Devolution in Scotland and the Supreme Court: A Question of Interpretation?

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As we celebrate its first decade it is clear that the Supreme Court is coming to terms with its position as an apex constitutional court for the United Kingdom. Whilst recent trends indicate that this is true even in the face of Westminster legislation and UK Government action, in the devolved sphere the court has been cultivating a bespoke devolution jurisprudence almost from its inception. In this paper I want to focus on two key issues that arise from this. First, that despite the Supreme Court holding itself out to be a truly constitutional court in the devolved sphere – where it has power hitherto unknown to UK courts to strike down primary legislation enacted by democratically elected legislature – it remains uncomfortable proceeding from first constitutional principles. Rather, the devolution jurisprudence of the Court – certainly as it relates to the constitutional status of devolution – demonstrates the Court's continued faith in its exercise of a more traditional function: that of (sometimes innovative means of) statutory interpretation. Second, that whilst relatively few devolution disputes will manifest themselves before the Supreme Court, that (still developing) jurisprudence looms large over the work of government and parliamentary lawyers whose task it is to protect as far as possible every piece of devolved legislation from judicial censure through an intricate process of legislative constitutional review.

KEY WORDS: Devolution; Supreme Court; Constitutional review; Statutory interpretation; Devolution jurisprudence

I. INTRODUCTION

A fundamental feature of the UK constitution has been the *absence* of constitutional review by the courts of primary legislation. The traditional approach taken by courts to the legality of Acts of Parliament was captured by Ungoed-Thomas J in *Cheney v Conn*:[1]

> What…statute itself enacts cannot be unlawful, because what the statute provides is itself the law, and the highest form of law that is known to this

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[1] *Cheney v Conn (Inspector of Taxes)* [1968] 1 WLR 242.

> country. It is the law which prevails over every other form of law, and it is not for the court to say that a parliamentary enactment, the highest law in this country, is illegal.[2]

This culture of restrained judicial power vis-à-vis primary legislation was so engrained that when the policing of boundary disputes as between the UK Parliament and the (aborted) Scottish Assembly came to be considered in 1978, officials stressed that their resolution by the judiciary 'should not be contemplated' as this would run contrary to 'the spirit of devolution within a unitary state with one sovereign Parliament'.[3]

Those concerns barely registered, however, when devolution was revived and delivered by the Labour Party following its general election victory in 1997. For those who had framed the devolution settlement, judicial control of the legislature was an important point of departure from the Westminster tradition: to be a model for democracy, said Bernard Crick and David Millar, '[a new] Scottish Parliament…needs [to be limited by law] as much as any other'.[4] At the same time, the judiciary was beginning to shed its own inhibitions. As it was put by Lord Rodger in *Whaley v Lord Watson of Invergowrie*,[5] the radicalness of this new approach was radical only in the particular context of the UK: taking a broader view, he said, the Scottish Parliament had merely 'joined that wider family of Parliaments [that] 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'.[6] Indeed – and as officials had feared in 1978 – the prospect that devolution might undermine the sovereignty of the Westminster Parliament itself was given credence by Lord Steyn who, in *Jackson v Attorney General*,[7] cited the Scotland Act 1998 alongside the influence of EU law and the European Convention on Human Rights as evidence of a 'divided sovereignty' that in his view had rendered the classic Diceyan account of sovereignty 'to be out of place in the modern United Kingdom'.[8]

If this new power of the judiciary – in Ewing and Dale-Risk's words, the 'clear and unambiguous power (and duty) to strike down legislation passed by a democratically elected Parliament'[9] - could be defended on constitutional grounds it was likely also to give rise to concerns of a similar nature. On the one hand, there was a concern from democracy about the proper constitutional

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[2] Ibid at 247.
[3] James Mitchell, *Devolution in the UK* (2009) 120-21.
[4] Bernard Crick & David Millar, *To Make the Parliament of Scotland a Model for Democracy* (1995) 9.
[5] 2000 SC 340.
[6] Ibid at 349.
[7] [2005] UKHL 56.
[8] Ibid at [102].
[9] Keith D Ewing & Kenneth Dale-Risk, *Human Rights in Scotland: Text, Cases and Materials* (2004) 61.

role of the judiciary vis-à-vis a democratically elected, representative and accountable legislature.[10] On the other hand, by being 'dragged into the political arena' in order to police constitutional boundaries, it was argued that the integrity of the judges themselves was at stake: their decisions, it was feared, would not be portrayed as 'upholding individual rights but as the thwarting of the democratic will' as expressed through the acts of the new legislature and executive.[11]

Much has been written about the way in which the Supreme Court has navigated this particular tight rope. In this contribution, however, I want to focus on two related questions. First, the way in which the Supreme Court has been able to shape the constitutional status of – as well as the constitutional protections for – devolution, not by appeal to high constitutional principle (a task which risks exposing the Court to that charge of politicisation) but rather through the altogether more legalistic application of canons of statutory interpretation. Second, the way that bureaucratic and political actors approach *their* interpretation of the Supreme Court's jurisprudence in order to protect (in so far as possible) legislation from the threat of judicial censure.

II. THE CONSTITUTIONAL STATUS OF DEVOLUTION

The Supreme Court has been asked to address the constitutional status of devolution in at least two contexts. First, what is the status of the devolution statutes themselves; second, what is the status of the devolved legislatures *qua* legislatures. Let us address each in turn.

i. *To be or not to be, a constitutional statute*

The question as to the constitutional status of the devolution statutes was (intentionally) left untouched during the passage of the relevant legislation. With the particular exception of section 1 of the Northern Ireland Act 1998, which stipulates the manner and form by which Northern Ireland might leave the UK and unify with Ireland,[12] devolution's enabling Acts – as was the case with other contemporaneous constitutional reforms[13] – took the form of regular statutes that neither were created by, nor (until reforms made to the devolution settlements by the Scotland Act 2016 and the Wales Act 2017) did they themselves create, any special constitutional amendment procedure. Thus, according to the orthodox reading of the UK constitution and its absence of legislative hierarchy - as Dicey famously put it, 'neither the Act of Union with Scotland nor the Dentists Act 1878 has more claim than the other to be

[10] Ibid.
[11] Aidan O'Neill, 'The Scotland Act and the Government of Judges' (1999) 9 Scots Law Times (News) 61 at 66.
[12] This provision determines that Northern Ireland will remain a part of the United Kingdom except with 'the consent of a majority of the people of Northern Ireland voting in a poll' that determines a 'wish' by that majority to 'cease to be part of the United Kingdom and [to] form part of a united Ireland'.
[13] See, for example, the Human Rights Act 1998 which has in its short life been subject to various threats from the political right about its repeal and replacement with a so-called British Bill of Rights.

considered a supreme law'[14] – even these significant constitutional reforms could be amended or repealed by the later passage of ordinary legislation.[15] However, the tenability of this position has come under pressure from the common law, and this from at least two directions: first, through the interpretation by the Supreme Courts of the *purpose* of the devolution statutes; second, through the interpretation by the Court of the *effects* of recognising the constitutional quality of that body of legislation.

The purpose of the devolution statutes was at issue in the House of Lords case *Robinson v Secretary of State for Northern Ireland.*[16] There, their Lordships had to grapple with the inability of the Northern Irish Assembly to elect from its members a First Minister (FM) and a Deputy First Minister (DFM) within the prescribed six-week period following the restoration of the Assembly from suspension in September 2001 (David Trimble for the UUP and Mark Durkan for the SDLP having been confirmed as FM and DFM respectively two days following the expiry of that period). A literal interpretation of section 32(3) of the Northern Ireland Act 1998 (NIA) ought arguably to have led to fresh Assembly elections being called with the passing of the six-week period:

> If [the six-week period] ends without a First Minister and a Deputy First Minister having been elected, the Secretary of State *shall* [emphasis added] propose a date for the election of the next Assembly.

However, by a 3:2 majority the House of Lords determined that the FM and DFM had lawfully been elected outside of that period, notwithstanding the ordinary meaning of the words used in that provision, by giving effect to (what the majority deemed to be) the *purpose* of the legislation. The NIA, Lord Bingham said, 'is in effect a constitution' with the effect that its provisions should be read 'generously and purposively' having regard to the 'values which the constitutional provisions are intended to embody'.[17] In this context those values included the implementation of the Belfast Agreement and the cessation of a protracted and bloody conflict. To require fresh elections, Lord Bingham continued, might serve only to 'deepen divisions' in Northern Ireland.[18] Arguing that 'the democratic ideal is not the only constitutional ideal which this constitution should be understood to embody', it was said to be desirable that 'the government should be carried on, that there be no governmental vacuum'.[19] This is to say that the *constitutional* nature of the NIA – as well as the context within which it operates – led

[14] AV Dicey, *An Introduction to the Study of the Law of the Constitution* (1959) 145.
[15] And so this has proved to be the case with, inter alia, significant reforms to devolution being delivered by virtue of further pieces of ordinary legislation in the shape of the Scotland Act 2012 and the Scotland Act 2016.
[16] [2002] UKHL 52.
[17] Ibid at [11].
[18] Ibid.
[19] Ibid.

the majority in the House of Lords to apply a different rule of interpretation to that that would have applied to *ordinary* legislation.

In the case of *Imperial Tobacco Ltd v Lord Advocate* both the Inner House of the Court of Session[20] and the Supreme Court[21] sought to roll back from the broadest implications of *Robinson*, or at least to confine *Robinson* to the peculiar complexities of the Northern Irish devolution settlement. 'The Scotland Act,' said Lord Reed, whose view then from the Inner House is given additional weight by his soon to be elevation to the office of President of the Supreme Court, 'is not a constitution but an Act of Parliament'.[22] As such, beyond the intention to create a settlement that is 'rational and coherent' and which provides for 'stable and workable' constitutional arrangements, Lord Reed said that 'the interpretation of any specific provision [of the Scotland Act] will depend upon the language used, and the context that is relevant to understanding the meaning of that language'.[23] Drawing a distinction between that context as between Northern Ireland and Scotland, the Lord President of the Court of Session pointed to the 'clear background purpose' of the NIA, that being the implementation of the GFA, as against the narrower purpose of the Scotland Act, to '[divide] functions between the Scottish Parliament and the United Kingdom Parliament'.[24] In the Supreme Court, Lord Hope provided authoritative guidance as to the proper method to be taken to the interpretation of the Scotland Act. '[T]he description of the Act as a constitutional statute,' he said, 'cannot be taken, in itself, to be a guide to its interpretation'.[25] Rather, the provisions of the Scotland Act 'must be interpreted like any other statute'.[26] Whilst Lord Hope did not dispute the intention of Parliament to create in the Scotland Act a statutory scheme that was 'coherent, stable and workable' this, he said, was no aid to interpretation: on the contrary it was a feature of all statutes enacted by Westminster or by Holyrood.[27] The best means of achieving a 'coherent, stable and workable' settlement, it was said, 'is to adopt an approach to the meaning of [even] a [constitutional] statute that that is constant and predictable,' and this by reference to 'the ordinary meaning of the words used'.[28]

In *Imperial Tobacco*, then, the Supreme Court confined the 'generous and purposive' approach to the interpretation of the devolution statutes to the facts and to the political context which gave rise to the dispute in *Robinson*, realigning the approach to be taken to the interpretation of constitutional and ordinary statutes. There are two important points that follow. First, that *Imperial Tobacco* in the Supreme Court stands as authority for the approach to be taken to the question of the legislative competence of legislation made by the devolved legislatures. That is:

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[20] [2012] CSIH 9.
[21] [2012] UKSC 61.
[22] *Imperial Tobacco* (IH) (n 20) at [71].
[23] Ibid at [72].
[24] Ibid at [14].
[25] *Imperial Tobacco* (SC) (n 21) at [15].
[26] Ibid.
[27] Ibid at [14].
[28] Ibid.

1. That the question of legislative competence must be determined in each case by reference to the particular rules that are set out in the Scotland Act;[29]
2. That those rules must be interpreted in the same way as rules found in any other UK statute;[30]
3. That the description of the Scotland Act as a constitutional statute cannot be taken, in itself, as a guide to interpretation.[31]

Second, that despite the Supreme Court in *Imperial Tobacco* adopting a narrower approach to the method of interpretation than that of their predecessors on the majority of the House of Lords in *Robinson*, it is clear that this latter approach is one that is intended to protect and to preserve, rather than unduly to constrain, the devolved sphere. Whilst Lord Hope rejected the view that the approach to legislative competence taken in section 29 – that challengers must demonstrate that a provision is outwith (rather than the government having to demonstrate that a provision is within) legislative competence – creates a presumption in favour of competence, he went on to say that it does demonstrate a purpose of the Scotland Act: to 'enable the Parliament to make such laws within the powers given to it...as it saw fit'.[32] The Scotland Act, Lord Hope continued, was intended – within the limits of legislative competence – to be a 'generous settlement of legislative authority'.[33]

Accordingly, the Supreme Court has been resistant to attempts by the UK Government to use litigation to *narrow* the scope of devolution on grounds of constitutional principle. Most notably, the Court rejected an argument by the UK Government that the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill – the Scottish Government's legislative response to its recommendation to the Scottish Parliament to refuse legislative consent to the UK's post-Brexit EU law Continuity Bill – was outwith legislative competence as being 'contrary to the constitutional framework underpinning the devolution settlement' on the basis established in *Imperial Tobacco* that '[t]he constitutional framework underlying the devolution settlement is neither more nor less than what is contained in the Scotland Act'.[34] However, the Court in that case was willing to interpret *the provisions of the 1998 Act itself* in a (seemingly) creative way that bolstered Westminster's sovereignty as a stand-alone and legally enforceable constraint upon the freedom of the devolved legislatures. So, a challenge to section 17 of the Continuity Bill was accepted by the Court to have been an unlawful modification of section 28(7) of the Scotland Act. That provision – protected from amendment by schedule 4 of the

[29] Ibid at [13].
[30] Ibid at [14].
[31] Ibid at [15].
[32] Ibid.
[33] Ibid.
[34] THE UK WITHDRAWAL FROM THE EUROPEAN UNION (LEGAL CONTINUITY) (SCOTLAND) BILL – *A Reference by the Attorney General for Scotland* [2018] UKSC 64 at [35].

1998 Act – restates Westminster's legislative sovereignty in negative terms: that devolution 'does not affect the power of the Parliament of the United Kingdom to make laws for Scotland'. In its first substantive judgment on what it means to 'modify' protected provisions of the Scotland Act, the Court made clear that the protection of particular statutes against modification does not prevent Holyrood from legislating in the same legal field. The Human Rights Act 1998, for example, might be a protected *statute* in terms of Schedule 4 of the Scotland Act but, not being a reserved *matter* in terms of Schedule 5, the Scottish Parliament otherwise retains its capacity to legislate in the field of human rights more broadly. Nevertheless, the Court held that express amendment or repeal of protected enactments are not exhaustive of the means of (unlawful) modification, which must include also the enactment of any provisions which are *in substance* inconsistent with them. On that basis, section 17 – which would make the enactment of secondary legislation by UK Ministers subject to the consent of Scottish Ministers - was found to be inconsistent with s28(7). Although the Court accepted that there would *in fact* be no impact on Parliament's sovereignty, since Parliament could amend, disapply or repeal s17, it nevertheless considered that – by purporting to limit the UK Parliament's capacity to authorise the making of secondary legislation by UK ministers – the provision was inconsistent with the continued recognition of Parliament's unqualified sovereignty, and therefore tantamount to an amendment of s28(7).[35] Thus, contrary to the orthodox view that s28(7) amounts to no more than a symbolic – and, for that, an unnecessary - restatement of the UK Parliament's continuing legislative supremacy, the Court seems to have read into that provision a justiciable limit on Holyrood's law-making powers.[36]

Imperial Tobacco notwithstanding, the description of the Scotland Act as a constitutional statute may have legal effects beyond the choice of interpretative method to be applied to particular pieces of legislation. In *H v Lord Advocate*[37] it was argued that certain provisions of the Extradition Act 2003 had impliedly repealed the earlier Scotland Act 1998, with the effect of ousting the jurisdiction of the Supreme Court to hear appeals under the former, even where it might be argued that Scottish Ministers had acted incompatibly with Convention Rights contrary to section 57(2) of 1998 Act. Lord Hope, having determined that there was no inconsistency between the two acts and therefore that the question of implied repeal was misdirected, addressed in obiter comments what the position would have been had the later (ordinary) statute come into conflict with the earlier (constitutional) statute. In that (hypothetical) case, he said, the 2003 Act *could not* be held impliedly to have repealed the relevant provisions of the Scotland Act. This was because of the 'fundamental constitutional nature of the

[35] Ibid at [42]-[52].
[36] For a fuller discussion, see Chris McCorkindale and Aileen McHarg, 'Continuity and Confusion: Towards Clarity? – The UK Supreme Court and the Scottish Continuity Bill' (20 Dec 2018) UKCLA Blog, available at: https://ukconstitutionallaw.org/2018/12/20/chris-mccorkindale-and-aileen-mcharg-continuity-and-confusion-towards-clarity-the-supreme-court-and-the-scottish-continuity-bill/, and 'The Supreme Court and Devolution: the Scottish Continuity Bill Reference' (2019) 2 *Juridical Review* 190.
[37] [2012] UKSC 24.

settlement that was achieved by the Scotland Act [that] in itself must be held to render it incapable of being altered otherwise than by an express enactment'.[38] In so doing, the Supreme Court thus endorsed the oft quoted dicta by Laws LJ in *Thoburn v Sunderland City Council*[39] that certain statutes – amongst them he listed the devolution statutes, Magna Carta, the Bill of Rights 1698, the Acts of Union, the Reform Acts and the Human Rights Act[40] – ought be, because of their constitutional character, protected from implied repeal: a legal and justiciable distinction that flies in the face of the traditionally non-hierarchical approach to the status of legislation made by the UK Parliament. Indeed, Lord Hope was prepared to go further than Laws LJ in requiring *only* express repeal of constitutional statutes where the latter had been prepared to accept the validity of implied repeal by necessary implication.[41]

ii. Common Law review

Imperial Tobacco, then, stands as authority for the proposition that, although the devolution statutes may properly be described as *constitutional* statutes, that description does not itself require a more generous and purposive interpretation to the scope and limits of devolved powers, though it might achieve a 'quasi-entrenchment'[42] of the Scotland Act at least against the effects of implied repeal. In *AXA General Insurance v Lord Advocate,*[43] the Supreme Court was invited to consider the constitutional status of the devolution from another angle.

In 2007, the House of Lords ruled that pleural plaques – often asymptomatic growths on the lung which evidence significant previous exposure to asbestos but which do not themselves threaten or lead to other asbestos related conditions, such as lung cancer – did not constitute recoverable damage for the purposes of the law of negligence.[44] In response to this judgment the Scottish Parliament enacted the Damages (Asbestos-related Conditions) (Scotland) Act 2009 which provided that pleural plaques and certain other asbestos-related conditions *are* to be actionable personal injuries in Scotland. In order to protect their (financial) interests, AXA General Insurance challenged the validity of the 2009 Act both on statutory grounds - that the legislation was incompatible with Article 1, Protocol 1 of the European Convention on Human Rights and therefore was outwith the legislative competence of the Scottish Parliament - and on common law grounds. It is the latter argument that interests us here: that was, that the statutory limits to devolved powers are not exhaustive; that, as creatures of statute, the devolved legislatures are – as was suggested by the then Lord President of the Court of Session, Lord Rodger – 'in principle…like any other body set up by law…subject to the law and to the courts which

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[38] Ibid at [30].
[39] *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin).
[40] Ibid at [62].
[41] Ibid at [63].
[42] To borrow from Adam Perry and Farrah Ahmed's 'Are Constitutional Statutes Quasi-Entrenched?' (2 Nov 2013) UKCLA Blog, available at: https://ukconstitutionallaw.org/2013/11/26/adam-perry-and-farrah-ahmed-are-constitutional-statutes-quasi-entrenched/.
[43] [2011] UKSC 46.
[44] See *Rothwell v Chemical and Insulating Co Ltd* [2007] UKHL 39.

exist to uphold that law'.[45] Put differently, it was AXA General Insurance's contention that the devolved legislatures are subject to the statutory constraints to their legislative competence *and in addition to those* are subject to the ordinary common law grounds of judicial review, including the ground of irrationality. In the Outer House and in the Inner House of the Court of Session it was said that, whilst the Scottish Parliament is 'a non-sovereign public body owing its existence and powers to statute' it was also a 'democratically-elected parliament', enactments by which 'are in the nature of primary legislation', as evidenced by their direct receipt of Royal Assent, and therefore was qualitatively different from other statutory bodies.[46] The legal effect of this, the court said, was that legislation passed by the devolved legislatures are 'not open to challenge on the grounds of irrationality short of the extremes of bad faith, improper purpose or manifest absurdity,' none of which could reasonably be applied to the impugned legislation.[47] Any more liberal approach to the standard of review, said the Outer House, would problematically 'lead the courts into unwarranted scrutiny of the democratic process'.[48] The approach taken by the Supreme Court[49] was different to that taken by the Court of Session, and in constitutionally interesting ways.

In what has been described as 'the most important question to have arisen so far' in the Supreme Court's developing devolution jurisprudence,[50] the Scottish Justices – Lord Hope and Lord Reed - agreed with the Court of Session that devolved legislation could be challenged on common law – as well as on statutory – grounds. Because the Scotland Act 1998 did not explicitly exclude the supervisory jurisdiction of the Court of Session, it followed, for Lord Hope that 'in principle Acts of the Scottish Parliament are amenable to [judicial review] at common law'.[51] The more salient task, then, was for the Court to determine what would be the appropriate grounds of review applicable to any such challenge.[52] In this the Court was, by its own admission, in 'unchartered territory', the matter never having arisen owing to the impossibility (at least, according to (still) prevailing constitutional orthodoxy) of mounting a common law challenge to the validity of Acts of the UK Parliament.[53] In the case of devolved legislation, however, Lord Hope said that the task was 'made easier' because 'conflicting views about the rule of law and the sovereignty [need not] be reconciled'.[54]

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[45] *Whaley v Lord Watson of Invergowrie* 2000 SC 340 at 348.
[46] *AXA General Insurance v Lord Advocate* [2010] CSOH 2 at [142].
[47] Ibid.
[48] Ibid at [118].
[49] [2011] UKSC 46.
[50] Alan Page, *Constitutional Law of Scotland* (2015) 25.
[51] *AXA* (SC) (n 49) at [47].
[52] Ibid at [48].
[53] Ibid.
[54] Ibid at [51].

With little guidance to be found in the authorities, Lord Hope addressed the issue as one of a two-fold principle.[55] First, he placed stress on the fundamental nature of the Scottish Parliament, that has:

> …its firm rooting in the traditions of a universal democracy. It draws its strength from the electorate. While the judges, who are not elected, are best placed to protect the rights of the individual, including those who are ignored or despised by the majority, the elected members of a legislature of this kind are best placed to judge what is in the country's best interests as a whole.[56]

Having established the democratic character of the devolved legislatures – that 'are not sovereign [but which share with the UK Parliament] the advantages that flow from the depth and width of the experience of its elected members and the mandate that has been given to them by the electorate'[57] – Lord Hope insisted that judges 'should intervene' in the review of devolved legislation 'only in the most exceptional circumstances'.[58] Second, then, in establishing what those circumstances might look like, Lord Hope said that, in his view, the 'guiding principle' for the Court is that 'the rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based'.[59] It followed that the circumstances that might justify judicial intervention, at common law, with devolved legislation might be legislation that interferes with that principle. Setting out the threat, Lord Hope made reference to the composition at that time of the Scottish Parliament in which (contrary to the expectations created at the outset by a move to a more proportionate Additional Member System for the allocation of Scottish Parliament seats) a single party – the Scottish National Party – 'dominates the only chamber in that Parliament and the committees by which bills that are in progress are scrutinised'.[60] Even if unlikely, it was 'not unthinkable,' he said, 'that a government which has that power may seek to use it to abolish judicial review or to diminish the role of the courts in protecting the interests of the individual'.[61] Thus, a generous deference to the democratic credentials of the Scottish Parliament notwithstanding, it was

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[55] Ibid at [48].
[56] Ibid at [49].
[57] Ibid.
[58] Ibid.
[59] Ibid at [51].
[60] Ibid. Albeit that in his extra-judicial writing Lord Hope has been critical of the work of the Scottish Parliament's committees and of the intellectual curiosity of their members. See *Lord Hope* of Craighead, 'What a Second Chamber Can Do for Legislative Scrutiny' (2004) 25 *Statute Law Review* 3.
[61] Ibid. One might wonder if the negative political reaction by the then First Minister, Alex Salmond and the then Justice Secretary, Kenny McAskill, to a number of adverse rulings by the Supreme Court on the compatibility of Scots criminal law with the ECHR just a few months earlier played some part in Lord Hope's thinking here. See Severin Carrell, 'Alex Salmond provokes fury with attack on UK Supreme Court' (Wed 1 June) *The Guardian*, available at: https://www.theguardian.com/uk/2011/jun/01/alex-salmond-scotland-supreme-court.

essential in Lord Hope's view that judges 'retain the power to insist that legislation of that extreme kind is not law which the courts will recognise'.[62] Indeed, he said, the rule of law requires it.[63]

Lord Reed reached the same substantive conclusions as did Lord Hope – that 'it would not be constitutionally appropriate for the courts to review [legislative] decisions on the ground of irrationality'[64] but that devolution legislation of an extreme kind may be struck down at common law – but via a different route. Whereas for Lord Hope the rule of law as a constitutional value stood alone from – and potentially in conflict with – the democratic processes and principles from which legislation is created, for Lord Reed the enforcement of the rule of law by the courts was baked into the task of statutory interpretation. In enacting the Scotland Act 1998, Lord Reed said, the UK Parliament had not legislated in a vacuum but had legislated for 'a liberal democracy founded on particular constitutional principles and traditions'.[65] Thus, according to the principle of legality, the UK Parliament 'cannot [in the absence of express words to the contrary in the Scotland Act itself] be taken to have intended to establish a body [the Scottish Parliament] which was free to abrogate fundamental rights or to violate the rule of law'.[66] It is likely that, of the two, it is Lord Reed's approach – reading rule of law values *into* legislative silence or ambiguity – that is most indicative of the Supreme Court's evolving approach to constitutional adjudication more generally: where the application of the application of the principle of legality through the method of statutory interpretation has been used effectively as a means of checking both Westminster's legislative freedom[67] as well as the lawful sphere of executive action.[68]

III. SOFT BOUNDARIES: THE SUPREME COURT AND SEWEL

A striking feature of the Scotland Act 1998 was the absence of any safeguards for devolution against its repeal or amendment by anything other than an ordinary Act of Parliament. During the passage of the Scotland Bill various means of achieving (a degree of) entrenchment on the face of the Act were put forward but not taken up.[69] Indeed, the most significant safeguard on the face of the Act is that which expressly preserves the power of the UK Parliament to legislate for Scotland in devolved areas.[70]

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[62] *AXA* (SC) at [51].
[63] Ibid.
[64] Ibid at [148].
[65] Ibid at [158].
[66] Ibid at [153]
[67] For the most egregious example see *R (*Evans*)* v Information Commissioner [2015] UKSC 21 and commentary by Mark Elliott, 'Of Black Spiders and Constitutional Bedrock' (26 March 2015) Public Law for Everyone blog, available at: https://publiclawforeveryone.com/2015/03/26/of-black-spiders-and-constitutional-bedrock-the-supreme-courts-judgment-in-evans/.
[68] See Lord Reed's powerful articulation of the access to justice as a rule of law value in *R (Unision) v Lord Chancellor* [2017] UKSC 51 and – again - the commentary by Mark Elliott, 'Unison in the Supreme Court: Tribunal Fees, Constitutional Rights and the Rule of Law' (26 July 2017) Public Law for Everyone blog, available at: https://publiclawforeveryone.com/2017/07/26/unison-in-the-supreme-court-employment-fees-constitutional-rights-and-the-rule-of-law/.
[69] Page (n 50) 28.
[70] Scotland Act 1998 s 28(7).

The legal effects of these legislative decisions – to *exclude* safeguards for the devolved legislature from the face of the Act, and to *include* safeguards for the UK Parliament - are more apparent than real. On the one hand, the power of the UK Parliament to repeal or to amend the Scotland Act derives from the doctrine of parliamentary sovereignty, not from the devolution legislation itself, and so any attempt to entrench the devolution settlement would remain vulnerable to Diceyan orthodoxy: that Parliament may by ordinary legislation 'unmake any law whatever,'[71] including any provision purporting to entrench prior legislation even of a constitutional nature.[72] On the other hand, the UK Parliament's legislative sovereignty is itself the source of its power to legislate in devolved areas. Section 28(7) merely re-states that pre-existing constitutional principle. Nevertheless, these legislative decisions betray at least two aspects of the then government's thought process. First, and as seen also in the model of rights protection given effect to by the Human Rights Act 1998, that a substantive (and arguably a radical) programme of constitutional reform should nevertheless leave untouched the core constitutional principle of parliamentary sovereignty.[73] Second, that in order to sell devolution to sceptics who feared the consequent break-up of the Union – those such as Labour's Tam Dayell who famously warned that devolution to Scotland would create a 'highway to independence with no exit' – the centre of gravity would have to tilt inwards towards the centre and not outwards towards the devolved nations. As the then Lord Chancellor, Lord Irvine of Lairg, would later remark, this was 'an unpalatable reminder to Scotland thought necessary to assuage English sentiment.'[74]

If not by statute it was left primarily to constitutional convention to do the work of safeguarding devolution from the unwelcome intrusion of Scotland's other Parliament. During the passage of the Scotland Bill through the House of Lords the then Minister of State for the Scotland Office, Lord Sewel, answered concerns about any potential conflict between the two legislatures on devolved matters with the stated expectation that 'a convention [would] be established that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament'[75] – a convention that has evolved in its scope also to require consent for any UK legislation that alters the legislative competence of the Scottish Parliament or the executive competence of the Scottish Ministers.[76] Contrary to the expectation that UK legislation in devolved areas would be an infrequent

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[71] Dicey (n 14) 3, 37-38.
[72] For a sophisticated argument in support of entrenchment at least as to the manner and form of legislative change, see Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (2015).
[73] UK, HC, 'Rights Brought Home: The Human Rights Bill', Cm 3782 in *Sessional Papers* (1997) 1 at [2.13].
[74] Lord D Irvine, 'A Skilful Advocate' in Wendy Alexander (ed) *Donald Dewar: Scotland's First First Minister* (2005) 128.
[75] UK, HL, *Parliamentary Debates*, vol 592, col 791 (21 July 1998) (Lord Sewel).
[76] Thus mirroring the requirement to seek consent where powers (such as the temporary transfer of power to hold an independence referendum) are devolved by secondary legislation under section 30 of the Scotland Act 1998. On the evolution of the convention, see Christopher McCorkindale, 'Echo Chamber: The 2015 General Election at Holyrood – A Word on Sewel' (13 May 2015*) UK Con Law*

occurrence, in practice there have been approximately 30-35 legislative consent motions tabled during a typical session of the Scottish Parliament, only two of which have been refused, albeit that the *prospect* of refusal has led the UK government to make amendments to legislation in order to achieve consent. Indeed, the way in which refusal (actual or potential) has been used to generate political dialogue with UK counterparts in order to *improve* (rather than to frustrate) UK legislation (or at least to make it more palatable to the Scottish Parliament) suggests that the convention has broadly lived up to its constitutional function: to create a space for co-operation between the UK and devolved governments/legislatures through 'political dialogue' and negotiation.[77] Whilst as a matter of constitutional law the UK Parliament retains the right to legislate in devolved areas even where consent has been withheld, on each of the occasions that this has occurred the expression of consent by the Scottish Parliament has been respected. Thus the Sewel convention has had a significant political, if not legal, bite by dint of which the legislative sovereignty of Westminster - to make or unmake any law by way of ordinary legislation - has, in the context of devolution, been made subject to an additional constitutional hurdle: the requirement (at least in 'normal' circumstances) to seek the consent of the Scottish Parliament.

Following the narrow vote for Scotland to remain in the UK in the Scottish Independence Referendum 2014, the Smith Commission, comprising representatives of the five political parties represented in the Scottish Parliament, was convened to make recommendations for the further devolution of powers to the Scottish Parliament.[78] As well as the specific transfer of powers, however, the commission also recommended that the 1998 Act be amended in order to strengthen the safeguards for the devolved institutions: first, by recognising in the Scotland Act itself the permanence of the Scottish Parliament and Scottish Government; second, by placing the Sewel Convention on a statutory footing.[79] As to the former, during the passage of the Bill clauses were amended from a general 'recognition' that *a* Scottish Parliament, and *a* Scottish Government, are 'permanent part[s] of the United Kingdom's constitutional arrangements' to something with – on the face of it – greater bite: section 1 of the resulting Scotland Act 2016 having amended the Scotland Act 1998 to assert that *the* Scottish Government and Parliament are permanent features of the UK constitution and that 'in view of the commitment' of 'the Parliament and Government of the United Kingdom to the Scottish Parliament

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Blog, available at: https://ukconstitutionallaw.org/2015/05/13/chris-mccorkindale-echo-chamber-the-2015-general-election-at-holyrood-a-word-on-sewel/. On the uses made of the convention, see Paul Cairney & Michael Keating, 'Sewel Motions in the Scottish Parliament' (2004) 47 *Scottish Affairs* 115, and Andrea Batey & Alan Page, 'Scotland's Other Parliament: Westminster Legislation about Devolved Matters in Scotland since Devolution' (2002) *Public Law* 501.

[77] UK, HL, *Parliamentary Debates*, vol 592, col 798 (21 July 1998) (Lord Sewel).

[78] See the Smith Commission's *Report of the Smith Commission for Further Devolution of Powers to the Scottish Parliament* (2014), available at: http://webarchive.nationalarchives.gov.uk/20151202171059/http://www.smith-commission.scot/smith-commission-report/ at ch 1.

[79] Ibid at 13.

and the Scottish Government' their abolition may proceed only 'on the basis of a decision of the people of Scotland voting in a referendum.'[80] Given the political reality that a UK Government is unlikely ever to seek the abolition of the Scottish Parliament it remains a question of constitutional theory as to whether the new provision places a legal – and justiciable – limit of manner and form on the residual sovereignty of Parliament to 'unmake' those institutions. As to the latter, clause 2 of the Scotland Bill – which 'recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament' – was passed without amendment.[81] This begs at least two questions. First, does the new provision encompass the expanded scope of the Sewel convention so as to cover UK legislation that amends devolved competence. Despite a claim by the Advocate General to the contrary,[82] it would appear that the answer to this question is 'yes': the impact on legislative competence being one reason why the UK Government sought legislative consent from the devolved legislatures for the EU (Withdrawal) Act 2018.[83] Second, does statutory 'recognition' of the convention lend it legal and justiciable bite. In what surely will be the most significant *constitutional* legacy of *Miller v Secretary of State for Exiting the European Union*[84] the Supreme Court took a narrow approach to this question. Far from being placed 'on a statutory footing' as the Smith Commission had recommended, the Court took the view that section 28(8) amounted to no more than statutory *recognition* of the already existing political convention. The purpose of the provision, the Court said, was not to create legal rights and duties on the part of the devolved and UK Governments; rather, it was to 'entrench [Sewel] as a convention.'[85] Having established that the rule was political rather than legal in character, the Court then adopted the (somewhat surprising) position that it 'cannot give legal rulings on [the] operation or scope [of the convention, because] those matters are determined within the political world.'[86]

Here lies one of devolution's most significant asymmetries – the erection of a hard legal boundary to the legislative competence of the Scottish Parliament in contrast to the softer political constraints placed on the legislative freedom of the UK Parliament. An ASP which strays into reserved matters 'is not law' and can be struck down on that ground by the courts. An Act of [the UK] Parliament, on the other hand, which strays into devolved matters remains valid until such time as it is repealed or amended, even where that might have problematic practical effects in the meantime for individuals or groups subject to the rights or obligations that arise from any overridden ASP. This said, against the conventional wisdom that underpins that asymmetry – that power devolved is power retained, leaving

[80] Scotland Act 2016 s 1.
[81] Ibid s 2.
[82] UK, HL, *Parliamentary Debates*, vol 769, col 305 (24 February 2016) (Lord Keen of Elie).
[83] UK, Department for Exiting the European Union, *Exiting the EU with Certainty* (2017), available at: https://www.gov.uk/government/news/exiting-the-eu-with-certainty.
[84] [2017] UKSC 5.
[85] Ibid at [149].
[86] Ibid at [146].

unreformed and unchanged the principle of parliamentary sovereignty – can be made at least two arguments from constitutional *law*. First, and as we have seen, there is judicial authority from the Supreme Court that the Scotland Act can properly be described as a 'constitutional statute' with the legal and justiciable effect that its provisions are protected from *implied* repeal,[87] chipping away at a traditional understanding of parliamentary sovereignty that recognises no such distinction between 'ordinary' and 'constitutional' statutes, and which requires effect to be given to a more recent statute where it comes into conflict with an earlier counterpart. Second, by placing an obligation on the courts, where possible, to read an ASP as narrowly as is required in order to bring it within legislative competence, section 101 of the Scotland Act creates a legal and justiciable safeguard against devolution's centripetal force: what one Member of the House of Lords has called 'a bias in favour of devolution' where the allocation of power as between the UK and Scottish Parliaments is contested.[88]

IV. THE SUPREME COURT AND LEGISLATIVE CONSTITUTIONAL REVIEW

In assessing the constitutional impact of the Supreme Court's devolution jurisprudence it is important to recognise that the judicial review case load tells only half of the story – the Supreme Court looms large in other ways. In recent years public law scholarship has sought to describe, and to defend, an alternative or 'third way' of constitutionalism. This approach builds upon (rather than breaks with) antecedent models of legislative or judicial supremacy in which either the parliament or the courts have the last word on the legality of legislation.[89] Two characteristics distinguish this approach. One is constrained judicial remedial powers. For Westminster-based parliamentary systems, the idea of introducing a judicially-enforceable bill of rights represents a fundamental departure from previously held assumptions about the core constitutional principle of parliamentary supremacy. However, by distinguishing between judicial review and judicial remedies, it is possible to retain the legislature's last word on the validity of legislation. The second fundamental characteristic is that this approach envisages a far more important role for rights review at the legislative stage than is usually associated with a bill of rights. By placing a statutory obligation on the executive to report to parliament when a Bill is inconsistent with rights this particular focus reflects the following ideals:[90] first, identifying

[87] *H v Lord Advocate* (n 37) at [30].
[88] UK, HL, *Parliamentary Debates*, vol 593, col 1953 (28 October 1998) (The Earl of Mar and Kellie). On the interpretative obligation as a safeguard for Welsh devolution, see Lady Justice Mary Arden, 'What is the Safeguard for Welsh Devolution' (2014) 2 *Public Law* 189.
[89] See for example, Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (2013); Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (2008); George Williams, 'The Victoria Charter of Human Rights and Responsibilities: origins and scope' (2006) 30 MULR 880; Francesca Klug, *Values for a Godless Age: The Story of the United Kingdom's New Bill of Rights* (2000).
[90] These reporting obligations vary. Some are made by the Attorney General (New Zealand, ACT) or Justice Minister (Canada), whereas others are made by the sponsoring minister (UK and Victoria); some include only government Bills (Canada, UK); and some require reports only for inconsistency (Canada,

whether and how proposed legislation implicates rights; second, encouraging more rights-compliant ways of achieving legislative objectives (and in the extreme discourage the pursuit of objectives that are fundamentally incompatible with rights); third, facilitating parliamentary deliberation about whether legislation implicates rights, thereby increasing parliament's capacity to pressure government to justify, alter or abandon legislation that unduly infringes rights.[91] Whilst the Scotland Act model departs from this 'third way' by reserving to the judiciary the last word on the legality of ASPs, the statutory reporting requirement set out in sections 31 and 33 expand the traditional scope of parliamentary review in two ways. First, by requiring not only the responsible person (typically, the responsible Minister) but, in addition, the Parliament's Presiding Officer to report to the legislature on the question of competence, and by permitting the Scottish and UK Government Law Officers to refer a Bill directly to the Supreme Court where concerns persist, the Scotland Act requires a far more expansive range of assessments of competence that combine so as to create stronger incentives than exist in other jurisdictions for the executive to revisit opinions of competence or to make amendments in order to secure a safe passage for its legislation. Second, the devolution model expands the range of constitutional boundaries against which these assessments must be made. Not just rights review, the Scotland Act requires parliamentary constitutional review in a broader sense, taking account of the territorial division of power between the UK and the devolved institutions as well as the rights and obligations that flow from membership of the European Union. Taken together, the aims of this form of review are two-fold. Internally, it serves to ensure that at each of the relevant check-points a proper and informed assessment has been made about competence.[92] It should, in other words, be extremely difficult for the Scottish Government (knowingly or otherwise) to introduce, and for the Scottish Parliament to pass, legislation that is outwith competence. Externally, it serves to aid the Scottish Parliament in the exercise of its scrutiny function by informing Parliament so that –as the Bill makes its way through the chamber -its members may 'ask questions about [those assessments], raise queries as to whether [they are] entirely correct, and no doubt identify particular provisions in the Bill where there may or may not be some doubt as to whether the provisions lie within the legislative competence.'[93] Constitutional review, in other words, ought in the first instance to be a political exercise conducted during the legislative process and in relation to all Bills rather than a judicial examination of the relatively few pieces of legislation that are brought to the attention of the Courts.

The experience of judicial review outlined above points to the relative effectiveness of these checks in achieving the first aim: the protection of legislation against judicial censure. However, the

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New Zealand) whereas others report both affirmative and negative reports of compatibility (UK, ACT and Victoria).

[91] James B Kelly and Janet L Hiebert, *Parliamentary Bills of Rights: The Experiences of New Zealand and the United Kingdom* (2015) 1-6.

[92] HL Deb Vol 592, col 1353, 28 July 1998 (Baroness Ramsay of Cartvale) and at col 1350 (Lord Mackay of Drumadoon).

[93] Ibid (per Lord Mackay of Drumadoon).

second aspiration –informing the legislature so that it might be aware of and engage with competence concerns during the legislative process – has not yet been met. Despite there being serious disagreement between the Scottish Government and the Presiding Officer and/or Law Officers as to the legislative competence of a Bill once or twice in a typical year there has been just one instance of the Presiding Officer disclosing the existence or the nature of any disagreement to the Parliament upon introduction, and disagreement between the Scottish and UK Government has just once (and in relation to the same Bill) manifested in the reference of a Bill by the Advocate General to the Supreme Court during the four week pre-enactment period.[94] Instead, the experience has been that these disagreements are resolved in a series of iterative processes that take place mostly between officials during the policy formulation stage (between the Scottish Government Legal Directorate (SGLD) and the Lord Advocate) and in the pre-introduction period (between the Scottish Government and (separately) both the Solicitor to the Scottish Parliament, on behalf of the Presiding Officer, and the Office of the Advocate General (OAG)on behalf of the UK Government). During these processes the key question for each of the relevant actors is: 'how would the Supreme Court be likely to decide' in the event of a judicial challenge. For the Scottish Government, the key decision is whether to amend legislation before it is introduced into the Parliament in order to address concerns expressed by the Lord Advocate, the Presiding Officer or by OAG that the Supreme Court would be likely to strike down the legislation (or provisions therein) in its existing form, or whether to continue with its view that the legislation is likely to be saved by the Court. In the case of close calls the benefit of the doubt will normally be given to the Scottish Government's view where it is reasonably arguable that legislation (or powers conferred therein) would be more likely than not to survive judicial censure.[95] A holistic analysis of these processes is beyond the scope of this article. For present purposes we need only stress two important ways in which the possibility of judicial constitutional review influences this process. First, because the ultimate sanction is judicial strike down the question of competence is seen as a legal question that is best addressed by legal advisors reflecting upon the jurisprudence of the Supreme Court, rather than by political actors. On the question of competence Ministers will defer entirely to the view of the Lord Advocate whilst the Presiding Officer –a Member of the Scottish Parliament (MSP) typically with no legal background - will lean heavily on the advice offered by the Solicitor to the Scottish Parliament. Moreover, MSPs in plenary or in committee will defer to the view of the Presiding Officer that a Bill is within competence rather than look behind that statement to determine whether there persists a reasonable (but undisclosed) doubt that should be examined further during the legislative process. The legal nature of the exercise in other words undermines the aim of informed parliamentary review behind the process's 'efficient secret': the more impactful exercise of bureaucratic review by officials before the Bill is introduced into

[94] On this, see the contributions by McCorkindale and McHarg at n 36.
[95] For a detailed assessment of legislative constitutional review in the Scottish Parliament see Chris McCorkindale and Janet Hiebert, 'Assessing Bills in the Scottish Parliament for Legislative Competence' (2017) 21(3) *Edinburgh Law Review* 319.

Parliament. Second, because the test is conceived of in legal terms the aspiration to think politically about legislative competence risks giving way to an assessment of the bare minimum protection required by law.

V. CONCLUSION

As we reflect on 20 years of devolution it is clear that the Supreme Court is maturing both in its willingness to use the powers at its disposal and in its confidence to develop an identifiable (if not yet strictly coherent) devolution jurisprudence. As to the former, in 2019 the Scottish Government has twice announced its attention not to proceed with flag-ship legislation following successful *vires* challenges in the Supreme Court.[96] As to the latter, Lord Reed has said extra-judicially that – frustrated at not being directed to Welsh devolution jurisprudence by counsel in Scottish cases - he made explicit reference to that body of case-law in his judgments in order to stress the holistic and unified approach that the Court is developing in its devolution jurisprudence. In each case we see a Court beginning to shed any early reservations about the exercise of judicial power in the face of primary legislation made by democratically elected legislatures and becoming comfortable in its own constitutional skin effectively to police the hard constitutional boundaries that exist around the devolution settlements. The Court's approach, however, is tied to a strict legalism. Reluctant to innovate in the name of *constitutional principle* – whether that is to narrow the scope of devolution as the Court was invited to do by the UK Government in the Continuity Bill challenge or whether that is to harden the constitutional protections for devolution as suggested by the Scottish Government in relation to Sewel - the starting point for academics seeking to understand, and for practitioners and officials having to work with, a still developing devolution jurisprudence must instead (if it is to be successful) lies in more familiar terrain. This is to say that, the record so far suggests, that to encourage the Supreme Court towards innovation in its devolution jurisprudence the surest strategy is to disguise that innovation in an altogether more traditional function: that of statutory interpretation.

[96] Those being first, the implementation of the Named Person scheme according to which an identified individual (the 'named person') would be made available to each child in Scotland in order to provide advice and support to the child and their parents, to help them access relevant public services, and to discuss matters relating to the child with relevant public services, on the grounds that safeguards around the sharing and use of information about the child were insufficiently grounded in law in accordance with article 8 ECHR (see *The Christian Institute and Others v Lord Advocate* [2016] UKSC 51; and, second, the Scottish Continuity Bill on the post-Brexit status of EU law in Scotland (see the judgment at n 34 and commentary at n 36).