DEVOLUTION IN SCOTLAND

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Introduction

Devolution to Scotland, in its current incarnation, is a relatively recent constitutional phenomenon. The devolved Scottish Parliament, based at Holyrood in Edinburgh, and the Scottish Government[1] were established by the Scotland Act 1998 ("the 1998 Act"), and the first elections to the Holyrood parliament, from which a government was selected, were held on 6 May 1999. It would, however, be a mistake to think that Scottish devolution only began in 1999. On the contrary, elements of a distinctive Scottish governance system have been in place ever since the Union of 1707. Although officially an "incorporating union", in which the previously independent Scottish and English states were dissolved and merged into a new state of Great Britain, the terms of union provided certain guarantees for the smaller and weaker Scottish partner, most notably the continued existence of a separate Scottish legal system.[2] The governance of Scotland was never wholly assimilated to that of England. During the 18th century, "the British state … was always mediated through … 'native Scottish surrogates'"[3] – the so-called Scottish "managers",[4] or the Lord Advocate, acting as adviser to the British Home Secretary. With the expansion of the functions of the state from the mid-19th century onwards, separate administrative arrangements were frequently adopted for Scotland. In 1885, the Scottish Office was created within the UK Government, headed by a "Secretary for Scotland", later upgraded to the status of Secretary of State, and the Scottish Office continued to accrue additional functions throughout the 20th century.[5] Distinctive institutions of local government (albeit subject to several reorganisations) have also persisted in Scotland since the Union. Institutions of intermediate government – such as the police, the National Health Service, and nationalised industries – were often separately constituted, and sometimes substantively different from equivalent institutions elsewhere in the UK. In addition, by the late 20th century, there were well-established arrangements in the Westminster Parliament for handling Scottish business.

By the 1990s, then, Scotland enjoyed extensive administrative devolution. The Scottish Office system was able to tailor government policies to the distinctive needs of Scotland, and sometimes to pursue different policy lines, albeit within the constraints of collective Cabinet responsibility, and subject to the political direction determined by the UK-wide majority in the Westminster Parliament. In an important sense, the new institutions established by the 1998 Act were an evolutionary development from this system of administrative devolution. The Scottish Government inherited an already-functioning government machine based in St Andrew's House in Edinburgh, and the subject areas over which the Scottish Parliament and Government were given responsibility largely mirrored the previous responsibilities of the Scottish Office, although the scope of devolved competence has since expanded, most notably via the Scotland Acts of 2012 and 2016, and will further increase after the UK leaves the European Union ("Brexit").[6]

[1] The Scotland Act 1998 referred to the "Scottish Executive". However, this was unofficially renamed the "Scottish Government" in 2007 by the newly-elected Scottish National Party (SNP) administration, and the name change was confirmed by the Scotland Act 2012, s 12.
[2] Treaty of Union, Arts XVIII and XIX.
[3] L Paterson, *The Autonomy of Modern Scotland* (1994) 34.
[4] Ibid, 32 – 34; J Mitchell, *The Scottish Question* (2014) ch 2.
[5] See Mitchell, *Devolution in the UK* (2009) ch 2; *The Scottish Question* (above n?) ch 3.
[6] European Union (Withdrawal) Act 2018, s 12.

Nevertheless, the 1998 Act made two fundamentally important changes to the governance of Scotland: it conferred *legislative competence* on the Scottish Parliament; and it created new institutions of *political representation* for Scotland. This has meant that the formation of law and policy in devolved areas is no longer dependent upon political forces at Westminster, but rather is determined by electoral outcomes and political choices within Scotland itself.

These twin changes have had profound implications for Scottish governance. First, they have enabled further divergence in law and policy in Scotland compared with the rest of the UK. This was muted at first, while the Labour party was in power both at Westminster and as the larger coalition partner in Edinburgh, but became more significant after 2007 when Scottish and UK electoral outcomes began to diverge. Secondly, the 1998 Act reforms have heightened political consciousness of Scotland as a distinct territorial unit within the UK, in ways which have sometimes spilled beyond the boundaries of devolved competence. This latter effect has, on the one hand, fuelled demands for greater autonomy for Scotland, culminating in the referendum of 18 September 2014 on whether Scotland should become independent. Although 55% of Scottish voters opted to remain within the UK, the independence question remains a live one, and a major determinant of political behaviour within Scotland. On the other hand, heightened Scottish political self-consciousness has sometimes manifested in a demand for Scotland's distinctive political voice to be taken into account in UK-wide decision-making, most notably in relation to Brexit.

As this latter point suggests, the 1998 Act (along with the other devolution statutes) has also had broader constitutional implications beyond increasing Scottish self-government. By distributing legislative power away from the UK Parliament, and pluralising centres of political authority, it has had an impact on the wider UK constitution. The precise nature of that impact is, however, highly contested. Should devolution be understood as a form of decentralisation within a still essentially unitary constitutional order? Is it, rather, an expression of Scottish popular sovereignty and self-determination within the context of a "union state"?[7] Or is it part of a more fundamental pluralisation and federalisation of the UK's territorial constitution? The answer to this question is not merely of academic importance, but may have significant practical consequences both in terms of how the courts interpret the powers enjoyed by the Scottish Parliament and Government, and in shaping the behaviour of political actors in cases of conflict between UK and Scottish institutions. But the answer given may vary depending on one's perspective. Differences in geographical position (in Scotland or elsewhere), in political objectives, both short and long-term, and in broader constitutional understandings and value commitments may produce different interpretations of legal texts, and different readings of the significance of historical and contemporary political events. Moreover, since devolution is still an evolving process, understandings of its constitutional significance may vary over time, and it remains highly uncertain how it will develop in future. While Scotland has, in recent years, seemed to be on a path of ever-greater decentralisation, Brexit has served to highlight the weak constitutional supports for devolution, and reminds us that the current level of Scottish autonomy within the UK cannot be taken for granted.

This chapter aims to do three things. First, it outlines the development of devolution in Scotland, showing how different forces and constitutional understandings have shaped contemporary arrangements. Second, it discusses the constitutional status of devolution along two – albeit inter-related – dimensions: the *juridical* – i.e., how the powers of the Scottish Parliament and Government

[7] See S Rokkan and D Urwin, 'Introduction: Centres and Peripheries in Western Europe', in S Rokkan and D Urwin (eds), *The Politics of Territorial Identity* (Sage Publications Ltd, London, 1992).

are understood by the courts; and the *political* – i.e., the status of the devolved institutions vis-à-vis the UK Parliament and Government. Finally, it briefly considers the future of devolution in Scotland, in the light of the two key contemporary destabilising forces, namely the ongoing pressure for independence, and the impact of Brexit.

The Development of Devolved Government in Scotland

The single most important explanation for the development of devolution in Scotland has been as a response to nationalism. Sometimes that has been nationalism with a capital N – i.e., the electoral success of the Scottish National Party (SNP), the central aim of which is to secure Scotland's independence. At other times, it has been nationalism with a small n – i.e., the perception, even amongst those committed to maintaining the Union, that Scotland is nevertheless a distinct political community with a right to self-determination and (a degree of) self-government.[8] That is not to say that there have not also been genuine constitutional weaknesses in the governance of Scotland. But the perceived urgency of responding to those problems, and the nature of the response in the form of increased autonomy for Scotland, have been a result of constitutional grievances being filtered through, and amplified by, a nationalist lens.

The Growth of Administrative Devolution

The legacy of the Union of 1707 was to preserve a distinct sense of Scottish national identity, and one which was expressed in institutional as much as in cultural terms. The Union settlement preserved elements of Scots civic life which, at a time of minimal state intervention, were regarded as important markers of national identity – the legal system, the Royal Burghs and, above all, the Presbyterian church. However, Mitchell argues,

> "The union was not simply a settlement which preserved particular Scottish institutions, but an agreement that Scottish institutions should be protected. In other words, the underlying principle was that Scottish national identity should be protected, but that might take different institutional forms at different times…. Scotland's constitutional status was archetypically that of a component of a union state, not a unitary state."[9]

As the functions of the central state expanded, therefore, a distinct Scottish administration began to emerge – partly as a pragmatic response to distinctive local conditions, and partly for symbolic reasons. Initially, as elsewhere in the UK, this was primarily through the formation of functional boards, but these were eventually brought under the control of the Scottish Office, albeit somewhat later than the ending of the board system in England.[10] The establishment of the Scottish Office itself seems to have been motivated primarily by symbolic concerns – the need to respond to the perceived neglect of Scottish affairs.[11] Although questions of good government also played a part[12] – the desirability of ministerial and parliamentary oversight of Scottish administration – the acknowledgment of a distinct territorial dimension to the governance of Scotland was an important exception to the general principle of functional organisation within central government.

The dominant constitutional question in the late 19th and early 20th centuries was the question of Home Rule for Ireland. There was some interest in extending Home Rule to Scotland, as part of a

[8] On "nationalist-Unionism", see C Kidd, *Union and Unionisms: Political Thought in Scotland, 1500 – 2000* (2008).
[9] *Devolution in the UK*, above n?, 10.
[10] See A Page, *Constitutional Law of Scotland* (2015) paras 1.26 – 1.29.
[11] Mitchell, *Devolution in the UK,* 17, 19.
[12] Ibid, 17

programme of "Home Rule all round", and this was official Labour Party policy until 1958. In 1949-50, 1.7 million people signed a "National Covenant" expressing a commitment to Home Rule.[13] However, until the 1970s, there were no serious proposals for an elected Scottish assembly. Instead, the pattern was one of steady accretion of responsibilities by the Scottish Office, with opposition parties in particular willing to play "the Scottish card" to argue for greater recognition of Scottish distinctiveness.[14] The Scottish Office became a "state within a state",[15] always headed by a Scottish politician, and the Secretary of State for Scotland was expected to represent Scottish interests within the Cabinet beyond the specific responsibilities of the Office.[16]

The Kilbrandon Commission and the Scotland Act 1978

It was only in the late 1960s that the prospect of legislative devolution for Scotland began to be taken seriously. The key impetus was rising support for the SNP (which had been at the margins of Scottish electoral politics since its formation in 1934), and in particular Winnie Ewing's unexpected victory for the party in the 1967 Hamilton by-election. The Labour Government at Westminster felt it had to react, but the scope for additional administrative devolution, and the likelihood of it paying further electoral dividends, was considered to be limited.[17] The eventual response was the establishment of the Royal Commission on the Constitution (the Kilbrandon Commission) in 1969, to consider reform of the territorial constitution. The Commission reported in 1973, recommending (with two commissioners dissenting) the creation of a legislative assembly for Scotland.[18]

In the Kilbrandon Report, we find a mixture of all three understandings of the constitutional significance of devolution, referred to above. The Report contained a diagnosis of general constitutional discontent throughout the UK, raising "the presumption that there was a basic fault in the system of government which had nothing to do with nationalism – i.e., that government was too centralised."[19] The sense of alienation and frustration that gave rise to a desire for greater participation in government in Scotland (and Wales) existed everywhere, and "the basic need was for people in Britain as a whole to win back power from London."[20] In other words, the UK constitution required fundamental reform to improve its democratic credentials.[21] However, the Commission acknowledged that it was the sense of Scottish (and Welsh) national identity that caused frustration to be felt – and expressed – more keenly in those territories, and its proposals for reform were corresponding limited. In keeping with the understanding of the UK as a union state, diversity in governance arrangements was regarded as a source of strength, which should continue to be respected.[22] Nevertheless, devolution was understood by the Commission in essentially unitary and top-down terms, as "the delegation of central government power without the relinquishment of sovereignty."[23]

As far as Scotland was concerned, the constitutional problems to which legislative devolution was considered to provide the solution were threefold. First, Scotland had a separate legal system, but no

[13] See Mitchell, *The Scottish Question*, above n?, 88 – 92.
[14] Mitchell, *Devolution in the UK*, ???
[15] Page, above n?, para 1.38.
[16] Mitchell, *Devolution in the UK*, above n?, 19.
[17] Ibid, 28 -9.
[18] *Report of the Royal Commission on the Constitution 1969-73*, Cmnd 5460 (1973).
[19] Ibid, para 6.
[20] Ibid, para 6.
[21] Ibid, para 269.
[22] Ibid, para 417.
[23] Ibid., para 543.

dedicated legislature, giving rise to persistent complaints about the neglect of Scottish law reform by the Westminster Parliament.[24] Second, there was perceived to be an over-concentration of functions in the Scottish Office, and a corresponding lack of democratic accountability to the Scottish electorate.[25] Third, and most fundamental, was what later came to be called the "democratic deficit", namely the divergence between voting patterns in Scotland and the rest of the UK. This was problematic because of the overwhelming dominance of England within the UK. As MCrone has put it "so long as Scotland and England voted more or less the same way, the constitutional anomaly whereby the United Kingdom always got a government the English voted for did not matter."[26] But the decline of the Conservative vote in Scotland from the 1950s and the rise of the SNP in the 1960s and 70s disrupted the pattern of two party politics in Scotland, increasing the risk that Scotland might get a government it had *not* voted for, and exacerbating the other democratic weaknesses in the system of administrative devolution.

Despite these principled arguments in favour of devolution, the response to the Kilbrandon Report was politically-driven. The continued rise of the SNP, encouraged by the discovery of North Sea oil, meant that the minority Labour governments elected in February and October 1974 had little choice but to act on Kilbrandon's recommendations. However, considerable opposition remained amongst Labour MPs, and the government's first attempt to legislate for devolution via the Scotland and Wales Bill 1976 was abandoned in February 1977 when the government lost a timetabling motion.[27] Nevertheless, continued electoral pressure from the SNP meant that another Scotland-only Bill was introduced later the same year and, with support from the Liberal party, became the Scotland Act 1978. This was, though, a weak and grudging measure of devolution.[28] Crucially, also, in order to appease backbench critics, the government had conceded that a referendum would be held in Scotland before the Act was brought into force, and the notorious "Cunningham amendment" required at least 40% of the electorate to vote in favour of devolution.

The referendum was duly held on 1 March 1979. Although a small majority (51.6%) supported the establishment of a Scottish Assembly, the threshold requirement was not satisfied. In consequence, the SNP withdrew their support for the Labour Government, and on 28 March, it was defeated on a confidence vote in the House of Commons. Following the 1979 General Election, the incoming Conservative Government repealed the 1978 Act.

The Scottish Constitutional Convention and the Scotland Act 1998

It was the election of four successive Conservative governments during the 1980s and 1990s that finally cemented public support in Scotland for legislative devolution. The Conservatives' ability to secure landslide majorities at Westminster, while Scots voters returned equally overwhelming majorities of Labour MPs, graphically illustrated the perceived democratic deficit in the governance of Scotland. Moreover, not only did the Conservative governments have only limited electoral support in Scotland, but (particularly under the premiership of Margaret Thatcher) they were also regarded as insensitive to Scottish distinctiveness. Unitarist rather than unionist in her instincts, Thatcher saw the Scottish Office – like local authorities – as just another layer of bureaucracy standing in the way of

[24] Ibid, para 1101.
[25] Ibid, paras 363, 1101.
[26] D McCrone, "Scotland Out of the Union? The Rise and Rise of the Nationalist Agenda" (2012) 83 Pol Q 69 at 73.
[27] Mitchell, *Devolution in the UK*, above n?, 120-4.
[28] Ibid, 124-6.

radical reform of the role and operation of the state.[29] The democratic deficit was epitomised by the "Poll Tax" (or Community Charge), which was introduced in Scotland in 1989,[30] a year earlier than in England and Wales. This was a deeply unpopular, ideologically-driven reform of local government taxation which led to widespread civil disobedience in the form of a non-payment campaign. Although it was demand from within the Conservative party in Scotland that led to its early introduction north of the border, it was only the fact that the Scottish Office was controlled by a party that Scots had not voted for that enabled the policy to be adopted at all. In addition, it was not opposition in Scotland that led to the Poll Tax eventually being abandoned, but rather the fact that it proved to be equally unpopular when it was later introduced in England and Wales.

Although support for the SNP declined dramatically after 1979 (falling from 11 to just two seats), the tendency of opposition parties to "play the Scottish card"[31] meant that opposition to Thatcherism nevertheless came to be seen in nationalist terms. The Conservative party was regarded not merely as having no mandate to govern Scotland, but in some more existential way as "anti-Scottish"[32] and a threat to Scottish national identity.[33]

Matters came to a head after the 1987 General Election, at which the Conservatives secured a 101-seat majority, but saw their support in Scotland fall to just 10 seats out of 72 (from 22 seats out of 71 in 1979). In 1988, the Campaign for a Scottish Assembly (set up in 1980 to keep the case for devolution alive) issued a *Claim of Right for Scotland*, which asserted the "sovereign right of the Scottish people to determine the form of Government best suited to their needs."[34] Later signed by 58 out of Scotland's 72 MPs, the Claim of Right deliberately echoed earlier *Claims* of 1689 and 1842. The Claim went onto assert the fundamental flaws in Scotland's governance arrangements – flaws which were said to undermine the spirit of the Treaty of Union – and to make the case for a Scottish assembly:

> "Scotland, if it is to remain Scotland, can no longer live with such a constitution and has nothing to hope for from it. They must now show enterprise by starting the reform of their own government."[35]

In 1989, a Scottish Constitutional Convention (SCC) was established to draw up plans for devolution. This was an unofficial body, but enjoyed support not only from the Labour and Liberal Democrat parties in Scotland,[36] but also from key civic institutions such as the Church of Scotland, the Scottish Trades Union Congress and the Convention of Scottish Local Authorities.[37] The SCC's final report published in 1995[38] recommended the establishment of a powerful devolved parliament. Unlike the weak model of devolution proposed in the Scotland Act 1978, this would be constituted on a reserved powers, rather than conferred powers basis – i.e., it would have plenary legislative competence

[29] Mitchell, *Devolution in the UK*, 30; see also C Kidd & M Petrie, "The Independence Referendum in Historical and Political Context" in A McHarg *et al* (eds), *The Scottish Independence Referendum: Constitutional and Political Implications* (2016), 38-41.
[30] Abolition of Domestic Rates etc (Scotland) Act 1987. For an account of the opposition to the Poll Tax in Scotland and its constitutional significance, see M Goldoni & C McCorkindale, "Why We (Still) Need a Revolution' (2013) 14 *German Law Journal* 2197, 2217-21
[31] Mitchell, *Devolution in the UK*, 30.
[32] Ibid.
[33] See Report of the Constitutional Steering Group, *A Claim of Right for Scotland* (1988).
[34] See House of Commons Library, *Claim of Right for Scotland*, Debate Pack No 2016-0158 (2016).
[35] Constitutional Steering Group, above n?, epilogue.
[36] The SNP was initially represented in the Convention, but withdrew when it became clear that it would not consider the option of independence.
[37] See J McFadden, "The Scottish Constitutional Convention" [1995] PL 215.
[38] *Scotland's Parliament, Scotland's Right*.

subject to specific exceptions. Also in contrast to the 1978 model, it would have competence across the full range of Scottish Office responsibilities, as well as limited tax varying powers. With only minor modifications, the SCC's blueprint for devolution was eventually enacted in the Scotland Act 1998.

Although formally a creature of the UK Parliament, its origins in the work of the SCC gave the Scottish Parliament a strongly autochthonous quality, reflecting an understanding of the UK as a union state in which Scots enjoyed a right to self-government as an expression of their distinct national identity. This was reinforced by the outcome of a pre-legislative referendum, held on 11 September 1997, in which 74.3% voted in favour of establishing a Scottish Parliament, and 63.5% in favour of it having tax varying powers (on a 60.1% turnout). There was some doubt about whether a referendum was either necessary or desirable, but strong popular endorsement both helped to ease the passage of the subsequent Scotland Bill through Parliament and has been regarded as giving Holyrood a degree of political entrenchment.[39]

Nevertheless, as with the Kilbrandon report, the constitutional narrative surrounding the 1998 Act was not entirely consistent. Alongside the theme of protecting Scottish autonomy, there were strong overtones of democratic renewal. This was reflected in the design of the new Scottish institutions, which were modelled on the Westminster Parliament (i.e., with an executive chosen from and accountable to the legislature), but with some important departures. The SCC saw devolution as an opportunity to make fundamental improvements in the way Scotland was governed, increasing its openness, accountability, accessibility and responsiveness,[40] and ushering in "a way of politics that is radically different from the rituals of Westminster: more participative, more creative, less needlessly confrontational."[41] Thus the 1998 Act created a unicameral parliament, elected by proportional representation, and with a strong committee system in place of a second chamber. The 1999 report of the Consultative Steering Group, established to advise on the new Parliament's procedures, also emphasised principles of power-sharing, accountability, access and participation, and equal opportunities.[42]

In addition, devolution was part of a wider programme of constitutional reform pursued by the New Labour government elected in 1997, alongside enactment of the Human Rights Act, reform of the House of Lords, freedom of information legislation, regulation of political parties, and a commitment (ultimately abandoned) to reform the House of Commons' electoral system. Alongside other constraints on Westminster's legislative freedom imposed by EU law and the growth of "common law constitutionalism", the creation of a legally-limited Scottish Parliament might be seen as part of a new model of constrained constitutionalism, rather than simply a marker of its subordinate status.[43]

At the same time – and despite the threat that the SCC identified that it posed to Scottish autonomy[44] – the Labour government was at pains to emphasise that Parliamentary sovereignty would remain intact:

[39] See *Report of the Independent Commission on Referendums* (2018) paras 2.13-2.17.
[40] Scottish Constitutional Convention, above n?, 24.
[41] Ibid, 9.
[42] Consultative Steering Group*, Shaping Scotland's Parliament* (1999). It is questionable to what extent these principles, and the desire for a "new politics" have been achieved in practice – see Commission on Parliamentary Reform, *Your Parliament, Your Voice: Report on the Scottish Parliament* (2017).
[43] See C McCorkindale *et al*, "The Courts, Devolution and Constitutional Review" (2018) 36 *University of Queensland Law Journal* 289, 291-2.
[44] See Scottish Constitution Convention, *Towards Scotland's Parliament* (1989), para 5.1.

> "The UK Parliament is and will remain sovereign in all matters; but as part of Parliament's resolve to modernise the British constitution Westminster will be choosing to exercise that sovereignty by devolving legislative responsibilities to a Scottish Parliament without in any way diminishing its own power."[45]

This was underlined by the – strictly unnecessary, on an orthodox understanding of Parliamentary sovereignty – inclusion of the statement in s28(7) of the Scotland Act 1998 that the power of the Scottish Parliament to legislate in devolved areas "does not affect the power of the Parliament of the United Kingdom to make laws for Scotland." Whereas the legislative competence of the Scottish Parliament would be subject to hard, legally-enforceable limits, preventing it from straying into reserved areas, the powers of the UK Parliament would be constrained only by what was to become known as the Sewel (or Legislative Consent) Convention: the expectation that "Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament."[46]

Nor were there any formal changes to the organisation or operation of the Westminster Parliament and Government which might have suggested a move towards a more federal understanding of the territorial constitution. Apart from a reduction in the number of Scottish MPs from 72 to 59, and the creation of a new post of Advocate-General for Scotland,[47] it was business-as-usual at Westminster. Similarly, the limited provisions in the 1998 Act for interaction between the UK and devolved governments mainly suggested a hierarchical relationship, in which the UK Government would police the boundaries of devolved decision-making through powers of judicial referral[48] or (in limited circumstances) powers of veto and direction.[49] More general machinery for intergovernmental relations was again regarded as a matter for soft rather than hard law, contained in non-statutory Concordats and Memoranda of Understanding,[50] the development of which was treated as an internal government matter and was largely based on pre-devolution administrative practice.[51]

Post-1998 Developments

Despite the relatively generous powers conferred upon the Scottish Parliament and Government by the 1998 Act, devolution was always conceived of as a dynamic rather than fixed process. Sections 30 and 63 of the Scotland Act allowed the boundary between reserved and devolved competence to be adjusted by Order in Council, and these have been used on numerous occasions to transfer additional executive or (less frequently) legislative powers from London to Edinburgh. In addition, there have been two major waves of post-1998 reform to Scottish devolution, both of which have clearly been a response to the resurgence of the SNP.

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[45] Scottish Office, *Scotland's Parliament*, Cm3658 (1997) para 4.2.
[46] Lord Sewel, HL Deb, Vol 592, col 791 (21 July 1998).
[47] Scotland Act 1998, ss 86 and 87. The Advocate General for Scotland is the UK Government's Law Officer in relation to Scots Law. The creation of the post was necessitated by the decision that the Lord Advocate, as head of the system of criminal prosecution in Scotland, as well as Law Officer, should become a member of the Scottish Government.
[48] Scotland Act 1998, ss33, 98 and sch 6.
[49] Scotland Act 1998, ss35 and 58.
[50] See *Devolution Memorandum of Understanding and Supplementary Agreements Between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee* (2013), available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/316157/MoU_between_the_UK_and_the_Devolved_Administrations.pdf.
[51] See R Rawlings, "Concordats of the Constitution" (2000) 116 LQR 257.

For the Labour party, one of the anticipated benefits of devolution was that it would "kill Nationalism stone dead."[52] This was expected to occur both because devolution would satisfy Scottish demands for self-government, and because the electoral system chosen for the Scottish Parliament – the Additional Member System – would prevent any party, including the SNP, from gaining an overall majority. However, at the 2007 Holyrood election, following two terms of Labour-Liberal Democrat coalition, the SNP overtook Labour by just one seat to become the largest party and formed a minority government. Four years later, the impossible happened, and the party won an overall majority (although it returned to minority government status in 2016).

Following the 2007 election, lacking parliamentary support to take decisive steps towards its ultimate goal of independence, the SNP government launched a "National Conversation" on Scotland's constitutional future, setting out options for independence or extensive further devolution.[53] Feeling the need to respond, the unionist parties in Scotland (Labour, the Conservatives and the Liberal Democrats), with the support of the UK Government, set up the Calman Commission to review the operation of devolution.

The Calman Commission found that devolution was popular in Scotland and had largely worked well.[54] It saw little scope for transfers of further substantive areas of policy-making competence. However, in identified a major weakness of the 1998 Act in relation to the financing of devolution. The 1998 Act allowed the Scottish Parliament to vary the basic rate of income tax by 3 pence above or below the rate set at Westminster. This was, however, regarded as too restricted to be an effective fiscal tool and in fact it had never been used. All other fiscal powers, with the exception of local government taxation, were reserved to Westminster, and the Scottish Government also lacked borrowing powers. It was, therefore, dependent upon a block grant from the Treasury, set (as it had been prior to devolution) using the so-called "Barnett Formula" by reference to a percentage of spending in devolved policy areas for England. Although this arrangement ensured a relatively generous share of public expenditure for Scotland, the Calman Commission considered it to be flawed in two main respects. First, it reduced policy flexibility by tying overall devolved expenditure to UK government choices on expenditure in England, as well as by denying Scottish governments important policy instruments. Second, Calman considered that it undermined the responsibility of devolved governments in Scotland. Since governments were responsible for spending money, but not raising it, party competition focused on expenditure rather than fiscal choices, and governments could pass the buck for policy failures by blaming Westminster for inadequate funding.

The Calman Commission's proposals for fiscal reform were partially, though not entirely, implemented by the Scotland Act 2012. This provided for a significant increase in the Scottish Parliament's tax-raising powers (and a corresponding reduction in the block grant) through an obligation (rather than merely a power) to set a "Scottish Rate of Income Tax", to compensate for a 10 pence reduction in the basic and higher rate of income tax set by the UK Parliament for Scottish taxpayers. It also devolved power over Stamp Duty Land Tax and Landfill Tax, as well as enabling the Scottish Government to borrow (with Treasury Consent) on the bond markets to finance capital expenditure.

[52] Attributed to George Robertson MP, as Shadow Secretary of State for Scotland, in 1995.

[53] Scottish Government, *Choosing Scotland's Future: A National Conversation: Independence and Responsibility in the Modern World* (2008).

[54] See Commission on Scottish Devolution, *The Future of Scottish Devolution within the Union: a First Report* (2008); Commission on Scottish Devolution, *Serving Scotland Better: Scotland and the United Kingdom in the 21st Century: Final Report* (2009).

The Calman Commission's reports are also notable for their attempt, for the first time, to articulate principled limits to devolution, via an understanding of the political, economic and cultural underpinnings of the union,[55] as well as their emphasis on the importance of effective machinery for intergovernmental relations in order to successfully negotiate the competing demands of autonomy and integration.[56] These aspects of the reports did not, however, result in any concrete changes to devolution.

Before the 2012 Act was even enacted, the constitutional debate had moved on in Scotland. The SNP majority at the 2011 election meant it now had the parliamentary support – and a popular mandate – to pursue a referendum on independence. In October 2012, via the so-called "Edinburgh Agreement", the UK Government agreed to facilitate the holding of an independence referendum, but it refused to agree a second referendum question on a proposal for further devolution. Nevertheless, during the long independence referendum campaign it became clear that, even if there was not yet majority support for ending the union, there was substantial public appetite for additional reforms to devolution going beyond the Calman Commission's recommendations. A series of individual initiatives by the unionist parties culminated in the (in)famous "Vow", published in the *Daily Record* on 16 September 2014, in which the three party leaders promised to deliver extensive new powers to the Scottish Parliament in the event of a No vote.

On the morning after the independence referendum, the Prime Minister, David Cameron announced the establishment of a commission, chaired by Lord Smith of Kelvin, and with representatives from all five parties with seats in the Scottish Parliament (Labour, Conservatives, Liberal Democrats, SNP and Greens), to draw up a package of measures for further devolution. By 27 November, the parties had reached agreement,[57] and the Smith Commission's proposals were in due course enacted in the Scotland Act 2016, again with relatively little modification.

The 2016 Act reforms addressed three main issues. First, like the Calman Commission, Smith recommended further substantial fiscal devolution, although stopping short of the "full fiscal autonomy" sought by the Scottish Government. Thus, the 2016 Act provided for the (almost) complete devolution of income tax, control over the Aggregates Levy and Air Passenger Duty,[58] and assignment of VAT receipts,[59] and alongside the legislation the UK and Scottish Government negotiated a new Fiscal Framework governing the future calculation of Scotland's block grant.[60] Secondly, the 2016 Act devolved a (somewhat disparate) range of new substantive powers, although again these did not go as far as the Scottish Government sought. Of greatest significance in constitutional terms were powers over elections to and the composition of the Scottish Parliament,[61] over welfare benefits,[62] and over abortion.[63] All of these policy areas raise issues of citizenship and social citizenship, and devolution therefore paves the way for potentially significant variations in the terms of citizenship in different parts of the UK. Thirdly, and of greatest constitutional significance, were proposals to guarantee the permanence of the Scottish Parliament and Scottish Government,

[55] See Commission on Scottish Devolution, *First Report*, above n?, ch 4.
[56] Commission on Scottish Devolution*, Final Report*, above n?, part 4.
[57] *Report of the Smith Commission for Devolution of Further Powers to the Scottish Parliament* (2014).
[58] Devolution of these two taxes had been recommended by the Calman Commission, but not implemented.
[59] Scotland Act 2016, part 2.
[60] See S Eden, "Scotland Act 2016: Further Tax Powers Come North" (2016) 20 Edin LR 376; M Lazarowicz & J McFadden, *The Scottish Parliament: Law and Practice* (5th edn, 2018) ch 10.
[61] See P Reid, "Elections and Supermajorities: Simply Another Staging Post?" (2016) 20 Edin LR 367.
[62] See T Mullen, "Devolution of Social Security" (2016) 20 Edin LR 382.
[63] See M Neal, "Devolving Abortion Law" (2016) 20 Edin LR 399.

and to place the Sewel Convention on a statutory footing[64]. These were constitutionally significant because they appeared to address one of the key weaknesses of devolution identified by supporters of independence – its lack of constitutional entrenchment[65] – and hence to place limits on the sovereignty of the UK Parliament. In the event, the statutory language adopted by the 2016 Act was hedged around with qualifications and, as will be discussed further below, seemed designed to provide only symbolic reassurance rather than legally-enforceable guarantees.

The UK Government claimed that the 2016 Act reforms would make the Scottish Parliament "one of the most powerful devolved parliaments in the world."[66] Although there is some room for scepticism about this claim,[67] Holyrood clearly does enjoy extensive powers and these will increase still further following Brexit. Thanks to the reserved model of devolution, powers currently exercised at EU level in areas that are otherwise devolved (such as agriculture, fisheries or environmental regulation) will default to the Scottish Parliament, although this will be subject in some areas to new UK-wide common frameworks,[68] and calls by the Scottish Government for even further devolution post-Brexit (for example in relation to immigration)[69] have so far been resisted.

Clearly, however, legislative devolution has turned out to be far more than a mechanism for preserving Scotland's autonomy against the imposition of unpopular policies. Rather, it has provided a platform for the articulation of Scotland's distinctiveness, helping to embed a "Scottish frame of reference"[70] in a way which always has the potential to generate new demands for recognition of Scotland's voice and Scottish interests spilling beyond the existing boundaries of devolved competence. But as both the Calman and Smith Commissions recognised, strong provision for Scottish "self-rule" has not been matched by effective mechanisms for "shared rule" – for recognition of Scotland's voice in matters of continued UK decision-making, or for mediation between competing territorial interests in areas of overlapping competence.[71] Here, the potential "democratic deficit" remains, arguably exacerbated post-devolution by the fact that the Westminster institutions now combine roles as representatives of both the UK and England. As will be discussed further below, this has proved to be a significant source of tension, particularly in the context of Brexit.

The Constitutional Status of Devolution

The devolved institutions created by the Scotland Act 1998 enjoy both legislative and executive power. The Scottish Parliament has the freedom to enact new laws in areas of devolved competence, and to amend or repeal pre-existing UK Parliament legislation in those areas. The executive competence of the Scottish Government mirrors the legislative competence of the Scottish Parliament, so that the Scottish Ministers are able to exercise statutory and prerogative powers in devolved areas previously exercised by UK Ministers,[72] as well as new powers or duties conferred upon them by Acts of the Scottish Parliament (ASPs). The Scottish Ministers also have a range of additional executively-devolved powers (i.e., exercised under UK legislation, where legislative power remains reserved to Westminster) conferred either by or under the Scotland Acts, or by other sectoral legislation. In

[64] See Scotland Act 2016, ss 1 and 2.
[65] See A McHarg, "The Constitutional Case for Independence", in A McHarg *et al* (eds), above n?, 115-21.
[66] See, eg, David Mundell MP, "David Mundell Calls for End to Blame Games", BBC Website, 16 May 2016.
[67] See N McEwen, "A Constitution in Flux: the Dynamics of Constitutional Change After the Referendum", in A McHarg *et al* (eds), above n?, 234-40.
[68] European Union (Withdrawal) Act 2018, s12.
[69] Scottish Government, *Scotland's Place in Europe* (2016) ch 4.
[70] McCrone, above n?, 75.
[71] See McEwen, above n?, 237-40.
[72] Scotland Act 1998, s53.

addition, since competence constraints bite only on ASPs or on the exercise by Ministers of specific legal functions,[73] both the Parliament and Government enjoy unrestricted power to discuss and/or advocate for policy changes even in relation to matters reserved to the UK level.

The question remains, though, how the constitutional significance of these devolved powers should be understood. As we have seen, the Scottish Parliament and Government are in legal terms creatures of statute: they were created by the Westminster Parliament and their powers remain dependent upon UK legislation. In political terms, however, self-government was clearly *demanded by* rather than granted to Scots voters. Moreover, devolution and its subsequent development has been accompanied by intimations of an alternative constitutional model of constrained, but guaranteed autonomy. How best to account for the constitutional significance of devolution is not merely an issue of academic interest. Rather it has real implications for the extent of devolved autonomy in practice, and the ways in which the Scottish Government and Parliament are able to exercise their powers. These issues play out across two, related, dimensions: first, regarding how the courts respond to legal challenges brought against the devolved institutions; and, second, concerning the relationship between Holyrood and Westminster.

Devolution and the Courts

As the Scottish Parliament is not a sovereign legislature, it is uncontroversial that its Acts – as well as decisions of the Scottish Government – can be subject to judicial challenge. As Lord Rodger stated in *Whaley v Lord Watson*,[74] Holyrood had "joined that wider family of parliaments" which "owe their existence and powers to statute and are in various ways subject to the law and to the courts which act to uphold the law." It followed that, unlike Westminster, the Parliament and its members enjoyed no general legal privilege entitling them to regulate their own affairs free from judicial interference, except insofar as expressly provided for in the 1998 Act.[75]

Nevertheless, the courts have had to consider how they should approach the question of review of ASPs and, more fundamentally, how they should be categorised in legal terms. The latter question was settled by the Supreme Court in *AXA General Insurance Ltd v Lord Advocate.*[76] The case involved a challenge to the Damages (Asbestos-Related Conditions) (Scotland) Act 2009, which enabled persons exposed to asbestos and who had developed non-symptomatic pleural plaques to recover damages, reversing the decision of the House of Lords in *Rothwell v Chemical and Insulating Co Ltd*.[77] The appellants argued, *inter alia*, that ASPs should be regarded as a species of delegated legislation which were amenable to judicial review on normal common law grounds. Since the House of Lords had found in *Rothwell* that pleural plaques did not cause harm, they argued that the legislation was irrational in the *Wednesbury* sense and therefore invalid.

The Supreme Court rejected this argument. Although ASPs derived their authority from an Act of the UK Parliament, this did not mean that they were subject to judicial control in the same way as delegated legislation made by ministers. According to Lord Hope:

> "The Scottish Parliament takes its place under our constitutional arrangements as a self-standing democratically elected legislature. Its democratic mandate to make laws for the

[73] Scotland Act 1998, ss29 and 54. Nb, the cross-cutting constraints of EU law and Convention rights apply on a broader basis than the subject-matter constraints to executive "acts", including failures to act – Scotland Act 1998, s57(2), and see further below.
[74] 2000 SC 340, 349.
[75] See Scotland Act 1998, ss 40-42.
[76] [2012] 1 AC 868.
[77] [2008] AC 281.

> people of Scotland is beyond question. Acts that the Scottish Parliament enacts which are within its legislative competence enjoy, in that respect, the highest legal authority.[78]

Accordingly:

> "Acts of the Scottish Parliament are not subject to judicial review at common law on the grounds of irrationality, unreasonableness or arbitrariness. … it would also be quite wrong for the judges to substitute their views on these issues for the considered judgment of a democratically elected legislature …"[79]

For Lord Reed, the ordinary grounds of judicial review – predicated on the idea that statutory powers are conferred for a purpose which imposes limits on the lawful exercise of those powers – also had no analytical purchase in relation to ASPs. Within the limits set down by the Scotland Act, the Scottish Parliament had plenary legislative power which:

> "is as ample as it could possibly be … The Act leaves it to the Scottish Parliament itself, as a democratically elected legislature, to determine its own policy goals. It has to decide for itself the purposes for which its legislative powers should be used, and the political and other considerations which are relevant to its exercise of those powers."[80]

However, this did not mean that ASPs were wholly immune from challenge at common law. Both Lord Hope and Lord Reed stressed that, in exceptional circumstances, the courts could strike down ASPs which breached the Rule of Law, although they arrived at this conclusion by different routes. For Lord Hope, it was a matter of first principle that there were constitutional limits that even a democratically elected legislature could not breach; given the status of the Rule of Law as "the ultimate controlling factor on which our constitution is based …, the judges must retain the power to insist that legislation of that extreme kind is not law which the courts will recognise."[81] By contrast, Lord Reed relied upon the more constitutionally-orthodox route of the principle of legality. In enacting the 1998 Act:

> "Parliament did not legislate in a vacuum: it legislated for a liberal democracy founded on particular constitutional principles and traditions. That being so, Parliament cannot be taken to have intended to establish a body which was free to abrogate fundamental rights or to violate the rule of law."[82]

While the decision adds an element of uncertainty to the scope of the Scottish Parliament's legislative competence which litigants will naturally attempt to exploit,[83] *AXA* nevertheless suggests that Holyrood exists within a constrained constitutional order in which the exercise of the powers of the UK Parliament, as well as its own, are to be guided by considerations of constitutional principle. This

[78] *AXA*, above n?, para 46.
[79] Ibid, para 52. See also Lord Reed at paras 147-8.
[80] Ibid, para 146.
[81] Ibid, para 51.
[82] Ibid, para 153.
[83] In *Moohan v Lord Advocate* [2014] UKSC 67, there was an unsuccessful attempt to argue that legislation denying prisoners the right to vote in the independence referendum was in breach of the Rule of Law. In *Re UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64, it was argued that the existence of separate legislation governing the status of retained EU law after Brexit for devolved and reserved matters would breach the Rule of Law principle of legal certainty, but this was also robustly rejected by the court (see para 86)

is reinforced by the decision in *H v Lord Advocate*,[84] in which the Supreme Court held that the Scotland Act 1998 is a constitutional statute which cannot be impliedly repealed.

The primary grounds of challenge to ASPs, then, are those set out in section 29 of the 1998 Act.[85] The most important restrictions[86] on the Parliament's legislative competence fall into two categories. First are subject-matter restrictions, which define the division of competences between the UK and Scottish Parliaments. Holyrood may not make laws which "relate to" the list of policy areas reserved to Westminster set out in Schedule 5.[87] In addition, it may not modify certain protected statutes listed in Schedule 4,[88] nor may it modify the "law on reserved matters", except insofar as this is part of a reform of the general rules of Scots private or criminal law which are common to reserved and devolved matters.[89] Second are cross-cutting constraints which apply to legislation otherwise within devolved competence: ASPs must not be incompatible with rights contained in the European Convention on Human Rights nor (for the time being) with European Union (EU) law.[90]

Although there are ample opportunities for challenging legislative competence,[91] by December 2018, only 18 out of the 281 Acts enacted by the Parliament had been subject to legal challenge post-enactment,[92] plus one Bill was the subject of a pre-enactment reference to the Supreme Court.[93] Provisions in six ASPs have so far been found to be beyond competence,[94] five on grounds of breach of Convention rights, which has been by far the most common basis for challenge, and the sixth on the ground that it modified protected statutes.[95] The relative paucity of challenges has been attributed to the effectiveness of pre-legislative *vires* checks[96] and to the flexibility mechanisms built into the devolution settlement – the ability to use section 30 Orders to confer additional competences on the Parliament, or the use of the Sewel Convention to allow Holyrood to consent to UK legislation on devolved matters where doubts exist about the competence of proposed Scottish Bills.[97]

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[84] [2013] 1 AC 413.

[85] N.b., these limitations also apply to acts of the Scottish Ministers (Scotland Act 1998, ss 54 and 57(2), subject to the possibility of powers being executively devolved and therefore not subject to the subject-matter constraints.

[86] The Parliament is also prohibited from legislating extra-territorially (s 29(2)(a), or from removing the Lord Advocate from his position as head of the system of criminal prosecution and investigation of deaths in Scotland (s 29(2)(e)).

[87] Scotland Act 1998, s 29(2)(b).

[88] Scotland Act 1998, s 29(2)(c). The Sch 4 restrictions do not, however, occupy the policy field in the same way as the Sch 5 restrictions. In other words, the Scottish Parliament may legislate in the same policy areas, provided that this supplements the relevant UK legislation and does not modify it, either expressly or in substance – see Continuity Bill reference, above n?, para 51.

[89] Scotland Act 1998, s 29(4) and Sch 4, para 2. See *Martin v HM Advocate* 2010 SC (UKSC) 40; *Henderson v HM Advocate* 2011 JC 96.

[90] Scotland Act 1998, s 29(2)(d). When the UK leaves the EU, the latter restriction will be lifted, but UK Ministers will be able to make regulations prohibiting the Scottish Parliament from modifying retained EU law in specified areas – European Union (Withdrawal) Act 2018, s 12(1)(2)

[91] See McCorkindale *et al*, above n?, 291.

[92] Ibid, 295-8; see also Lazarowicz & McFadden, above n?, ch 9.

[93] Under Scotland Act 1998, s 33.

[94] See *Cameron v Cottam* 2013 JC 12; *Salvesen v Riddell* 2013 SC (UKSC) 236; *Christian Institute v Lord Advocate* 2017 SC (UKSC) 29; *P v Scottish Ministers* 2017 SLT 271; *AB v HMA* 2017 SLT 401; Continuity Bill Reference, above n?

[95] Continuity Bill Reference, above n?. See further below at ???.

[96] See B Adamson, 'The Protection of Human Rights in the Legislative Process in Scotland', in Murray Hunt *et al* (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit'* (2015) and C McCorkindale and JL Hiebert, 'Vetting Bills in the Scottish Parliament for Legislative Competence' (2017) 21 Edin LR 319.

[97] McCorkindale *et al*, above n?, 297.

Nevertheless, there is now a sufficient body of case law on the boundaries of devolved competence to allow an understanding of the nature of the interpretive challenges that arise and how the courts handle them.

Challenges brought on Convention rights or EU law grounds raise few issues peculiar to the devolved context. Although they may result in legislation being struck down, rather than simply in a declaration of incompatibility or "disapplication" as in the case of UK statutes, it is hard to detect much difference in the way in which the courts handle such challenges against Holyrood as compared with Westminster legislation. Thus, where questions of proportionality arise, the courts show a degree of deference towards the Scottish Parliament's legislative choices (albeit varying in extent depending on the context), and there is a statutory injunction, similar to that required by section 3 of the Human Rights Act 1998 or by the *Marleasing* principle,[98] to resolve competence issues through interpretation wherever possible.[99] However, one potential difference concerns the relevance of the Scottish Parliament's limited competence to the conduct of a proportionality assessment. This was raised but not resolved in the *Scotch Whisky Association* case,[100] which involved a challenge to legislation imposing a minimum unit price for alcohol as being incompatible with Art 34 TFEU. The fact that Holyrood had no competence in relation to alcohol duty (which might have been considered a less intrusive means of achieving the policy aim of reducing alcohol-related harms) was referred to as "the elephant in the room".

Nevertheless, the most challenging constitutional issues arise in relation to the subject-matter constraints. Such challenges raise a number of difficult interpretive questions, the handling of which may significantly affect the scope of Holyrood's competence, and the relative balance of policy-making power as between the Scottish and UK Parliaments.[101] These include: determining the scope of reserved policy areas; deciding what it means to "relate to" a reserved matter or "modify" a protected statute; determining the "purpose" and "effect" of an impugned ASP;[102] and – in the context of a dynamic boundary between reserved and devolved matters – determining the time at which competence is to be judged (when a Bill is passed by the Parliament, when it receives Royal Assent, when it comes into force?).

The prevailing approach, set out most clearly by Lord Hope in *Imperial Tobacco*,[103] is to treat the 1998 Act in the same way as any other statute: i.e., it is to be interpreted according to the ordinary meaning of the words used, taking account of its purpose where relevant. In the context of a reserved powers model, this tends to favour a generous understanding of devolved competence: the constraints on competence are only those explicitly set out in the 1998 Act. At the same time, though, the detail and complexity of the reservations – and exceptions to reservations – in some areas means that a literal approach to interpretation could trip up an ASP with a predominantly devolved purpose, but which nevertheless strays into reserved areas. Attitudes to this issue have differed. In *Martin v Most*, which concerned whether a modification of Scots sentencing law which affected the reserved area of road

[98] *Marleasing SA v LA Comercial International de Alimentacion SA,* Case C-106/89 (1992) 1 CMLR 305.
[99] Scotland Act 1998, s 101. According to Lord Hope in *Salvesen v Riddell*, above n?, para 46 "the obligation to construe a provision in an Act of the Scottish Parliament so far as it is possible to do so is a strong one, and the court must prefer compatibility to incompatibility."
[100] *Scotch Whisky Association v Lord Advocate* 2018 SC (UKSC) 94.
[101] See further, McCorkindale *et al*, above n?, 302-5.
[102] Scotland Act 1998, s 29(4): "the question whether a provision … relates to a reserved matter is to be determined … by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances."
[103] *Imperial Tobacco v Lord Advocate* [2012] UKSC 61.

traffic offences was within competence or not, Lord Hope preferred "a generous application … which favours competence":[104]

> "Given that the Scottish Parliament is plainly intended to regulate the Scottish legal system I am disinclined to find a construction of Schedule 4 which would require the Scottish Parliament, when modifying that system, to invoke Westminster's help to do no more than dot the i's and cross the t's of the necessary consequences."[105]

By contrast, Lord Rodger preferred a narrower approach to construction, seeing no constitutional objection to the fact that this would leave Holyrood dependent on Westminster for the achievement of its policy purposes. However, in *Imperial Tobacco*, Lord Hope held that, where an ASP has more than one purpose, one of which "relates to" a reserved matter, the legislation will be invalid unless the reserved purpose "can be regarded as consequential and thus of no real significance."[106]

There is also a risk that the approach to interpretation could vary depending on the perceived political and constitutional significance of the case. For instance, in the recent Continuity Bill reference, the UK Government appeared to be arguing for an approach to competence significantly at odds with established jurisprudence. The case involved a challenge by the UK Government – the first competence dispute between the UK and Scottish Governments to reach the courts – to the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill. This was enacted to give continuity of effect to EU law in devolved areas post-Brexit, and was passed in the context of a major dispute between the UK and Scottish Governments over the allocation of decision-making competences returning from the EU, which resulted in the Scottish Parliament refusing to grant consent under the Sewel Convention to the European Union (Withdrawal) Act 2018 (which was nevertheless extended to Scotland anyway). The UK Government challenged the Bill on multiple grounds, including that it breached EU law and the Rule of Law, as well as encroaching upon various reserved matters.[107] The latter challenges were particularly notable, not only for their very expansive approach to the scope of the relevant reservations, but also because the Government attempted to read in various restrictions on competence based on assumptions about what powers the UK Parliament would have intended the Scottish Parliament to have in the event of Brexit, and about the general constitutional principles underpinning devolution. This approach seemed inconsistent with a reserved powers model, in which power to legislate in respect of unanticipated events falls by default to the devolved level. For the most part, the UK Government's arguments were rejected, with the Supreme Court reaffirming that "The constitutional framework underlying the devolution settlement is neither more nor less than what is contained in the Scotland Act construed on principles which are now well settled."[108] Nevertheless, the court did accept a novel argument that section 17 of the Bill (which purported to make the exercise of UK ministerial powers under future UK legislation affecting devolved matters subject to the consent of the Scottish Ministers) amounted to an unlawful modification of section 28(7) of the 1998 Act (as a protected statute) because it sought to place conditions on the unlimited power of the UK Parliament to continue to legislate for Scotland.

Holyrood and Westminster

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[104] Above n?, para 38.
[105] *Ibid*, para 66.
[106] *Imperial Tobacco*, above n?, para 43.
[107] See Written Submission of the Advocate General for Scotland, available at: https://www.gov.uk/government/publications/supreme-court-case-no-uksc-20180080-written-submission.
[108] Above n?, para 35.

The Continuity Bill case is a good illustration of the way in which judicial interpretation of devolved competence may affect the balance of power between Westminster and Holyrood in policy disputes in areas of intersecting devolved and reserved competence. But it also demonstrates the fact that, while Westminster's sovereignty remains intact, it will always have the upper hand in such disputes, legally at least. Although the Supreme Court regarded the Continuity Bill as having been largely *within* devolved competence at the time the reference was made, the UK Government had a trump card. The effect of its power under section 33 of the 1998 Act to refer a Bill to the Supreme Court was to delay the enactment of the Continuity Bill (because Royal Assent cannot be granted until the competence question has been resolved). In the meantime, the UK Parliament enacted the EU (Withdrawal) Act, which, *inter alia*, added the Withdrawal Act itself to the list of protected statutes that the Scottish Parliament is not permitted to modify. Since the Supreme Court held that competence is to be judged at the time legislation is *enacted* rather than when it is *passed*, this rendered much of the Continuity Bill *ultra vires* to the extent that it was inconsistent with equivalent provisions in the Withdrawal Act. Moreover, even if the UK Government had lost the case, the UK Parliament could simply have repealed the Scottish legislation. In other words, while Parliamentary sovereignty remains unaffected by devolution, the UK Parliament can simply resolve disputes with the Scottish Parliament by fiat – by legislating to override Holyrood legislation and/or by removing issues from the scope of devolved competence.

As was noted above, the protections provided for the devolved institutions against Westminster encroachment in the initial devolution arrangements were political rather than legal: the legitimacy that they gained from popular endorsement, and the operation of the Sewel Convention. Since 1999, the Sewel Convention has developed into the key mechanism for managing constitutional relations between the UK and Scottish Parliaments, albeit in practice it has acted as a means of *enabling* Westminster to enact legislation on devolved matters as well as for protecting Holyrood's autonomy against unwelcome Westminster intrusion.[109] The practice has also developed of seeking consent for legislation which changes the *scope* of devolved competence, as well as to statutes in areas of existing devolved competence.[110] The importance attached to the Sewel Convention was underlined by its recognition in the Scotland Act 2016.

Until recently, Sewel appeared to be an effective way of tempering Parliamentary sovereignty. While Parliament might *as a matter of law* retain unlimited power to legislate for Scotland, the practical reality seemed different. Thus, the need for consent was respected on all but one minor occasion (and subject to some disputes about whether particular pieces of legislation engaged the Convention); the threat of consent being refused was usually sufficient to lead to negotiation and compromise over the content of UK Bills; and where, exceptionally, consent could not be obtained, this had been respected – Scotland was removed from the scope of the offending provisions, and Holyrood was permitted to introduce its own legislation.

The Convention has, however, been put under severe strain by Brexit. There have been two major disputes between the UK and Scottish Governments over its application, which risk permanently weakening the protection it provides. The first concerned the need for devolved consent to the European Union (Notification of Withdrawal) Act 2018. The Scottish Government argued that, if

[109] For discussion of the constitutional functions of the Sewel Convention, see A McHarg, "Constitutional Change and Territorial Consent: the *Miller* Case and the Sewel Convention", in M Elliott *et al* (eds), *The UK Constitution After Miller: Brexit and Beyond* (2018) ???

[110] See Department for Constitutional Affairs, *Post-Devolution Primary Legislation Affecting Scotland,* Devolution Guidance Note 10 (2005), available at: https://www.gov.uk/government/publications/devolution-guidance-notes.

legislation was necessary to authorise the triggering of the EU Withdrawal process under Article 50 TEU, such legislation would engage the Sewel Convention because Brexit would necessarily impact on matters within devolved competence as well as affecting the scope of devolved competences. The UK Government rejected this analysis, arguing that withdrawal from the EU was a matter of international relations, which is reserved to the UK level. In the *Miller* case,[111] the Scottish Government intervened in the proceedings seeking a declaration that consent was required. However, the Supreme Court refused to decide the question, holding that statutory recognition of the Convention had not given rise to enforceable legal obligations; according to the court, it remained purely a matter of convention, and as such disputes about its operation or scope were not justiciable. This not only handed a *de facto* victory to the UK Government, which simply insisted on its position that consent was not required for the Notification of Withdrawal Act, but also negated any suggestion that statutory recognition of the Convention and of the permanence of the Scottish Parliament and Government had effected any fundamental enhancement of the constitutional status of devolution. While an argument could be mounted that the promise in section 1 of the 2016 Act, that the devolved institutions will not be abolished unless authorised by another referendum, amounts to a "manner and form" constraint on the exercise of Westminster's legislative sovereignty,[112] the decision in *Miller* does not give much cause to expect that such an argument would be successful.

The second dispute arose in relation to the European Union (Withdrawal) Act 2018. Here, the UK Government did accept that the Sewel Convention was engaged and, following protracted negotiations, significantly amended the Bill in response to strenuous objections by the Scottish and Welsh Governments to its original drafting. Despite these amendments, the Scottish Parliament was still unwilling to consent to the Bill. Nevertheless, for the first time ever, it was enacted anyway without further amendment. As UK Ministers pointed out, the Sewel Convention does not establish an invariable rule, but rather requires only that devolved consent is *normally* required. However, instead of explaining what it was about the, admittedly unusual, circumstances of Brexit which made it constitutionally acceptable to ignore the refusal of devolved consent, Ministers seemed to be advancing a different understanding of the Convention, such that it requires consent to be *sought*, but does not give the devolved legislatures a veto in relation to UK legislation on devolved matters if consent cannot be *secured*.[113] According to Bogdanor, writing in 1999, "the relationship between Westminster and Edinburgh will be quasi-federal in normal times and unitary only in crisis times."[114] It remains to be seen whether this dramatic reassertion of Parliamentary sovereignty will turn out to be temporary, or rather a lasting confirmation of Holyrood's constitutionally subordinate status.

How the constitutional significance of devolution is understood affects not only the relationship between the UK and Scottish Parliaments, but also that between the UK and Scottish Governments. Except insofar as UK Ministers have specific statutory consent or veto powers, there is no general relationship of hierarchy between the UK and Scottish Governments, and UK Ministers may not act in devolved areas unless they are specifically empowered to do so. Indeed, it was because it considered the EU (Withdrawal) Act to breach this principle that the Scottish Government felt unable to

[111] *R (Miller) v Secretary of State for Exiting the European Union* [2017] 2 WLR 582.
[112] For a defence of manner and form constraints, see M Gordon, *Parliamentary Sovereignty in the UK Constitution* (2015).
[113] See, e.g., the evidence of David Lidington MP and David Mundell MP to the House of Commons Public Administration and Constitutional Reform Committee, *Devolution and Exiting the European Union: Reconciling Differences and Building Strong Relations*, 8th Report, 2017 – 19, HC 1485, paras 52, 57-9.
[114] V Bogdanor, *Devolution in the United Kingdom* (1999) 287.

recommend consent to it, even in its amended form.[115] Thus, the Act gives UK Ministers the power to determine via regulations, and without having to secure devolved consent, that new UK-wide frameworks are necessary in areas currently governed by EU law, and so to prohibit the Scottish Parliament from legislating in those areas.[116]

With the exception of the decision to refer the Continuity Bill to the Supreme Court, successive UK Governments have not felt the need to exercise any of their formal powers over the devolved institutions in Scotland. And they have frequently been willing to acknowledge and respect the political authority of the devolved institutions. The most vivid example of this was in relation to the independence referendum, where the UK Government acknowledged the Scottish Government's mandate to hold a referendum and was willing to facilitate it, even though it considered that it was not within devolved competence to legislate for a referendum. Nevertheless, the authority it derives from its relationship with the UK Parliament, and the informal nature of the arrangements for inter-governmental relations effectively allow the UK Government to assert its will over the devolved administration, should it choose to do so.

The UK Government dominates the inter-governmental relations process both because it is able to set the agenda for discussion – and indeed to determine whether the Joint Ministerial Councils meet at all – and because there is no independent mechanism for resolving disputes between governments. As noted above, this is particularly problematic in areas where the UK Government represents both English voters and the UK electorate as a whole. This means that where territorial conflicts arise, for instance in relation to financial allocations or because of political divergence (such as in relation to Brexit), English interests are likely to prevail. The weakness of the devolved governments in the inter-governmental relations process has been repeatedly criticised,[117] but there is no sign of any imminent change. Thus, the influence of the devolved governments in areas of intersecting competences or overlapping interest remains dependent upon whatever political resources they are able to muster, rather than resting upon a secure legal or constitutional foundation.

Scotland's Constitutional Future

As we have seen in this Chapter, the strongest political resource available to those seeking recognition of Scotland's political voice has historically been nationalism; the assertion of a right on the part of Scottish voters to self-government and self-determination. In the context of Brexit, the threat of Scotland exiting from the Union has been made explicit. As soon as the result of the EU referendum was known, Scotland's First Minister, Nicola Sturgeon, made clear that, unless there was some recognition and accommodation of the fact that a majority of Scots voters had chosen to Remain in the EU, the option of a second independence referendum was firmly "on the table".[118] When, in March 2017, it became clear that the UK Government intended to trigger the UK's withdrawal from the EU under Article 50 TEU without securing the Scottish Government's agreement to the form that Brexit should take, Sturgeon activated that threat by announcing her intention, subsequently

[115] Scottish Government, *Supplement Legislative Consent Memorandum: European Union (Withdrawal) Bill* (2018), available at: http://www.parliament.scot/S5ChamberOffice/LCM-S5-10a.pdf.
[116] European Union (Withdrawal) Act 2018, s 12. The Act requires a "consent decision" by the Scottish Parliament before regulations can be made, but this requirement can be satisfied by a refusal of consent, or even by a failure to consider the matter.
[117] See, e.g, Calman Commission, *Final Report*, above n?, part 4; Smith Commission, above n?; House of Lords Constitution Committee, *Inter-Governmental Relations in the United Kingdom*, 11th Report, 2014-15, HL Paper 146; Public Administration and Constitutional Affairs Committee, above n?, ch 8.
[118] See http://www.bbc.co.uk/news/uk-scotland-36620375.

endorsed by a vote in the Scottish Parliament,[119] to seek agreement from the UK Government for a second referendum to be held in Autumn 2019. The Prime Minister's response was to reject the request. But crucial to the credibility of that stance was the result of the snap UK general election held in May 2017, at which the SNP lost a substantial proportion of its seats and vote share (albeit from an unprecedentedly high level in 2015). Since the referendum request was a major election issue in Scotland, this undermined the Scottish Government's claim to have a mandate for another referendum.

Although Brexit is in many ways a textbook illustration of the democratic and constitutional weaknesses of Scotland's constitutional position within the UK, it has not had the dramatic impact on support for independence that might have been expected. This is perhaps explicable by a stronger attachment to a UK rather than an EU identity amongst Scottish Remain voters, as well as significant uncertainty about the impact of Brexit – uncertainty having been a major factor for those voting No to independence in 2014.[120] Thus, while support for Scottish independence remains at an historically high level,[121] the immediate threat of another referendum appears to have receded (although it clearly has not gone away). This may explain the robust attitude taken by the UK Government to the recognition claims made by the Scottish Government in relation to Brexit, and its willingness to assert an essentially unitary understanding of the territorial constitution. If the only protection for the devolved institutions lies in convention, the only sanctions for breaching convention are political; but here the risk of a significant political backlash appears to have been neutralised.

At the same time, it must be acknowledged that the recognition claims being advanced by the Scottish Government were unusual ones.[122] This was not simply about seeking protection against Westminster interference in areas of existing Scottish autonomy, or making new claims for Scottish self-rule. Rather, it was the assertion of a right to shared rule; to influence matters of common interest which form part of the constitutional framework in which devolution is situated. Here we see the limits of the constitutional reconfiguration brought about by devolution. While high levels of Scottish autonomy may be tolerated, there is much less willingness to countenance devolved vetoes over UK-wide decision-making.

Yet, as the Scottish Parliament has become more powerful, it has become harder to maintain a watertight division between reserved and devolved matters. Both the 2012 and 2016 Scotland Acts have created significant areas of shared decision-making, particularly in relation to fiscal and welfare matters. This process is further extended by Brexit, which necessitates reconsideration of the common frameworks within which devolution operates. EU law, as a constraint on both devolved and UK decision-making, provided an important centralising counterweight to the decentralising effects of devolution. Thus, post-Brexit, new mechanisms are required to preserve the UK's internal market and the ability of the UK Government to enter into new trade deals. However, while the UK Government has shown an acute awareness of the dangers of the excessive decentralisation and fragmentation post-Brexit,[123] there has been a failure to acknowledge that common frameworks are matter of mutual

[119] Motion S5M-04710 (Nicola Sturgeon) SPOR, 28 March 2017 (Session 5).
[120] See R Liñeira *et al*, "Voters' Response to the Campaign: Evidence from the Survey", in M Keating (ed), *Debating Scotland: Issues of Independence and Union in the 2014 Referendum* (2017).
[121] See: http://whatscotlandthinks.org/questions/how-would-you-vote-in-the-in-a-scottish-independence-referendum-if-held-now-ask#line.
[122] See further, McHarg, above n?, ???
[123] On this see A McHarg, "Unity and Diversity in the United Kingdom's Territorial Constitution', in M Elliott *et al* (eds), *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives* (2018) 297-9.

interest which require to be established and governed in a co-operative manner and not imposed unilaterally by Westminster.

It may be that, once the immediate Brexit crisis has passed, we will see a return to the gradual evolution of the territorial constitution towards a quasi-federal relationship, in which there is an acceptance of constitutionally-divided authority and the need for effective mechanisms for shared rule alongside self-rule. If not, history suggests that, given the choice between self-government and unmediated unitary decision-making at Westminster, most Scots are likely to prefer the former.