> in which the author proclaims his steadfast belief in the absolute power of the sovereign, known in England, he says, as royal prerogative. The second one bears the title of “*De Unione Regnorum Britanniae, ad l.2. De Constitutionibus principis Disputatio II*”<sup>33</sup>. The “*disputatio*” deals with the union of the British kingdoms. Such a change could only be justified if demonstrated to be of genuine interest in accordance with the above mentioned “*Lex*” (*l. 2. De Constitutionibus principis*). Gentili was aware that the debate over union commanded a great deal of interest and attention. As he acknowledges rather humorously, he was merely adding his voice to the many who had already dealt with the issue: “*Disputemus nos hic de eo quod tractant omnes nunc*”<sup>34</sup>. Up to a point, these two “disputations” are linked as the second one deals with the role of a king who has been previously invested with absolute power<sup>35</sup>. Gentili does not conceal his admiration for a king who from the first minute places this power at the service of unity. He employs a range of arguments derived from the law of nature and nations (*ius naturae et gentium*), eminently familiar to him, to support the eternal debate over the inherent virtue of unity: *In unitate bonum, in pluralitate malum*<sup>36</sup>.

As far as the advantages of union are concerned, he suggests that differences in nationality (“... *Scoti non essent peregrini in Anglia, et Angli non essent peregrini in Scotia*”)<sup>37</sup> and religion should be overlooked. In the case of the two churches<sup>38</sup>, he believes that their proximity could provide a good opportunity to even unify them. He goes into greater detail on this point at a latter stage.<sup>39</sup> Unless reciprocal nationality and denomination led to increased fiscal and military collaboration union would be fragile. Gentili concluded that in the case of England and Scotland union need not affect other areas. It was unnecessary to interfere with the diversity of laws (“*iura*”) within the new incorporated nation or change the structure of either component<sup>40</sup>.

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31. GENTILI, Alberico. *De Unione Regnorum Britanniae*. In: *Regales Disputationes Tres*, London: 1605.

32. *Ibid.*; pp. 5-41.

33. *Ibid.*; pp. 41-98.

34. *Ibid.*; p. 41.

35. OGG, David (ed.) *Ioanis Seldeni Ad Fletam Dissertatio*, Reprinted from the edition of 1647 with parallel translation, introduction and notes by David Ogg, fellow and tutor of New College, Oxford. Cambridge, at the University Press, 1925; p. LIX-LX.

36. GENTILI, Alberico. *De Unione Regnorum Britanniae*, cit.; p. 48.

37. *Ibid.*; p. 47.

38. *Ibid.*; p. 48: “*Ipsa autem vicinitas iudicat bona occasio etiam unionis ecclesiarum*”.

39. *Ibid.*; p. 64.

40. *Ibid.*; p. 94: “... *tum respondemus per unionem non exstingui iura uniti alterius supra alterum nec statum unitorum mutari*”.

This unitary principle must be reflected in the name of the new nation. Spain was a good example as its name was commonly accepted, says Gentili, for the group of kingdoms that comprised it, this being particularly true outside the country. Gentili realizes that the term had come into use because the Kings of Castile were considered as Kings “Hispaniarum” (of the Spains) and universally accepted by all the Hispanic people. He shows ample familiarity with the Spanish historical process. It began with the diversity of the post Visigothic period in which, as this author quite correctly points out, it was possible to identify a king, García, of Nájera and Alava, his son, also king of Pamplona, and the successive Kings who ruled all of the Kingdom of Navarre. He held that matrimonial unions were the key to unity in Spain: this unity had been achieved when the “obstacles” of Navarre and Portugal had been overcome<sup>41</sup>.

## 5. AN UNUSUAL CASE: FRANCIS BACON

A study of the treatises, and reports written at the beginning of the seventeenth century on the Anglo-Scottish union must include Francis Bacon. He wrote at least two texts specifically on the issue as well as others containing references to it. In his *A Brief Discourse touching the Happy Union of the Kingdoms of England and Scotland* (dedicated in private to His Majesty)<sup>42</sup> Bacon not only refers to the Spanish situation but, I venture to say, uses it as a guide and counterpoint<sup>43</sup>. He first refers to Spain to stress its size and diversity<sup>44</sup>, as opposed to Anglo-Scottish conditions which were more homogeneous and where there were fewer geographical, linguistic or cultural differences<sup>45</sup>. He acknowledges that by incorporating Portugal in the kingdom Spain had managed to achieve something to which Britannia aspired: unity as the result of the combination of “container” and “contents”. Bacon considers the problem of the union of two kingdoms and the shape each one should take and favours a solution that, in his opinion, best reconciles the two aforementioned aspects: the union and the best way to achieve it. Bearing in mind the case in point, Bacon makes a revealing comparison. A union by “compositio” is no more than a temporary convergence that collapses at the merest setback because of its lack of solidity and durability, just as the water and cold air in snow separate as soon as the temperature rises slightly. On the other hand, a union by “mixtio” (in the text “mistio”) is like a salve and provides a strong, resilient and lasting result just like the alchemists’ formulas of three elements (earth, water and oil).

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41. *Ibid.*; p. 75.

42. Edited by, SPEDDING, James. *The works of Francis Bacon, baron of Verulam, Viscount St. Alban and Lord High Chancellor of England*, vol. X; *The letters and the life of Francis Bacon, including all his occasional works...*, vol. III, London, 1868; pp. 90-99.

43. As GIL PUJOL points out, “Ecos de una revuelta ...” cit. [fn. 19]; p. 298.

44. Ed. by SPEDDING, J., cit.; p. 97.

45. KIDD, Colin, *Subverting Scotland's Past. Scottish whig historians and the creation of and Anglo-British identity, 1689-c. 1830*, Cambridge: Cambridge University Press, 1993; p. 3.

It goes without saying that a union that seeks to combine all its component elements on bases that are solid, permanent and, above all, conducive to the creation of a new entity that replaces those that participate in the process receives approval from Bacon. On the other hand, unions that merely group together disparate components under a superior common sovereignty receive his condemnation. He claims that this type of union is weak and ambiguous and leads to conflict and sedition. They are not genuine unions and they create confusion. "Mixtio", on the other hand, brings about a genuine union and propitiates lasting peace. Although more problematic, more complex and less accessible, this is the kind of union that should serve as an example<sup>46</sup>.

Bacon does not limit himself to theoretical classifications but looks at the world around him. He takes the Kingdoms of Aragon (Arragon) and Castile, united by marriage, not by conquest, as examples of states or kingdoms that have expanded by accumulation and believes that this has been a source of conflicts and rebellions in Spain: each member of such a weak union drags in problems derived from their past.<sup>47</sup> Whilst it was true that the House of Austria had been in power for a whole century, Bacon claimed that Spain provided a perfect example of divided government because of poor unification procedures and the lack of bonding between the Crowns of Castile and Aragon. Bacon goes on to say that this weak structure had led to the "disturbances" of 1591, the rebellion of the subjects of Aragon in the name of their "fueros or liberties" (sic)<sup>48</sup>.

In another text he dealt with reciprocal nationality to provide equal access to public office for persons from different kingdoms. Once again he referred to Aragon. The popular battle cry of the rebellion that had taken place twelve years previously had been the *fueros*. It had been difficult to control it until the privileges were abolished, says Bacon, and Aragon incorporated in the rest of the Spanish Kingdom<sup>49</sup>. The author felt that one of the reasons for the communication breakdowns and the misunderstandings was the lack of reciprocal nationality. His attentive observation of the world that surrounded him and close study of the Iberian peninsula aroused his interest in developments in the Kingdom of Portugal; he was not convinced of its future in the Spanish Monarchy.

This does not mean that the concept of the perfect union that Bacon advocated necessitated the sharing of a large number of features in com-

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46. Ed. Spedding, cit., p. 98.

47. *Ibid.*; p. 96.

48. GIL PUJOL deals with this issue in his above quoted "Ecos de una revuelta ...", cit. [fn. 19]; pp. 298-300.

49. A speech used by Sir Francis Bacon in the lower house of Parliament, concerning the article of naturalization, Edited by, SPEDDING, James. *The works of Francis Bacon*, cit.; p. 307 and following pages.

mon. He believed that there were four essential elements: name, language, uniform law and equal access to public office. It thus seems that Bacon had some demanding criteria for approach and commitment to union. But once the process was under way and its success assured he was very flexible about how it evolved, as can be seen in his approach to the law. He held that everyone should only receive equal treatment under the law in the most fundamental areas these being ecclesiastic and civil law; there might well be important differences in other areas. He points out that it was not a matter of eradicating particular customs or bringing everyone to the same place for court hearings.

The theoretical nature of Bacon's position is quite explicit and his outlook even dubious when he uses examples from real life to illustrate his arguments. As we have just seen, the example of Spain, and in particular the union of the Kingdoms of Castile and Aragon, was just the opposite of what he was proposing<sup>50</sup>.

In conclusion, the analysis of early seventeenth century English and Scottish writings on union gives us an idea of how different the situation was there compared to Spain; and this was the prevailing idea in the British Isles at that time. The majority feeling in England and Scotland in 1603 was of being on the point of initiating a new relationship. In only the previous one hundred years in Spain, events had contributed to the creation of a rich casebook of examples that revolved around the aspects and issues we have indicated: the death of Isabel of Castile (1504) and the problems derived from the succession; Charles V's ascent to the throne (1516); the final years of his reign, his abdication and the succession of Philip II (1555); this king's problems with some of his realms –the Flemish provinces, the Kingdom of Aragon (1591) as well as the constant and ever changing series of wars and conflicts on the European scene.

A not inconsiderable number of these conflicts were waged with England, strangely enough after there had been a matrimonial union (Queen Mary and Prince Philip) between the two kingdoms<sup>51</sup>. Not only was the union a failure but it also aroused the antipathy that culminated in Philip II's attempt to invade the island by sea (1588). And in 1603 the English and the Scottish still retained very vivid memories of the Spanish Armada. At this time the confrontation between the Spanish and English crowns was real and constant. It could not be classed as open warfare; active harassment is a more accurate

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50. WORMALD, Jenny. "James VI, James I and the Identity of Britain", cit.; p. 30 and p. 32; HILL, Christofer, *The intellectual origins of the English Revolution*, Oxford, 1965. Spanish edition, *Los orígenes intelectuales de la revolución inglesa*, Barcelona: Crítica, 1980. Hill points out the "Spanish party", commanded by the Spanish ambassador Count of Gondomar. See the excellent article of THOMPSON, I.A.A. "Sir Charles Cornwallis y su 'Discurso sobre el Estado de España' (1608)", In: *La Monarquía Hispánica en tiempos del Quijote*, Porfirio Sanz Camañes (Coord.), Madrid: Sílex, 2005; pp. 65-101.

51. RODRÍGUEZ SALGADO, María José. *Un Imperio en transición. Carlos V, Felipe II y su mundo, 1551-1559*, Barcelona: Crítica, 1992.

term. And it could have turned into a full scale invasion of Ireland. Things did not turn out this way and the two countries signed a peace agreement the following year<sup>52</sup>. However, given the circumstances, it was inevitable that the English and the Scottish writers drafting their expert opinions and proposals would fix their gaze on a Spain that treated them with open hostility. As they considered the structure of the Spanish monarchy as a possible model, they naturally assessed its military capability and foreign policy. As Professor Wormald stresses, Spain was absolutely unacceptable as a model<sup>53</sup>. This being so, the palpable anti-Spanish feeling that, as Elliott stresses, typifies this period of English history could not help exerting an influence on contemporary writings: they reflected an awareness of the overwhelming superiority of Spain but at the same time of potential foci of crisis and weakness<sup>54</sup>. The latter was particularly true in an author as important as Francis Bacon.

In sum, there was a world of difference between the project to unite England and Scotland and the situation in Spain. The process in the latter country had had a long history and its Mediterranean foundations had been transplanted to its imperial organization<sup>55</sup>. Another important difference was the identification between the Catholic Church and a Spain that dominated Europe but looked towards the Atlantic and the Americas as well. The Anglo-Scottish Union seemed to come from quite the opposite direction as it had emerged from a movement radically opposed to Roman Catholic supremacy and sought to consolidate a self contained and self sufficient sphere of activity. The submission against the “English heresy” prepared by Francisco Suárez on Pope Paul V’s orders articulated the confrontation perfectly. Suárez’ retort to the “theologian king” of Scotland and England, whilst respectful and polite, is systematic and harsh at the same time; its argumentative power is irresistible<sup>56</sup>.

We find the third difference in the rough and tumble of diplomatic relations. After the “highpoint” of the Armada, open warfare between the two nations did not cease until the peace of 1604. Nevertheless, the Spanish

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52. CROFT, Pauline. “England and the peace with Spain, 1604”. In: *History Review*, 49 (September, 2004); pp. 18-23.

53. “James VI, James I and the Identity of Britain” cit. [fn. 3]; p. 30.

54. ELLIOTT, J.H. *El Conde-Duque de Olivares*, Barcelona: 1990, Ed. Crítica; pp. 558-561. See SANZ CAMAÑES, Porfirio, “España e Inglaterra: conflicto de intereses y luchas de poder entre 1585 y 1604”. In: *La Monarquía Hispánica en tiempos del Quijote*, Porfirio Sanz Camañes (Coord.), Madrid: Silex, 2005; pp. 627-646.

55. VICENS VIVES, Jaime. “Precedentes mediterráneos del virreinato colombino”. In: *Anuario de Estudios Americanos*, V (1948); pp. 571-614; LALINDE ABADÍA, Jesús. “Virreyes y Lugartenientes medievales en la Corona de Aragón”. In: *Cuadernos de Historia de España*, Buenos Aires, 1960; pp. 98-172; ELLIOTT, John H. *La España imperial*, Madrid, 2006: (Imperial Spain 1469-1716, London: first edition, 1963); pp. 84-85; CERNIGLIARO, A. *Patriae leges privatae rationes. Profili giuridico-instituzionali del cinquecento napoletano*, Napoli: Jovene Editore, 1988; pp. 34-35.

56. SUÁREZ, Francisco. *Defensio Fidei III. I: Principatus politicus o la soberanía popular*, introducción y edición crítica bilingüe por E. Elorduy y L. Pereña, Madrid: Corpus Hispanorum de Pace, vol. II, CSIC, 1965.

lobby was able to exert pressure on the Court in London through a variety of channels, including its ambassador. The personality and *modus operandi* of the Count of Gondomar<sup>57</sup>, a personal friend of James I, typified the ambiguous image that Spain projected in England: on one hand the ideal of a richly broad and diverse plurality and, on the other, the difficulty of maintaining it.<sup>58</sup> These contradictions were critically analyzed by Charles Cornwallis,<sup>59</sup> the English ambassador in Madrid, as they were a hundred years later by the Scot, Andrew Fletcher<sup>60</sup>.

In an atmosphere pervaded by ambiguous feelings, the strength of a strategy of religious, mercantile and maritime expansion basically directed at achieving a secure position and a new role in Europe tilted the balance in favour of the concept articulately advocated by Alberico Gentili and Francis Bacon; they also enjoyed the full support of James I himself. Whilst it is true that the analysis and study of Hispanic-Portugal included, and Lithuanian-Polish models provided some interesting points of reference, the clarity and strength of Bacon's stance offered more convincing arguments and, above all, was more relevant to conditions in the British Isles.

## **6. TYPES OF UNION CONSIDERED IN SPAIN AND IN SCOTLAND AND ENGLAND<sup>61</sup>**

One of the aspects that should be taken into account when comparing the types of union in Spain and Great Britain is how each country dealt with the idea. A global assessment of British writings on the subject enables us to deduce that there was a tendency to divide unions into two basic classifications: federal and incorporative. In Spain the tendency was to maintain the more detailed and complex type of division that had been established by Roman-Canonical legal doctrine. The definition derived from Roman law was based on the supposition that two parties commence a relationship by means of an agreement or "foedus". Depending on the circumstances that had brought about this relationship, the importance of each party and the future intentions of both, the agreement on which the "foedus" was based could stipulate equal terms or unequal ones, although in this case the weaker party

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57. BARTOLOMÉ BENITO, Fernando. *Don Diego Sarmiento de Acuña, Conde de Gondomar. El Maquiavelo español*, 1ª ed., Gijón: Ediciones Trea, 2005.

58. ELLIOTT, John H. *Imperios del mundo atlántico. España y Gran Bretaña en América (1492-1830)*, 1ª ed., Madrid: Santillana, 2006; p. 590.

59. THOMPSON, I.A.A. "Sir Charle Cornwallis ...", cit. [fn. 30].

60. *Discorso delle cose di Spagna*, edited by ROBERTSON, John. In: *Andrew Fletcher. Political works.*, Cambridge: Cambridge University Press, 1997; pp. 83-117.

61. KOENIGSBERGER, H.G. "Dominium regale, dominium politicum et regale. Monarquías y parlamentos en la Europa moderna". In: *Revista de las Cortes Generales*, 3er. cuatrimestre, 1984; pp. 87-119.

maintained his institutions. The third possibility was the status of “dediticia” of the weaker party; in this case the latter remained at the complete disposal of the former, as in the case of union by conquest<sup>62</sup>.

Bartolus of Saxoferrato (1313-1357), unanimously recognized as the leading figure of the *Mos Italicus* (Italian school) was also adopted as an authority<sup>63</sup>. He had managed to systematize the matter, setting it on a sound and irrefutable basis. He established a fundamental distinction: the difference between union by accession and union “*aeque et principaliter*”. When one territory was united to another by accession, the former assumed full powers of government over the latter; the subsequent merger made the first territory into part of the second. In union *aeque et principaliter* this was not the case: each one of the parts retained its character, legal system and institutions. The only thing that territories that had been united this way shared was their sovereign. Not surprisingly there were situations that did not conform exactly to this model. The most frequent one was when union *aeque principaliter* facilitated some type of “communication” that had not previously existed<sup>64</sup>. Thus the tripartite distinction derived from Roman culture (equal, unequal or “dediticius” –subject to the conqueror’s wishes– treatment) was frequently cited. We should add that, in spite of the above mentioned preference for the two categories, Thomas Craig<sup>65</sup> at the beginning of the seventeenth century and another Scot, George Hodges, at the beginning of the eighteenth<sup>66</sup>, both used the classical Roman tripartite one. This was also the case with Alberico Gentili. He was concerned about the relationship between what form a union took and the form of its relations with other kingdoms. There can be no doubt that if the union is by accession then the subordinate territory “*adsumit naturam rei principalis*”. Gentili defines the supposed principal union in the generally accepted fashion: each party preserves its rights. The key to the matter

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62. MANNORI, Luca. *Il sovrano tutore. Pluralismo istituzionale e accentramento amministrativo nel Principato dei Medici (Secc. XVI-XVIII)*, Milano: Giurfrè Editore, 1994; p. 42.

63. MANNORI, Luca, cit. p. 51; ARREGUI ZAMORANO, Pilar. “Capítulos del Fuero Reducido de Navarra que impidieron su confirmación”. In: *Initium. Revista Catalana d’història del dret*, 8 (2003) pp. 85-142; p. 116.

64. GENTILI, Albericus. *De Unione Regnorum Britanniae*, in *Regales Disputationes Tres*, London: 1605; p. 86. In Spain, the Catalan lawyer Andreu Bosch, distinguished three forms of union, following the Bartolist model, in his *Summari, index o epítome del admirables i nobilíssims títols d’honor de Catalunya, Rosselló i Cerdanya*, Perpiñan: 1628; Barcelona-Sueca: 1978; p. 110.

65. CRAIG, Thomas (Sir). *De unione regnorum Britanniae tractatus* (1605), Edinburgh, 1909, follows the tripartite division: by conquest; by “foedus” between enemies after war; by “foedus” between kingdoms that weren’t enemies. It reminds us the triple division of types drawn by Francis Bacon: two involving violent means and the third pacific and consensual (*A Brief Discourse touching the Happy Union of the Kingdoms of England and Scotland*, London 1603, ed. Spedding, vol. III; pp. 89-99).

66. HODGES, George. *Essay upon the Union shewing. That the subjects of Both Nations have been by the Union of the Two Crowns, justly Intitled to all manner of Privileges, which the influing Treaty can give them*, Edinburgh: Re-printed, 1706. This author distinguished three ways of union:” 1. By Incorporating themselves under one and the same Head and Allegiance; 2. By Confederacies betwixt Nations abiding under distinct Heads and Allegiances; 3. By Conquest”.

was that sovereignty now resided in a single person. This person assumes responsibility in the new government for negotiating agreements with other kingdoms. The agreements that each kingdom had before their union are considered to be null and void. In such cases, the king was not able to pursue one line of foreign policy as King of England and another as King of Scotland; he had to adopt the same line for both kingdoms<sup>67</sup>:

Nam respice ad omnes species unionis et censebis manere iura cum exteris, quae erant ante unionem. Si scilicet regnum regno adiicitur, transeunt adiecti iura in alterum, cui sit adiectio. Sicut iura filii adrogati transeunt in patrem adrogatorem. Et quod unitu alteri accessoriae, id adsumit naturam rei principalis. Si autem fit unio aequaliter, ut unitur utrumque simul iure pari, tum nec utrum exstinguitur.

All these issues arose when James VI of Scotland became James I of England as well, a novel situation for both kingdoms. The novelty, however, was greater for Scotland than for England, as Jenny Wormald shrewdly points out<sup>68</sup>. The Kingdom of England had already acquired a certain amount of experience in union as a result of certain procedures such as the *Act in Restraint of Appeals* of 1533<sup>69</sup>. The English experience in union covered areas such as equal access to public office, the broadening and modifying of jurisdictional areas (including the pursuit of crime and criminals) and the exercise of royal prerogative. Whilst the Scots were afraid of losing more than they expected to gain out of the union with England, the English felt very sure of themselves and thought to have the upper hand. This was one of the reasons why foreign models such as the Spanish and the Polish-Lithuanian were the subject of close study in Britain.

After reading and analysing English and Scottish theories on the different types of state-building and the kind they observed in Spain at the time of the 1603 union, we come to the conclusion that the Spanish model was unavoidable. Nevertheless, it was not so unavoidable that the English and the Scottish adopted the “horizontal” type of union, prevalent in Spain. This was despite the fact that, as we have seen, some of those taking part in the debate like the Scots, Pont and Russell, and even perhaps James I himself, were concerned for the equality and balance of the relationship.

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67. GENTILI, Alberico. *De Unione Regnorum Britanniae*, cit.; p. 86.

68. WORMALD, Jenny. “The nion of 1603”. In: *Scots and Britons. Scottish political thought and the union of 1603*, edited by Roger A. Mason, Cambridge: Cambridge University Press, 1994; pp. 17-40; “O Brave New World? The Union of England and Scotland in 1603”. In: T. C. Smout (ed.), *Anglo-Scottish Relations from 1603 to 1900*, Oxford, Oxford University Press, 2005; pp. 13-35; LEVACK, Brian P. *The Formation of the British State. England, Scotland, and the Union, 1603-1707*, Oxford: Clarendon Press, 1987; p. 55.

69. MORRILL, John. “State formation and nationhood in the Atlantic Archipelago, 1500-1720”, cit. [fn. 6]; p. 145.



## 7. ARTHUR DUCK. VARIOUS LAWS: THE RELATIONSHIP BETWEEN THEM FROM A EUROPEAN PERSPECTIVE

The process of constitutional analysis of 1603 came and went but the plans of James I did not come to fruition. As far as the subject matter of this paper is concerned there is no doubt that the theories of the Oxford professor Arthur Duck are relevant. A civil lawyer, he had been born in Heavitree, in the County of Devonshire, in 1580<sup>70</sup>. He spent the civil war years immersed in the preparation of a book entitled *De usu et auctoritate legum romanorum per dominia principum christianorum* with the help of the Bodleian Library collection<sup>71</sup>. For the previous forty years he had been studying Roman law and practising as a lawyer in England.

From the point of view of this article, Duck's book is extremely interesting and provides some very relevant information. The work is divided into two books. The first one deals with the history of Roman law in great detail and covers the medieval period as well. The second one looks at current European legal systems and includes an assessment of the influence of Romano-Canon law on each one. The chapters on English law are longer and better documented as are the ones on Scottish and Irish law. However he gives a fairly full account of the Laws of other European territories as well. As is well known, Duck's work is proof of the influence of Roman and Canon law both on the training of jurists and legal culture as well as on court procedures all over Europe at the time. As the author suggests in his general assessment, Christian Europe, despite being divided into Catholics and Protestants, shows a clear family resemblance<sup>72</sup>, while enabling each country to maintain its own identity. Up to a point Duck remains loyal to Gaius's old idea of the compatibility between each country's legal system and one shared with other countries.

Duck's exposition is characterised by jurisdictional and procedural considerations which give preference to the interpretations that the application of the law implies, especially from the point of view of the high courts. European practice demonstrates the important role of the courts with ultimate jurisdiction that delivered final decisions and formulated doctrine that subsequently appeared in the respective legal systems. This invaluable process also contributed to bringing continental European legal systems closer to ones in which precedents and decisions repeated in the supreme courts acquired the

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70. LEVACK, Brian P. *The Civil Lawyers in England, 1603-1641. A political study*, Oxford: Clarendon Press, 1973; pp. 225-226. A good approach in Spanish by Francisco J. DE ANDRÉS, In: "Ius Commune v. Common Law en el siglo XVII: el caso de Arthur Duck". In: *Anuario da Faculdade de Direito da Universidade da Coruña*, 2003; pp. 63-103 and a brief but accurate biography by the same author, In: *Juristas universales*, Rafael Domingo, (coord.) ed. Marcial Pons, 4 vols., Madrid, 2004, vol. II; pp. 331-334.

71. DUCK, Arthur. *De Usu et Auctoritate juris civilis Romanorum per dominia Principum Christianorum, libri duo*, London: 1689, Ristampa anastatica, Bologna: Forni Editore, 1971. Another facsimile edition, Koln-Wienne, 1990, with introductory study by E.T. Hinrichs.

72. Vid. *De Usu et Auctoritate...*, I, chapter VII.

force of law. Up to a point, these factors lead Duck to focus on the similarities between English and Roman and Canon law; at the same time, he does not dispute the fact that there were differences<sup>73</sup>.

If these arguments are valid for making an overall assessment of Europe's role in the creation and application of laws, they are even more so in dealing with the issue of the reconciliation between English and Scottish law. As can be expected, Duck applies the theses he put forward in his book to both systems: the existence of a common juridical culture and legal procedures in the high courts (being a civil lawyer, he shows less interest in local courts). He suggests that there is a common platform and that the solutions to legal problems reached in the really important cases pass through channels that are not really all that far apart as they show similar interpretative criteria. Duck implies that it would be difficult for these criteria to differ no matter how dissimilar procedures and the range and number of courts might seem. This means that if these apparent differences are dispensed with, the possibility of a common approach predominates. According to Duck' this factor contributes strongly to the confluence of English and Romano-Canon Law; each one has its own history and content as far as the rules of primary source of law are concerned but may have more in common when it comes to secondary legal sources.

Duck's extensive experience as a high court judge, especially in the ecclesiastical courts, enabled him to observe the frequent use of Roman and Canon law. This was the most appropriate law in courts that did recognize English law but provided solutions "ex aequo et bono". Duck insists that, whilst the Kings Bench and the Common Courts used English law exclusively, all the important English lawyers, even those most familiar with and supportive of English law, were experts in Roman and Canon law. This was especially true where the doctrinal authorities were concerned, just as the lawyers and judges who often practised in courts that did not recognise common law, that is to say, civil lawyers, were also well versed in English law.

Whilst listing the numerous similarities between English and Scottish law, Duck did not believe that a standardization of the two legal systems was particularly advantageous. A reasonable deduction based on the detailed analysis that Duck makes of both laws is that he was not overly concerned by the absence of a full merger between the two. Given his Romanist background, he probably felt it was a good idea that Scotland retained its well known predilection for the Roman Law not only as next source of law after the legislation enacted by the King and Parliament but also as a preferred source of reference for the application of rules of legal interpretation. In Duck's opinion the most important difference between the two legal systems lies in the fact that the judge's decision making was unrestricted, not regulated, under English law whilst, under Scottish law, it

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73. CAIRNS, John W. "Scottish Law, Scottish Lawyers and the Status of the Union". In: *A Union for Empire. Political thought and the British Union of 1707*, Cambridge: Cambridge University Press, 1995; pp. 243-268.

had to comply with Roman law which included doctrinal concepts. But Duck realized that the rules that jurists from both systems followed in practice were not really all that different.

Duck's work and especially the opinions and theories he develops in his book enable us to see that he was not very far from the points of view supported by Francis Bacon and Thomas Craig. Finally, all of them concurred that, in the words of Craig, English and Scottish law were similar enough that there was no concern over the differences which, in turn, were sufficiently important that it was not worthwhile trying to eliminate them.

As far as the subject of this article is concerned, union and its different forms and the interest the Spanish model aroused in England and Scotland, Duck's testimony is invaluable. Except for the English and Scottish laws, the Hispanic ones, in the plural, probably receive the greatest amount of attention in the book. Duck begins by acknowledging the dominant position that the Spanish monarchy enjoyed at the time but also the special nature of the Iberian kingdoms' history and legal system as they had been especially affected by the "tyranny of the Saracens and Moors". He realized that this magnified their sense of "isolation from the empire" (*exceptio ab Imperii*) and created a more intense awareness of the individual character and composition of their respective legal bodies. Indeed the diversity of kingdoms that existed in Spain was due to the fact that resistance to the Muslims emanated from diverse nuclei. Duck deals with each law separately and manages to conduct a very accurate analysis of the composition of each one, including its general content and origins. He goes into great detail when dealing with the issue of the acceptance of Roman law on each Iberic legal system.

The special interest Duck takes in Navarre and his extraordinary knowledge of its incorporation in the Kingdom of Castile are surprising. There is no doubt that all existing examples of the reconciliation of two bodies of law were relevant but perhaps Duck was interested in highlighting this one because it provided useful references for the Anglo-Scottish union, also coloured by the difficulties that arose from the granting of nationality and secondary sources of law.

The union of kingdoms and the forms that these unions had taken on the Iberian Peninsula had some interesting aspects which did not go unnoticed by Duck perhaps because they had some relevance from the English point of view. Duck firmly believed that the Aragonese and the Portuguese felt united "*principaliter, non accesorie, eidemque non submissa sed (ut loquuntur) aequata; atque ideo*". It is worth noting that Duck was well aware that this was the very form of union that existed within the Crown of Aragon between the Kingdom of Aragon and the Principality of Catalonia, the one that laid the foundation for their relationship in the twelfth century. However despite this he does not hesitate to make special mention of the fact that one consequence of this type of situation was that there was no mutual obligation to repatriate offenders.

In short, for the purposes of this article and the issues it addresses Duck's work is highly interesting for three main reasons. In the first place, he suggests that juridical and institutional uniformity in Europe is advisable and that the British Isles should not stray too far from the continental model. In second place, he suggests that England and Scotland maintain the structure and nature of their individual legal systems, that they should not be merged and that they had enough factors in common to move closer together at some point in the foreseeable future (we should not forget that Duck wrote his book around 1648). In third place, Duck was extraordinarily well versed in Hispanic laws and was thoroughly and accurately informed of the vicissitudes of amalgamating them.

## **8. THE UNION IN THE SECOND HALF OF THE SEVENTEENTH CENTURY**

An assessment of union and its nature at the beginning of the seventeenth century finds Spain, on one hand, with its one hundred year history of "principal" union, whilst England and Scotland were at the beginning of the process. The decades to follow brought a series of difficulties that prevented the prospects of union and rapprochement from being realized. There were no more developments either during the reign of James I or Charles I. Quite the opposite happened: there were a series of confrontations that ended in a war that provided ample evidence of all the problems and difficulties involved in the union and co-existence of two kingdoms. The force that the phrase "the war of the three kingdoms" has acquired in British historiography is eloquent enough. The British political climate was so charged that all the promising initiatives taken in the first years of James I's reign remained more or less frozen. Following the cycle that included the reign of Charles I, the civil wars and Cromwellian legacy, the Anglo-Scottish union appeared to be very seriously endangered. Charles II ascended the throne to govern a Scotland that had not moved closer to England economically but had possibly drifted further apart. The impact of Cromwell's invasion and the repression of the Presbyterians were still being felt as was the mark left by having been submitted to the military control and surveillance of their conquerors. There was one factor, however, that began to turn back this negative tide of events: the strength and determination of the Presbyterian Church. Its role as a force for change became important. In the final third of the seventeenth century Scots law and institutions established themselves in Scotland. It cannot thus be said that union was close when it was suggested that fresh ideas were required when Mary and William of Orange ascended the throne.

Neither was it a propitious time for the cohesion of kingdoms in Spain. The entire period between the death of Philip II (1598) and the minimal stability achieved under the Peace of the Pyrenees (1659) was a time during which the preservation of the Spanish monarchy was subjected to great tensions and difficulties, the outcome being the loss of Portugal and the Low Countries. There were also serious rebellions and uprisings in Naples and Sicily. The one in Catalonia led to its separation for twelve years (1640-1652). Thus the situation at the end of the seventeenth century compared

with the one at the beginning had changed significantly. This obliges us to move on to the second part of this article that deals with what we might describe as the second period of constitutional analysis of the Anglo-Scottish union. Spain subsequently aroused special interest as a reference point because of its varied and distinctive character.

## **9. THE ANTI-BOURBON PANIC AND THE ANGLO-SPANISH CONNECTION IN THE WAR OF THE SPANISH SUCCESSION**

The War of the Spanish Succession greatly reduced the differences between Spain and England at the beginning of the eighteenth century<sup>74</sup>. Great Britain clearly began a new phase and the British attitude to Europe underwent a profound change. A hundred years previously the British had had to contend with a dominant and hostile Spain that had adopted an aggressive posture as a planetary power. The British strategy was to keep their heads down and generally stay out of trouble. At the end of the seventeenth century and the beginning of the eighteenth, England, that at the time enjoyed a symbiotic relationship with the Dutch Republic, warned Europe at large against the danger of total dominance by the Bourbons. On this occasion however the British were prepared to go on the offensive, especially when they learned that the last Spanish Hapsburg had decided to tie the future of the Spanish line of the House of Austria to the rival Bourbons. The Anglo-Dutch decision to go to war to prevent this turn of events was not only due to circumstances of the moment but marked the beginning of a long term strategy<sup>75</sup>.

Europe was going through a critically important moment as far as its future composition was concerned. The partition agreements backed by Louis XIV showed that the distribution of territorial powers could change. England played a part in these agreements and revealed its real objectives<sup>76</sup>. New unions and disunions appeared on the horizon as did the accompanying wars, almost inevitable in this type of process. The Franco-Spanish Bourbon block was quickly identified as the enemy. England now took the initiative but, as Robertson points out<sup>77</sup>, the Anglo-Scottish union and reconciliation had to be consummated before embarking on the ambitious undertaking of confront-

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74. COLLEY, Linda, *Britons. Forging the nation 1707-1837*, second edition, Yale University Press, New Haven and London: 2005. ROBERTSON, John. "An elusive sovereignty..."; cit. [fn. 24] p. 201.

75. HOPPIT, Julian. *A Land of Liberty? England, 1689-1727*, Oxford: Clarendon Press, 2000.

76. *The Fable of the Lions Share, verified in the Pretended Partition of the Spanish Monarchy, done from the Original printed at Viena Part I*. London, Printed in the year 1701; *The Dangers of Europe from the Growing Power of France...*, London: 1702; *Division our Destruction or a Short History of the French Faction in England*, London: 1702; *Anguis in Herba or the Fatal consequences of a Treaty with France*, London 1702.

77. "An elusive..."; [fn. 24] p. 201.

ing the danger of the Franco-Spanish Bourbon union<sup>78</sup>. England was however prepared to tolerate the continued existence of the Austro-Spanish Hapsburg union.

Publications dealing with the potential problems involved in an Anglo-Scottish union appeared in this environment of concern over the advance of Bourbonism in Europe. In Scotland, both Andrew Fletcher, a federalist, and George Mackenzie, Earl of Cromarty (1630-1714) and a unionist, were aware of the Bourbon threat and the need for sound structures to confront it<sup>79</sup>. P. Paxton also had a very clear vision of the situation and in 1705 made no bones about the objectives: the defence of civil liberties and religion “against the Exorbitant Power of the House of Bourbon”<sup>80</sup>.

It was in this climate that the War of the Spanish Succession facilitated the comparison between England and Spain. War broke out when Portugal joined the allies thanks to the machinations of the English ambassador in Lisbon<sup>81</sup>. The Archduke Charles, after a visit to London, established himself in Lisbon and, working closely with Prince George of Darmstadt, began a period of intense activity. The latter played a vital role in persuading the allies to penetrate the peninsula. As well as being an international conflict, the War of the Spanish Succession became a Spanish civil war in which England backed those in favour of making the Archduke Charles King of Spain.

The allies advanced along the Mediterranean coast and took Barcelona. The viceroy, Fernández de Velasco, capitulated to Admiral George Peterborough, in October of 1705. The supporters of the Archduke Charles willingly lent their co-operation to the occupation of the city. The entire operation was carried out with the utmost care and given the greatest possible chances of success especially as a previous anti-Bourbon uprising in Naples had ended in failure in February of 1701. It was in fact a pact signed in Genoa in May of 1705 that was designed to ensure the success of the undertaking. There is no better example of the connection between the two countries than the Genoa Pact, a commitment made by Queen Anne to the Spanish supporters of the House of Austria in general and the Catalans in particular. In exchange for considerable military aid and an undertaking not to tamper with its legal system or political institutions, England and the rest of the allies took the war into the peninsula using the city of Barcelona as their operational headquarters and the seat of the court of the Archduke Charles.

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78. “An elusive ...”; [fn. 24] p. 222, 208.

79. MACKENZIE, George. *Parainesis Pacifica; or a perswasive to the Union of Britain (By a Person of Quality)*, London: 1702.

80. *A scheme of Union between England and Scotland, with Advantages to both Kingdoms*, London, 1705; (23 pp.) p. 22.

81. FRANCIS, David. *The First Peninsular War, 1702-1715*, London, 1975.

When comparing Britain and Spain and the types of union employed in each case, we notice a rather strange situation developing after 1705. Whilst the English became more enthusiastic about the idea of a union with Scotland after the latter had removed some obstacles and dispelled uncertainties [Alien Act, 1705], the Spanish began to question the future of Philip V on the throne of Spain. A great part of the instability was actually due to the English aid. This is how the Whig government of Queen Anne created a favourable climate for the Anglo-Scottish union and, at the same time, worked actively to seize the Spanish throne for the Archduke who was totally reliant on the help of his Catalan supporters.

On the British side, the conflictive final decade of the seventeenth century and the climate prior to the War of the Spanish Succession gave rise to or at least created favourable conditions for the Anglo-Scottish union. There was a flurry of commentary on the issue and a great deal of material appeared in a short period of time. Publishing activity in Scotland was inevitably reminiscent of the euphoria aroused by the union during the 1603-1605 biennium. A number of Scottish jurists, historians and politicians contributed to the debate in publications, reports and speeches in parliament and provided ample material for a description of their role.

## 10. SPAIN AS A REFERENCE FROM 1700 TO 1707

Just as in the 1603-1605 biennium, many of the commentaries from the 1700-1707 period made reference to Spain. Analysts admired the kingdom's broad and extensive structure but denounced its weaknesses. They were perhaps concerned at the possibility of confronting the strengths of Spain and the enormous expanse of its empire and the organizational skills and naval power of France. The combination of these two factors meant that the Bourbon dominance was regarded as highly dangerous.

The Scot, Andrew Fletcher, was amongst the most insistent in warning of the risk of the new Bourbon dominance on the eve of the War of the Spanish Succession. His viewpoint and his own experience reflected his familiarity with Spanish conditions. He had spent a number of months in the country (from July of 1685 to January of 1686)<sup>82</sup> where he was unfortunate enough to have been imprisoned<sup>83</sup>. He was also the author of *Discorso delle cose di Spagna*, printed in Edinburgh even though the imprint bears the place name of Naples<sup>84</sup>.

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82. ROBERTSON, John. *Andrew Fletcher. Political works.*, Cambridge: University Press, 1997; pp. 83-117, p. XXXII; *The case for the Enlightenment. Scotland and Naples 1680-1760*, Cambridge: Cambridge University Press, 2005; p. 162.

83. ROBERTSON, John. *Andrew Fletcher. Political works*, cit.; p. XXXII.

84. See Robertson's remarks in, *Andrew Fletcher*; cit.; pp. XXII-XXIII-XXIV and in his *The case for the Enlightenment*; cit.; pp. 161-165.

The *Discorso* contains numerous points of interest but for the purposes of this article I intend to focus on one: Fletcher writes as if he were addressing the new sovereign of the Spanish empire (he was writing in 1698, when it was common knowledge that Charles II lacked a successor)<sup>85</sup>. He suggests his prime objective should be to dominate maritime trade. Fletcher seems perfectly indifferent to English interests and even the country's ruin does not seem to bother him in the least. The discourse may be esoteric and speculative in its structure and ideas but there can be no doubt of Fletcher's precision in pinpointing the factors that have debilitated the Spanish empire. Addressing himself once again to a real or imaginary Hispanic prince, he does not hesitate to prescribe the remedy that would lead to the country's recovery of world dominance: the same strategy as the "great sea powers". His stance provides us with a genuine paradox: a Scot who in 1698 does not hesitate to propose measures that redound to the direct and undoubted detriment of England. This attitude, seen in the cold light of day, is not particularly patriotic and may well explain the curious circumstances surrounding its publication in Edinburgh with a Neapolitan imprint and in Italian, of all things. It is unclear whether Fletcher wrote the book in Scotland or Italy or if he was familiar enough with Italian not to require a translator. In any case, it seems more likely that Fletcher had some sort of connection with the circles that were drawing attention to the danger that the success of Louis XIV's plans represented to the balance of power in Europe on the eve of the crisis over the Spanish succession. The book shares a number of the ideas that a Neapolitan judge, Francesco d'Andrea, was developing at the time. The judge had connections with the circle of the Viceroy, the Duke of Medinaceli, and the Academy "degli Investiganti".

It is surprising that there is no record of Fletcher's reaction to events in Naples in the years following the publication of his discourse. It was here that the "Machia conspiracy", an uprising against the new dynasty, took place. It is also surprising that Fletcher remained silent over the fate of the Duke of Medinaceli. He was removed from office for his inaction at the time of the conspiracy, recalled to the peninsula and imprisoned in Pamplona where he died a few years later.

As indicated at the beginning of this article, the years 1603 and 1707 should not be considered apart when examining the Anglo-Scottish union and **George Ridpath**, a Scottish Presbyterian, provides us with the reason why. He wrote a book on the union and the connection between the proposals made in 1603 and the ones made in 1707. Ridpath published *A discourse upon the Union of Scotland and England* in 1702. It was an in-depth study of both the theoretical basis of the topic as well as the debate surrounding it and its passage through parliament in 1603. He devotes a great deal of attention to Spain. This is directly reflected in his eyewitness accounts of events of the times and indirectly in the opinions he voices on the situation in 1603.

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85. MASTELLONE, Salvo. *Francesco d'Andrea politico e giurista (1648-1698). L'ascesa del ceto civile*. Firenze, 1969.



In 1706 he published *Considerations upon the Union of the Two Kingdoms*<sup>86</sup>. Whilst *Discourse upon the union* was more general in nature, Ridpath refers to a particular issue in this work. The issue is of great importance for political unification but at the same time elementary. He argues (cap. 1) that equal access to public office is the basis of union and coexistence under the same ruler. After reviewing the Romans' approach to the issue, Ridpath turns his attention to the union of Aragon and Castile (cap. 3). He points out that the lack of a policy on equal access to public office for subjects of both kingdoms brought about calamity and rebellion. There is no doubt of Ridpath's admiration for Francis Bacon and he includes a long quote from him on his approach to the "postnati"<sup>87</sup>. Doddridge, an English commentator on the 1603 union, also commands a great deal of respect from Ridpath and he quotes him when dealing with the Antonio Pérez issue.

On the other hand, **George Hodges'** very important work on union<sup>88</sup> also contains references to Spain. His openly Presbyterian and federalist leanings did not prevent him sharing a number of ideas with Francis Bacon. This amounted to accepting to a greater or lesser degree Bacon's assessment on union in the Spanish monarchy, weaknesses included. Be that as it may, George Mckenzie, Earl of Cromarty (1630-1714), was an Episcopalian who played an important role in the preparation of the union and alluded far more explicitly to the debility of the national ties in Spain than any of the Scottish federalists quoted (Fletcher, Ridpath, Hodges). He was one of those who showed concern over the Bourbon dominance. As far as Spain is concerned, his exposition, *Parainesis Pacifica; or a perswasive to the Union of Britain*, has more in common with Francis Bacon's hypotheses than any other: he insists that the debility of Catalonia and Aragon's ties with the rest of Spain was the cause of the conflicts experienced by the Spanish Monarchy about the monarch. These had arisen because the territories were not "intirely incorporated and truly united"<sup>89</sup>.

Another author who devoted an extraordinary amount of attention to Spain at the time was P. Paxton<sup>90</sup>. The basis of this author's vision of the subject was federalist. According to this way of thinking the object of the

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86. *Considerations upon the Union of the Two Kingdoms: With an Account of the Methods taken by Ancient and Modern Governments, to effect an Union, without endangering the Fundamental Constitutions of the United Countries*. Printed in the Year 1706.

87. *Ibid.*; p. 18.

88. *The Rights and Interest of the two British Monarchies, with a Special Respect to an United or Separate State. Treatise III*, London, Printed in the Year, 1706; see p. 206.

89. London, 1702; p. 5, "And notwithstanding, that the Defects on the Compleat Union of Arragon and Catalonia with Castile and the other Kingdoms of Spain, want very little, and in few things; yet hath Spain found more Trouble and Embarras from Arragon, and more Wars and Sedition in Catalonia, by then times, than by all the other Kingdoms, which are intirely incorporated; and all these truly united, do always act as if one, against these two".

90. *A scheme of Union between England and Scotland, with Advantages to both Kingdoms*, London, 1705.

union between two kingdoms was to obtain advantages for both, especially in military defence. He considered it advisable to maintain separate jurisdictions in other matters. But according to him, Spain had adopted an unbalanced approach to these principles. Paxton believed that both the union between the Kingdoms of Aragon and Castile and the policy of Phillip II's government suffered from a lack of balance<sup>91</sup>.

In conclusion, two things stand out when assessing the body of work on the subject in England and Scotland at the beginning of the eighteenth century and the importance of Spain as a point of reference: the logical and sophisticated arguments that the authors who took part in the debate in 1700 found amongst the available material from 1603 and, above all, the direct and even literal use of this material. The unusual aspect of the output of the times was the use of both English unionists such as Bacon, Doddrige, Thornborough and Cornwallis from 1603 as well as Scottish federalists such as Hodges and Ridpath from 1700. The idea of equal access to public office as a means of improving relations is also striking. Such access was not incompatible with the survival of local laws either and this is exactly what happened, as Ridpath reminds us, in the union of the Kingdoms of Navarre and Castile. Be that as it may, although some authors stressed the debility of the ties between the Crowns (Kingdoms) of Castile and Aragon, Ridpath believed that they were actually providing evidence of how a second kingdom (in this case Aragon and Navarre) could be united with but not subject to a first one by retaining its original constitution as a primary source of law and using Civil and Canon Law as a secondary source if the primary one was defective "without taking notice of the Laws of Castile"<sup>92</sup> as Ridpath pointed out.

Thus, Ridpath saw a positive side to the solution: to be united but not subject. He focussed on the approach adopted in England in 1603 and the perception and assessment of the model provided by relations between the Spanish kingdoms. Ridpath believed, however, the consequences of the "communication" breakdown caused by exclusive access to public office and citizenship through the lack of harmonisation of the laws of Castile and Aragon required correction.

Ridpath's *Considerations* clearly shows the process of thought he went through in finally accepting Bacon's hypotheses which he subsequently uses as the basis for his arguments. He freely quotes his compatriot Craig as he enlarges on the casuistry employed by the latter in his *De unione regnorum Britanniae tractatus* written a hundred years prior to the *Considerations*. Of course when Ridpath wrote his text in 1706 the debate on the union had now moved on to specific, practical issues such as common nationality and the conservation of local legal codes through mechanisms such as the survival of the continuing use of different sources of law.

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91. *Ibid.*, p. 5.

92. *Considerations upon the Union of the Two Kingdoms*; p. 21.

As this debate brought commentators closer to Spanish models, England occupied a strong position in the war against Louis XIV and led an alliance of the enemies of the French monarch. Amongst them were the Catalan supporters of the House of Austria who had signed the Genoa Pact<sup>93</sup>. This pact brings us back to the War of the Spanish Succession again and provides an ideal vantage point for a comparative analysis of union processes in Spain and Great Britain as they stood in 1705.

## 11. 1707 IN SPAIN AND 1707 IN GREAT BRITAIN

The Genoa Pact improved the Archduke's position considerably: the allied troops took Madrid in the summer of 1706 and became masters of the royal court. This did not last long however as Phillip V recovered Madrid in October and his victory in the Battle of Almansa in April of 1707 turned the situation around<sup>94</sup>. This triumph determined the nature of the relationships between the kingdoms on the peninsula from this point on (including the Balearic Islands). Barely two months had gone by after the Battle of Almansa when Phillip V's Cabinet drafted the decree of the 29<sup>th</sup> of June abolishing Aragon and Valencia's *Fueros*. This clearly meant that Phillip V had opted to end the *aeque principale* system of unity and establish a compact union which would implement the Castilian model for the entire country, at least as far as the basic elements of Public Law were concerned. This decision was made by the highest levels of government surrounding the monarch and in the most dramatic moments of the war<sup>95</sup>.

The situation was certainly very different from the Anglo-Scottish union: there had been no open civil war. However, there had been a series of incidents in the final decade of the century: bloody military defeats such as the Battle of Glencoe in 1692 which wounded the pride of the Highland clans, as well as prolonged famines, attempts at colonization that were suppressed (the Darien Scheme) and decisions such as the Act of Settlement of 1701

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93. ALBAREDA, Joaquim. El "cas dels Catalans". *La conducta dels aliats arran de la Guerra de Successió (1705-1742)*, Barcelona: Fund. Noguera, 2005.

94. FRANCIS, David. *The First Peninsular War, 1702-1715*, London, 1975; DEFOE, Daniel. *Memorias de guerra del capitán George Carleton*, estudio preliminar y notas de Virginia León Sanz, Alicante, 2002.

95. GAY ESCODA, Josep María. "La gènesi del Decret de Nova Planta de Catalunya. Edició de la consulta original del 'Consejo de Castilla' de 13 de juny de 1715", In: *Revista Jurídica de Catalunya*, LXXXI-1 (1982); pp. 7-41 and 2, pp. 261-348; GAY ESCODA, Josep María. *El Corregidor a Catalunya*, Madrid: Marcial Pons, 1997. MORALES ARRIZABALAGA, Jesús. *La derogación de los fueros de Aragón (1707-1711)*, Zaragoza: 1986. Last contributions, TORQUEMADA, María Jesús. "La Corona de Aragón y Escocia: Paralelismos al hilo de *Heart of Midlothian*". In: *Cuadernos de Historia del Derecho*, nº 14, 2007. Madrid; pp. 167-188; INURRITIGUI, José María. *Gobernar la Ocasión. Preludio político de la Nueva Planta de 1707*, Madrid, 2008; BERNARDO ARES, José Manuel de. "Las uniones políticas en la Europa de 1707 (Escocia/Inglaterra y Aragón/Castilla/Valencia). Un análisis comparado e interrelacional". In: *Estudios de Historia Moderna en homenaje a la profesora Emilia Salvador Esteban*, ed. Ricardo Franch Benavent y Rafael Benítez Sánchez-Blanco, Universidad de Valencia, Valencia, 2008; pp. 135-150.

that were taken without consulting the Scottish Parliament. England obliged the Scots to comply with these decisions and showed them just who the junior partner in any future agreement would be. Any improvement in their position of inferiority depended on their acceptance of England's demands that they relinquish their colonial aspirations, their national dynasty and Jacobite support of the exiled king (James II who died in 1701 and his son James III). As well as that, they would have to ratify their acceptance of a single trade and customs zone if they wished to increase the volume of their exports to England.

A comparison between England and Spain in 1707 is interesting. The King was announcing the abolition of the rebels' *Fueros* in Spain at the same time (29<sup>th</sup> of June of 1707) as the Act of Union had just been promulgated in the English Parliament: first of May of 1707. The Act passed through parliament after seven long months of debate on the future of the union and exhaustive analyses of the pros and cons<sup>96</sup>. Meanwhile in Spain, the vanquished had no say in the decision and nor did those faithful followers of Phillip V who advocated the preservation of the laws of the Kingdoms of Aragon and Valencia and the Principality of Catalonia. In Aragon, the Count of Robres' *Memoirs* make clear reference to this state of affairs<sup>97</sup>.

Agustín López de Mendoza, Count of Robres had shown Phillip V unfailing loyalty and this gave him special licence to support the preservation of laws and institutions of the kingdom of Aragon. His opinions are especially useful in comparing the situation with the Anglo-Scottish union as he makes direct reference to the different way in which the British were dealing with the future coexistence of two kingdoms. This long suffering eye witness and active participant in events believed that the English and the Scots had managed to put aside their "*mutual antipathy and differences in religion and forms of government*" and had laid the foundations for an agreement that would serve as a legal basis in the future. This "*national convention*" endowed the union with some evidence of commitment; this was totally lacking in the Spanish case and this commentator regarded it as a serious basic defect. Robres regarded the new British Parliament as the natural result of the convergence of the two kingdoms and an organ that would preserve their individual identities virtually intact<sup>98</sup>. This is how a Spanish *Bourbonist* saw the 1707 Act of Union: whilst it might not have been the union of two equals it was at least a confluence that did not signify the absorption of one by the other. Robres genuinely believed that a new Great Britain with a new parliament had been born. This result would also

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96. RILEY, Patrick William Joseph. *The Union of England and Scotland. A study in Anglo-Scottish politics of the eighteenth century*, Manchester: Manchester University Press, 1978; MCLEAN, Ian; MCMILLAN, Alistair. *State of the Union*, Oxford: Oxford University Press, 2005.

97. LÓPEZ DE MENDOZA y PONS, A. (Conde de Robres). *Historia de las Guerras Civiles de España*, Zaragoza: 1882. See new edition, Conde de Robres, *Memorias para la historia de las guerras civiles de España*, estudio preliminar y transcripción de José María Iñurritegui, Madrid: Centro de Estudios Políticos y Constitucionales, 2006.

98. Conde de Robres, *Memorias ...*; cit. pp. 318-319.

have been highly feasible and reasonable if the union had followed the federalist models of a union of equals; the existence of two parallel parliaments with a rotating seat or the double parliament with reciprocal voting powers proposed by Ridpath and Hodges would not have been particularly viable in the medium term and the need for a common body would have arisen<sup>99</sup>.

But without doubt the most important issue of the entire unification process was how to preserve the ecclesiastical differences between the two countries. The Scots had to accept the House of Hanover and the Act of Settlement of 1701. But most of them found it just as difficult to accept a Catholic king as the English. There is no doubt that the understanding reached on this important issue facilitated things, especially when the Scottish Parliament passed the 1704 Act of Security for the Kingdom which placed conditions on the acceptance of the Act of Settlement and the Act for Securing the Protestant Religion and Presbyterian Church Government on the 12<sup>th</sup> of November 1706<sup>100</sup>. The latter was drafted during the final process of the agreement as the Scottish Parliament accepted the treaty on the 16<sup>th</sup> of January 1707. The debate in both parliaments created a new situation in which Scotland managed to preserve its church, its basic education system, its *corpus* of laws, its courts and their structure. The only higher authority beyond the Scottish courts was *the* House of Lords<sup>101</sup>. It is hard to describe such an outcome as a “total” or “true” union<sup>102</sup>.

Meantime, in Spain, Phillip V’s supporters continued to grumble about the excessive measures of centralisation. Robres was not the only one; the Valencians José Ortí and Pedro Luis Blanquer and Jurat and the Catalan Francisco Portell also raised their voices<sup>103</sup>.

Having seen these different facets of the connection between Spain and Britain during the War of Spanish Succession, it is worthwhile asking what the supporters of the House of Austria would have done if they had won the war. Many Spanish commentators have written on the subject but as far as the scope of this article is concerned the following testimony will suffice. Juan Amor de Soria was a supporter of the House of Austria who spent many years in exile

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99. RIDPATH, George. *A Brief View of the Original Rights of the Kingdom of Scotland, in A discourse upon the Union of Scotland and England*. London, 1702; HODGES, George, *The Rights and Interest of the two British Monarchies, with a Special Respect to an United or Separate State. Treatise III*, London, Printed in the Year, 1706.

100. PRYDE, George S. *The Treaty of Union of Scotland and England, 1707*, London and Edinburgh: Nelson, 1950; p. 16.

101. CAIRNS, John W. “Scottish Law, Scottish Lawyers and the Status of the Union”, cit. [fn. 73] p. 252.

102. CAIRNS, op. cit.; p. 248. points out that “imposing English Law on Scotland was politically impossible, at least in matters of private law”. Jesús Morales agrees with this conclusion in terms of Aragonese Law after the Decretos de Nueva Planta (*La derogación ...*, cit. [fn. 95]; p. 22.

103. PESET REIG, Mariano. “Notas sobre la abolición de los Fueros de Valencia”, In: *Anuario de Historia del Derecho Español*, 42 (1972); pp. 657-715.

in Vienna at the service of the emperor<sup>104</sup>. In 1734, the Emperor Charles VI requested him to prepare a report on a possible restructuring of the province of Lombardy, situated near the heart of the imperial dominions. Amor de Soria took an open-minded approach to the issue –the subject of this article– and was given a free hand to propose whatever structure seemed to him the most appropriate. His exile was a result of his lifelong opposition to the House of Bourbon which, he claimed, had brought all manner of ills on Spain, including the loss of the “horizontal” organization of the Hispanic kingdoms. Because of all this he now found himself in a very curious position: he had to give his opinion on how to organize the coexistence of a number of communities belonging to the imperial dominions and this meant proposing a form of union for them<sup>105</sup>.

In any event Amor de Soria had no hesitation in recommending the annexation type of union for the organization of the central government of the Lombard territories. This was the kind of strict incorporating structure that united the Indies with Castile, for example. He allows them to retain their legal systems and their statutes but only for internal matters. Amor de Soria was quite convinced that it was not good for appearances for the Lombard territories to be united under a horizontal union or union “*aeque principaliter*”. Rather

[...] all Your Majesty has to do is order the four provinces to unite under a general government with the title of Austrian Lombardy,...just as the English did by using the name Great Britain which includes the English, the Scots and the Irish. This would avoid the use of the terms *aequè principaliter* or annexation. The city of Milan could be the seat of the high courts and the government both of which would have jurisdiction over all the provinces according to the observation of Crespi de Valdaura quoted in item number 64<sup>106</sup>.

This recommendation was nothing if not curious. Thirty years after the Anglo-Scottish union, a supporter of the House of Austria who had also been an active supporter of the Archduke, took Great Britain as an example of how to create a new name or title for the union of kingdoms to avoid (“no es menester dezir”) the use of the terms “*aeque principaliter*” or “annexation”. A supporter of the Habsburgs like Amor de Soria simply regarded Great Britain as an effective and, it would seem, exemplary term that “included the English, the Scottish and the Irish”:

[...] a imitacion de lo practicado en Inglaterra con el titulo de la Gran Bretaña que comprehende a ingleses, a escozeses y a Irlandeses, y con esso no es menester dezir que la Union sea *aequè principaliter* ni *accesoriè* ...

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104. LLUCH, Ernest. *Aragonesismo austracista (1734-1742)*. Conde Juan Amor de Soria, Zaragoza: 2000.

105. Addiciones y notas históricas desde el año 1715 hasta el 1736. Viena, 1736, Real Academia de la Historia, 9/5603 (I owe this document to generosity of Joaquim Albareda).

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