

# THE COURTS, DEVOLUTION, AND CONSTITUTIONAL REVIEW

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## I INTRODUCTION

The defining feature of the United Kingdom's (UK) traditional constitution is the absence of constitutional review. The UK Parliament, since it enjoys unlimited sovereignty, cannot be said to have acted unlawfully, and therefore its acts cannot be struck down by the courts. In recent years, however, this feature of the constitution has come under pressure from a number of different directions,<sup>1</sup> including the establishment of devolved legislatures for Scotland and Northern Ireland in 1999,<sup>2</sup> and for Wales in 2011.<sup>3</sup> Since these bodies do not share Westminster's sovereignty, they are susceptible to judicial review on the ground that they have strayed beyond their legislative competence as defined in their parent statutes, and potentially – in extreme circumstances – also at common law.<sup>4</sup>

Judicial review of a subordinate legislature is not unprecedented in the UK context. Review had been possible of legislation enacted by the former Parliament of Northern Ireland, established under the *Government of Ireland Act 1920*, which existed from 1922 until 1972. However, resort to the courts was relatively uncommon – a fact attributed inter alia to the absence of a constitutional tradition of legislative review<sup>5</sup> – and there was only one successful challenge in the Parliament's 50-year history.<sup>6</sup> By contrast, judicial control has proved to be a far more important feature of the contemporary devolution settlements, both in terms of their institutional design and their practical operation. For instance, provisions in Acts of the Scottish Parliament (ASPs) have been declared ultra vires on five

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<sup>1</sup> See, eg, Mark Elliott, 'Legislative Supremacy in a Multi-Dimensional Constitution', in Mark Elliott and David Feldman (eds), *The Cambridge Companion to Public Law* (CUP, 2015); for a defence of the traditional understanding, see Richard Ekins, 'Legislative Freedom in the United Kingdom' (2017) 133 LQR 582.

<sup>2</sup> *Scotland Act 1998*; *Northern Ireland Act 1998*.

<sup>3</sup> The Welsh Assembly was also established in 1999, by the *Government of Wales Act 1998*, but only gained primary legislative powers in 2011 following a referendum held under the terms of the *Government of Wales Act 2006*.

<sup>4</sup> *AXA General Insurance Ltd v Lord Advocate* [2011] UKSC 46.

<sup>5</sup> See James Mitchell, *Devolution in the UK* (Manchester University Press, 2009) 74 – 75.

<sup>6</sup> *Ulster Transport Authority v James Brown & Sons Ltd* [1953] NI 79. Calvert notes that there were other examples of persuasive criticisms being made of the validity of Northern Irish legislation, which on at least one occasion led to legislative correction – Harry Calvert, *Constitutional Law in Northern Ireland: a Study in Regional Government* (Stevens & Sons Ltd/Northern Ireland Legal Quarterly, 1968) 289.

occasions so far,<sup>7</sup> whilst Welsh Assembly measures have been successfully challenged once<sup>8</sup> (although there have as yet been no challenges at all – successful or otherwise – to devolved primary legislation in Northern Ireland).

In this article, we explore the role and significance of constitutional review in the devolved context, focusing on the experience in Scotland. We discuss, first, the model of constitutional review put in place by the *Scotland Act 1998*; second, we explore the operation of these constraints in practice; and, third, we consider the developing devolution jurisprudence. In so doing, we identify a key tension in understanding the constitutional implications of the role of the courts in relation to the devolved legislatures. Is it, on the one hand, to be understood as a marker of the subordinate status of the devolved legislatures – which therefore serves to bolster the constitutional status of the UK Parliament by the fact of its freedom from corresponding constraints? Or is it, alternatively, a manifestation of a ‘new constitutionalism’, by which the Scottish Parliament has, in the words of Lord Rodger in *Whaley v Lord Watson of Invergowrie*, ‘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’<sup>9</sup>; a feature which underlines the unusual constitutional status of the UK Parliament,<sup>10</sup> and which may therefore be important a step on the road towards a more general acceptance of the legitimacy of constitutional review in the UK context?

## II CONSTITUTIONAL REVIEW UNDER THE *SCOTLAND ACT 1998*

The legislative competence of the Scottish Parliament is set out primarily in sections 28 and 29 of the *Scotland Act 1998*. The Act adopts a ‘reserved powers’ model of legislative competence whereby the Parliament is given plenary power to make laws by section 28(1), but these are subject to specific limits set out in section 29. The most important restrictions contained in section 29<sup>11</sup> are of two main types. First, there are what might be termed ‘federal’ restrictions; in other words, those which define the division of competences between the UK and Scottish levels of government. Thus, the Parliament may not make laws which ‘relate to’ the list of policy areas reserved to the UK Parliament set out in Schedule 5 to the Act (as

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<sup>7</sup> *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.

<sup>8</sup> *Re Recovery of Costs for Asbestos Diseases (Wales) Bill* [2015] AC 1016.

<sup>9</sup> 2000 SC 340, 349.

<sup>10</sup> *Ibid.*

<sup>11</sup> 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 systems of criminal prosecution and investigation of deaths in Scotland (s 29(2)(e)).

subsequently amended).<sup>12</sup> In addition, it may not modify specific statutes listed in Schedule 4 (including some, but not all, of the provisions of the Scotland Act itself) nor modify the ‘law on reserved matters’<sup>13</sup> (a distinct restriction from reserved policy areas),<sup>14</sup> except insofar as this occurs as part of a modification of the general rules of Scots private or criminal law which govern reserved and devolved matters alike.<sup>15</sup> Secondly, there are ‘constitutional’ restrictions. These are cross-cutting constraints applicable to legislation otherwise within devolved competence which seek to protect other important constitutional values, namely that ASPs must not be incompatible with rights contained in the European Convention on Human Rights (‘Convention rights’) or (for the time being) with European Union (EU) law.<sup>16</sup> To these express statutory restrictions, we must now add the further common law constraint that (as discussed further below) the Parliament must not legislate in a way which would breach the Rule of Law.<sup>17</sup>

As this last point suggests, one way in which these competence constraints may be enforced is via the ordinary supervisory jurisdiction of the courts at common law. But the 1998 Act itself also contains a range of mechanisms – both political and judicial – designed to ensure that the Parliament remains within competence. The political controls include requirements on the minister or other member introducing a Bill to state that its provisions are *intra vires*, as well as an independent requirement on the Parliament’s Presiding Officer to state her opinion as to the competence of the Bill,<sup>18</sup> and a veto power for UK ministers for use in situations where they reasonably believe that a Bill is incompatible with international obligations or the interests of defence or national security, or that it modifies the law on reserved matters in a manner which would have an adverse effect on the operation of that law.<sup>19</sup> The judicial controls include a power for UK or Scottish Government law officers to refer a Bill to the Supreme Court for a ruling as to its competence in the four week period between the passing of the Bill by the Parliament and its submission for Royal Assent.<sup>20</sup> In addition, Schedule 6 empowers the Law Officers to initiate post-enactment competence challenges, and regulates the handling of so-called ‘devolution issues’ which arise in other proceedings, including provision for notification of the law officers, and reference to higher courts. A separate procedure,

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<sup>12</sup> S 29(2)(b).

<sup>13</sup> S 29(2)(c).

<sup>14</sup> See *Christian Institute*, above n 7, at para 63.

<sup>15</sup> Sch 4, para 2. See *Martin v HM Advocate* 2010 SC (UKSC) 40; *Henderson v HM Advocate* 2011 JC 96.

<sup>16</sup> S 29(2)(d). Legislation on certain protected subject matters are now also subject to a procedural constraint whereby they require to be passed by a two-thirds majority – *Scotland Act 1998* s31A.

<sup>17</sup> *AXA General Insurance Ltd*, above n 4.

<sup>18</sup> *Scotland Act 1998* s 31.

<sup>19</sup> *Scotland Act 1998* s 35.

<sup>20</sup> *Scotland Act 1998* ss 32A and 33.

introduced by the *Scotland Act 2012*, regulates so-called ‘compatibility issues’, which are questions arising in criminal proceedings, inter alia, as to whether an ASP is compatible with Convention rights or EU law. Finally, the 1998 Act makes provision for interpretation of ASPs, instructing judges to read legislation ‘as narrowly as is required for it to be within competence, if such a reading is possible’,<sup>21</sup> and for remedies in the event of a finding that legislation is outwith competence.<sup>22</sup>

Three features of the system of constitutional review created by the Scotland Act are particularly noteworthy. The first is that it is, in comparative terms, a very *expansive* one. Provision is made for both pre-legislative and post-legislative challenge to the vires of legislation. Statutes can be attacked both directly, in proceedings raised specifically for that purpose, or collaterally in the course of other proceedings. In other words, both abstract and concrete review is permitted. In addition to the express provision for institutional challenge by the law officers made by the Scotland Act, any party with ‘sufficient interest in the subject matter of the application’ can raise judicial review proceedings at common law,<sup>23</sup> which is now interpreted widely to permit public interest as well as individual challenges.<sup>24</sup> And there are no specific time limits for the raising of a devolution or compatibility issue; provided that the proceedings in which the issue is raised are not themselves time-barred, the vires of an ASP could potentially be questioned many years after the legislation was enacted.

Perhaps surprisingly, the extent of the judicial control over the decisions of a democratic legislature to which this model potentially gives rise – the prospect, as one early commentator put it, for the creation of ‘*un gouvernement des juges*’,<sup>25</sup> with extensive freedom to interpret necessarily broad constitutional limits on the powers of the Scottish Parliament – was not controversial at the time the Scotland Act was enacted. This contrasts starkly with attitudes during earlier, abortive attempts at creating devolved assemblies for Scotland and Wales during the 1970s. As Tam Dalyell MP explained during the Commons Second Reading debate on the Scotland Bill:<sup>26</sup>

Who is to decide whether the Scottish Assembly has overstepped its powers? During the 1974-77 saga, that was a matter of hot debate within the Government, centring around the issue of judicial review. One school held, virtually as a matter of basic legal and constitutional principle, that it would be wrong to deny citizens the right to argue in the courts that an assembly Act that disadvantaged them exceeded the powers granted by Westminster in the devolution statute. The

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<sup>21</sup> *Scotland Act 1998* s 101.

<sup>22</sup> *Scotland Act 1998* s 103.

<sup>23</sup> *Court of Session Act 1988* s 27B(2)(a).

<sup>24</sup> *AXA General Insurance Ltd*, above n 4; *Walton v Scottish Ministers* [2012] UKSC 44.

<sup>25</sup> Aidan O’Neill, ‘The Scotland Act and the Government of Judges’ 1999 SLT (News) 61.

<sup>26</sup> HC Deb Vol 304, col 88, 12 January 1998.

other school held ... that it would be unreasonable in practice, for lack-of-certainty reasons, and politically objectionable to Scotland that the primary legislation of the Assembly should be liable at any time--perhaps, long after enactment--to be struck down by the courts as ultra vires. The more broadly drawn the delineation, the greater--so that school argued--the risks.

Mitchell cites the minute of a meeting in October 1974 of Whitehall Permanent Secretaries convened to discuss the issue of devolution. The participants 'noted that little thought had been given to resolving constitutional disputes but rejected a "constitutional tribunal such as the Judicial Committee of the Privy Council" as "entirely contrary to the spirit of devolution within a unitary state with one sovereign Parliament." This, they maintained, "should not be contemplated."<sup>27</sup>

What had changed by 1998? Dalyell points to the impact of EU law as having meant that 'public opinion has become more accustomed to the idea that the legal system might indeed be able to overrule democratically enacted statute.<sup>28</sup> But also significant is the origins of the 1998 Act in the work of the Scottish Constitutional Convention.<sup>29</sup> This body had begun life by endorsing the 1988 Claim of Right for Scotland, which proclaimed the sovereignty of the Scottish people over the sovereignty of the Westminster Parliament, and asserted the need for a system of checks and balances rather than concentration of power. Thus the Convention rooted its proposals for a Scottish Parliament in a claimed 'historical and historic Scottish constitutional principle that power is limited, should be dispersed and is derived from the people.<sup>30</sup> By the time the Scotland Bill was enacted, therefore, the principle that disputes over legislative competence should be subject to judicial resolution was no longer controversial.<sup>31</sup> As will be discussed further below, the only issue subject to serious debate was the identity of the court to which final appeal on devolution issues would lie.

The second important feature of constitutional review in the devolution context is its *asymmetry*. The hard legal limits on the competence of the *Scottish* Parliament are not mirrored by equivalent limits on the *UK* Parliament. As far as the federal constraints are concerned, the power of the UK Parliament to legislate for Scotland in devolved matters is expressly preserved by section 28(7) of the *Scotland Act 1998*. Its exercise is subject only to political constraint in the form of the so-called Sewel Convention, which states that the UK Parliament will not normally

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<sup>27</sup> Mitchell, above n 5, 120 – 121.

<sup>28</sup> Above n 26.

<sup>29</sup> See Jean McFadden, 'The Scottish Constitutional Convention' [1995] PL 215.

<sup>30</sup> Scottish Constitutional Convention, *Scotland's Parliament, Scotland's Right* (1995) 10.

<sup>31</sup> The case for judicial resolution had been set out in detail prior to the 1997 election by Colin Boyd QC, who subsequently became Solicitor General for Scotland: 'Parliaments and Courts: Powers and Dispute Resolution', in St John Bates (ed), *Devolution to Scotland: the Legal Aspects* (T & T Clark, 1997).

legislate in respect of devolved matters without the consent of the Scottish Parliament. Notwithstanding the statutory ‘recognition’ of the convention by section 2 of the *Scotland Act 2016*, the Supreme Court in *R (Miller) v Secretary of State for Exiting the European Union*<sup>32</sup> held that it remains a convention rather than a binding legal rule, and that the courts therefore have no role to play in either interpreting or enforcing its requirements.<sup>33</sup>

As regards the constitutional constraints, Convention rights bear more heavily on the Scottish Parliament than on the UK Parliament. Whereas an ASP which is incompatible with Convention rights is ‘not law’, in relation to UK statutes the courts are merely empowered to issue a ‘declaration of incompatibility’, which does not invalidate the legislation.<sup>34</sup> Only the EU law constraint operates more or less symmetrically, insofar as the courts may ‘disapply’ an Act of the UK Parliament which is contrary to EU law,<sup>35</sup> though even here there is a theoretical difference since there is judicial authority stating that the courts would give effect to an Act of the UK Parliament which expressly contradicted EU law.<sup>36</sup> More significantly, if the European Union (Withdrawal) Bill is enacted in its current form, the devolved legislatures will continue to be bound by ‘retained EU law’ even after the UK leaves the EU, while the UK Parliament will become free to amend it as it pleases.

From one perspective, this asymmetry is unremarkable; it merely marks the important constitutional distinction between a scheme of devolution and one of federalism, thereby underlining the subordinate status of the devolved legislatures. However, the justification for asymmetry is less obvious in relation to the cross-cutting constraints, especially Convention rights. Here the case can be made in principle that it is the democratic nature of a legislative body that entitles it, rather than the courts, to the last word on questions of rights protection within its sphere of competence, and not merely the ‘technicality’ of parliamentary sovereignty which uniquely entitles the Westminster Parliament to judicial deference.<sup>37</sup> The anomaly is underlined by the fact that the Scottish Ministers are also more tightly bound by Convention rights than their UK counterparts in that they cannot act incompatibly with Convention rights even if acting under a UK statute which authorises the

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<sup>32</sup> [2017] UKSC 5.

<sup>33</sup> This does not mean that it might not be given some legal force, for instance as an aid to interpreting the intention of Parliament in circumstances where it is unclear whether or not it intends to legislate for Scotland on a devolved matter.

<sup>34</sup> *Human Rights Act 1998* s 4.

<sup>35</sup> *R v Secretary of State for Transport ex p Factortame Ltd (No 2)* [1991] 1 AC 603.

<sup>36</sup> *Thoburn v Sunderland City Council* [2003] QB 151.

<sup>37</sup> See Chris Himsworth, ‘Rights versus Devolution’, in Tom Campbell, KD Ewing and Adam Tomkins (eds), *Sceptical Essays on Human Rights* (OUP, 2001).

incompatibility.<sup>38</sup> In relation to EU law, similarly, it may be argued that the refusal to lift the competence constraint on the devolved institutions post-Brexit evinces a lack of trust and a pulling of constitutional rank by Westminster, which is difficult to justify as a matter of constitutional principle.

The final notable feature of the devolution model of constitutional review is the role of the *UK Supreme Court* as the final arbiter of devolution issues. As originally enacted, the final appeal court for devolution disputes was the Judicial Committee of the Privy Council (JCPC). The JCPC was chosen for a number of reasons: it had played this role under the *Government of Ireland Act 1920*; it had experience of constitutional adjudication in relation to Commonwealth jurisdictions; and above all it avoided the perception – had the House of Lords been chosen as the apex court – of the UK Parliament sitting in judgment on disputes to which it was a party. Nevertheless, amendments were tabled both by the Scottish National Party (SNP) in the House of Commons<sup>39</sup> and by the Liberal Democrats in the House of Lords,<sup>40</sup> to replace the JCPC with a specially-constituted constitutional court. For the SNP, the main objection was to the composition of the JCPC, particularly its dominance by English-trained judges. For the Liberal Democrats, the primary concern was the JCPC's lack of institutional independence.

The latter issue was resolved in 2009, with the establishment of the Supreme Court<sup>41</sup> and the transfer to it of the JCPC's devolution jurisdiction (a reform which also resolved the practical problem created by the existence of two 'apex courts' which were sometimes asked to resolve the same legal issues by different procedural routes). However, the creation of the Supreme Court revived the SNP's objection to an English-dominated court having the last word on matters relating to Scots law. In fact, it commissioned a review of the possibilities for 'repatriating' final appeals in Scots cases to an Edinburgh-based court, although the resulting report concluded that this would be constitutionally inappropriate while Scotland remained part of the United Kingdom.<sup>42</sup> Of particular sensitivity, though, was the question of final appeals in criminal cases. The *Scotland Act 1998* had inadvertently created a right of appeal in criminal cases from the High Court of Justiciary to the JCPC/Supreme Court, where none had previously existed, because of the inclusion of the Lord Advocate (head of the Scottish criminal prosecution system) within the definition of the Scottish Ministers, and hence the subjection of prosecution decisions to

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<sup>38</sup> *Scotland Act 1998* s 57(2).

<sup>39</sup> See HC Deb Vol 312, cols 203 - 215, 12 May 1998.

<sup>40</sup> See HL Deb Vol 593, cols 1963 – 1986, 18 October 1998.

<sup>41</sup> Under the *Constitutional Reform Act 2005* Pt 3.

<sup>42</sup> Neil Walker, *Final Appellate Jurisdiction in the Scottish Legal System* (Scottish Government, 2010) <<http://www.gov.scot/Resource/Doc/299388/0093334.pdf>>.

devolution constraints. Following controversy about the operation of this appeal process amongst Scottish judges, and well-publicised objections by the then Scottish First Minister and Justice Secretary to the Supreme Court's decisions in *Cadder v HM Advocate*<sup>43</sup> and *Fraser v HM Advocate*,<sup>44</sup> the separate compatibility issues procedure was created for criminal cases, which limits the role of the Supreme Court to the determination of the compatibility issues and requires the case to be referred back to the High Court of Justiciary (HCJ) for final disposal.<sup>45</sup>

In determining devolution or compatibility issues, the Supreme Court is – uniquely – sitting as a UK court, rather than a Scottish (or English and Welsh, or Northern Irish) one as it does in all other cases.<sup>46</sup> In other words, determination of the limits of the Scottish Parliament's legislative competence is conceived of as a matter of UK constitutional law, rather than a matter of Scots law. Again, from one perspective, it is unremarkable that the establishment of institutions for self-rule through devolution should be balanced by the creation of a mechanism for asserting a common understanding of the limits to that self-rule. Nevertheless, the role of the Supreme Court remains contestable for two reasons. One is that differently-situated judges might have different understandings of the nature of the evolving constitutional order and of the place of the Scottish Parliament within it – something that is potentially problematic given the *political* understanding of the origins of devolution as an expression of a peculiarly Scottish constitutional tradition at odds with the dominant UK tradition. Secondly, as will be discussed further below, the idea of a common devolution jurisdiction is problematic given the diversity of the devolution settlements in Scotland, Wales and Northern Ireland themselves. And even in the application of the common external constraints of Convention rights and EU law, there is room for greater recognition of internal diversity that the unifying role of the Supreme Court may permit.<sup>47</sup>

### III JUDICIAL AND PARLIAMENTARY CONSTITUTIONAL REVIEW

#### A *Judicial Constitutional Review*

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<sup>43</sup> [2010] UKSC 43.

<sup>44</sup> [2011] UKSC 24.

<sup>45</sup> See Aileen McHarg, 'Final Appeals in Scots Criminal Cases', UK Const Law Blog, 4 October 2011; Chris Himsworth and Christine O'Neill, *Scotland's Constitution: Law and Practice* (Bloomsbury, 3<sup>rd</sup> edn, 2015) para 14.20.

<sup>46</sup> *Constitutional Reform Act 2005* s 41(2).

<sup>47</sup> See David Feldman, 'None, One or Several: Perspectives on the UK's Constitution(s)' (2005) 64 CLJ 329.



At the outset of the devolution project there was a certain expectation that the courts would regularly be called upon, whether by UK and/or Scottish Government Law Officers referring Bills to the Supreme Court during the statutory pre-enactment period<sup>48</sup> or in post-enactment challenges raised by private parties, to exercise their new powers of constitutional review. Whilst for some this was an aspiration – to be a model for democracy, according to Crick and Millar ‘[a new] Scottish Parliament...needs [to be limited by law] as much as any other’<sup>49</sup> – for others the possibility was more problematic. As Aidan O’Neill had warned, by being ‘dragged into the political arena’ in order to police constitutional boundaries the integrity of the judges themselves was at stake: the danger being that their decisions would not be portrayed as ‘upholding individual rights but as the thwarting of the democratic will’ as expressed through the acts of new legislature and executive.<sup>50</sup> However, the experience to date has been quite different.

Contrary to the expectation that the Scottish Parliament would be of a different nature to Westminster’s ‘legislative sausage factory’<sup>51</sup> the devolved Parliament has been something of a hyper-active legislature, having passed 264 ASPs (an average of 15 per annum) since its first - the *Mental Health (Public Safety and Appeals) (Scotland) Act* - in 1999.<sup>52</sup> Notwithstanding the volume of legislation, however, *no* Bills have been referred by the Law Officers to the Supreme Court<sup>53</sup> and there have been relatively few post-enactment challenges raised by private parties. Of the latter, just 18 ASPs have been subject to judicial review (albeit some more than once).<sup>54</sup> Incompatibility with Convention rights has been the dominant ground of challenge, with just three cases invoking the reserved/devolved boundary and three arguing for an incompatibility with EU law. Of the 18 ASPs that have been challenged five have been held to have fallen foul of section 29. All five have succeeded on Convention rights grounds, albeit in *Christian Institute* there was a parallel incompatibility as between article 8 ECHR and equivalent provisions of the EU Charter of Fundamental Rights.<sup>55</sup> The residual Rule of Law ground set out in

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<sup>48</sup> *Scotland Act 1998* s 33.

<sup>49</sup> Bernard Crick and David Millar, *To Make the Parliament of Scotland a Model for Democracy* (John Wheatley Centre, 1995) 9.

<sup>50</sup> Above n 25, 66.

<sup>51</sup> Alan Page, *Constitutional Law of Scotland* (W Green, 2015) 201.

<sup>52</sup> This Act was itself the subject of an unsuccessful challenge in *Anderson v Scottish Ministers* 2002 SC (PC) 63.

<sup>53</sup> By way of contrast, in Wales two Bills have been referred to the Supreme Court by the Attorney General (the legality of each being upheld) and one, which was struck down, has been referred by the Counsel General for Wales.

<sup>54</sup> The *Tobacco and Primary Medical Services (Scotland) Act 2010* was challenged separately on reserved matters grounds by Imperial Tobacco ([2012] UKSC 61) and on EU law grounds by a subsidiary, Sinclair Collis ([2012] CSIH 80).

<sup>55</sup> *Christian Institute*, above n 7, paras 102-105.

*AXA* has not been a significant feature of devolution litigation, receiving sustained attention only once, in an unsuccessful challenge to the exclusion of prisoners from the right to vote in the *Scottish Independence Referendum (Franchise) Act 2013*.<sup>56</sup> Given the high threshold for judicial intervention on this ground, this is unsurprising. In this case, however, the Supreme Court did illustrate the sort of (unlikely) situation to which this ground might apply: whilst the common law could not be used to extend the franchise beyond the limits set by the legislature, the Supreme Court – ‘informed by principles of democracy and the rule of law and international norms’ – *would* declare legislation to be unlawful which sought to ‘entrench [the executive] power by curtailment of the franchise or similar device’.<sup>57</sup>

Of the five cases to date in which legislation has been held ‘not [to be] law’ it is notable that each has related to specific provisions within the statutory scheme rather than to the statute or to the overall policy objective in its entirety. This being so the Supreme Court has so far adopted something of a ‘dialogic’ remedial approach as opposed to a rigid and final strike down. In two of the three civil challenges that were successful – *Salvesen* and *Christian Institute* – the Supreme Court exercised its discretion under section 102(2)(b) of the *Scotland Act 1998* to suspend the effect of its decisions that section 72(10) of the *Agricultural Holdings (Scotland) Act 2003* and the information sharing provisions of Part 4 of the *Children and Young People (Scotland) Act 2004* respectively were incompatible with Convention rights. This, the Court said, would allow an opportunity for the Scottish Parliament and the Scottish Ministers (if they so decide) to take measures in order to remedy the identified incompatibilities.<sup>58</sup> The dialogic nature of this remedy was underlined in *Christian Institute* in which, although the Court felt it ‘inappropriate to propose particular legislative solutions’,<sup>59</sup> it nevertheless took the opportunity to warn the executive and legislature that minimal amendments that failed to address the complexity of the breach would run the risk of further judicial sanction.<sup>60</sup> The third, *P v Scottish Ministers*, was a decision by the Outer House which at the time of writing had been put out to order pending submissions on the use of the court’s remedial powers.<sup>61</sup> In the remaining two successful cases – *Cameron* and *AB*, each of which raised ‘compatibility issues’ relating to criminal procedure in Scotland – the decisions that section 58 of the *Criminal Justice and Licensing (Scotland) Act 2010* and section 39(2)(a)(i) of the *Sexual Offences (Scotland) Act 2009* respectively were ‘not law’ were returned to

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<sup>56</sup> *Moohan v Lord Advocate* [2014] UKSC 67.

<sup>57</sup> *Ibid* para 35.

<sup>58</sup> *Salvesen*, above n 7, para 57.

<sup>59</sup> *Christian Institute*, above n 7, para 107.

<sup>60</sup> *Ibid*.

<sup>61</sup> *P*, above n 7, para 65.

the HCJ for that court to determine whether or not to suspend or to vary the effects of the resulting invalidity.

In *Martin*, Lord Hope expressed a degree of surprise that – in light of the complex and multi-layered boundaries to legislative competence – there had been so few challenges to the validity of ASPs, and noted as ‘remarkable’ the fact that those challenges had mostly been confined to Convention rights grounds.<sup>62</sup> Though the reserved matters model adopted in the *Scotland Act 1998* might not be ‘a model of clarity’ he thought it striking that it had so far achieved the aim of maximum stability. To this stability Lord Hope attributed harmony between the UK (Labour majority) and Scottish (Labour-led coalition) governments until the SNP formed a minority government in May 2007.<sup>63</sup> However, it is a significant feature of the SNP minority (2007-2011 and 2016-present) and majority (2011-2016) governments that political disharmony as between the Scottish and UK Governments since 2007 has not manifested in overt attempts by the former unilaterally to push the limits of devolved competence and to make political capital out of even adverse judgments about competence by the UK Supreme Court. Instead the close attention that is paid to the reserved/devolved boundary during the process of *parliamentary* review – in particular in the dialogue between the UK and Scottish Governments that precedes the Advocate General’s decision to make a reference to the Supreme Court - as well as politicians’ and officials’ instincts for what sits within the sphere of devolved competence and a genuinely-held commitment on both sides to government according to the rule of law - seems to have policed the reserved/devolved boundary effectively (at least in the sense of producing legislation that has so far avoided judicial censure).<sup>64</sup> To the reasons for the surprisingly few cases raised on reserved matters grounds we might add the willingness on both sides to utilise the flexibility inherent in the devolution settlement to supply omissions in legislative competence where there is a degree of policy convergence through the transfer of competence<sup>65</sup> or by the UK Parliament legislating with devolved consent in reserved areas that overlap with Scottish Government policy. We might attribute the greater frequency of - and the more successful recourse to - Convention rights grounds to the simultaneously more obvious and yet more vague nature of the ECHR boundary. On the one hand Convention rights issues are more readily identifiable – both by lawyers and by those who are potentially affected by legislative or executive action -

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<sup>62</sup> *Martin*, above n 15, para 4.

<sup>63</sup> *Ibid.*

<sup>64</sup> For more detailed analysis of the vetting process see Bruce 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* (Hart, 2015) ch 13, and Christopher McCorkindale and Janet L Hiebert, ‘Vetting Bills in the Scottish Parliament for Legislative Competence’ (2017) 21(3) *Edin LR* 319.

<sup>65</sup> This might happen by Order-in-Council under section 33 of the *Scotland Act 1998* or by way of primary legislation by the UK Parliament.

than are issues arising from the nuances of schedules 4 and 5, with a vast body of ECHR grounded case law (both at Strasbourg and in the domestic courts) to draw upon. On the other hand, it may be more difficult for legislators and officials correctly to anticipate how courts might apply abstract Convention rights to particular statutory provisions in the absence of directly analogous cases.

If the fear was that the judiciary would regularly be called upon to (and would often) exercise strong powers of judicial review in relation to ASPs, this has not yet materialised. Indeed, Page has argued that it is not judicial activism but judicial *inactivity* that has defined the experience so far: that ‘conscious of the more exposed position in which they find themselves as a result of devolution’ the judiciary have been – and might continue to be - wary of wielding those powers, with ‘bleak’ consequences for the aspiration of a legislature and government limited by law.<sup>66</sup> However, even if its use (for better or for worse) has been infrequent there is no doubt that the presence of what has been described by Lord Neuberger to be in effect a *constitutional* court in the devolved context<sup>67</sup> - to which the final word as to the legality of legislation has been vested - has significantly impacted upon the devolution landscape.

First, there is an opportunity for those with significant commercial interests at stake - and deep resources to draw upon - to (ab)use the legal process in order to *delay* for three to five years the implementation of legislation for short term, private gain. Even if ultimately their challenges were unsuccessful in the Supreme Court, the opportunity for AXA General Insurance to delay the implementation of legislation requiring them to make payments to the victims of asbestos exposure (with the hope of having to make fewer payments to still surviving victims at a later date of implementation), or the opportunity for Imperial Tobacco<sup>68</sup> or the Scotch Whisky Association<sup>69</sup> to delay the implementation of legislation with a likely negative impact upon the sale of tobacco or alcohol products (weighing income from sales during the period of the challenge against the cost of legal fees), illustrates the way in which judicially-enforceable limits on legislatures can be used strategically to subvert democratic institutions even where the judicial power to strike down legislation is wielded only sparingly. It is, in other words, the *existence* as well as the *exercise* of judicial power that proves problematic. Second, whilst remedial discretion in the

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<sup>66</sup> Above n 51, 268.

<sup>67</sup> Lord Neuberger, ‘The Constitutional Role of the Supreme Court in the Context of Devolution in the UK’, Lord Rodger Memorial Lecture 2016 <<https://www.supremecourt.uk/docs/speech-161014.pdf>>.

<sup>68</sup> *Imperial Tobacco v Lord Advocate* [2012] UKSC 61.

<sup>69</sup> *Scotch Whisky Association v Lord Advocate* [2016] CSIH 77. At the time of writing the Supreme Court has heard arguments on the final appeal but has not yet handed down its decision in a case primarily concerned with competence on the EU law ground.

event of a successful challenge returns the issue to be resolved by the democratically elected parliament or government, the courts wield a significant power therein actively to shape that resolution (as in *Christian Institute* by making a bold assertion of what would *not* be acceptable). Moreover, for those affected by ultra vires legislation a decision, for example, to limit the retrospective effect of the judgment (as in *Cameron* where the effect of the decision was limited only to ‘live’ cases) may have perverse effects for individuals who have in the past suffered from a resulting harm.<sup>70</sup> Third, the devolution jurisprudence (actual or anticipated) of the Supreme Court drives the assessments of legislative competence that are made at the sections 31 and 33 checkpoints during the *parliamentary* process of constitutional review, washing judicial norms through the political process.

### B *Parliamentary Constitutional Review*

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.<sup>71</sup> 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:<sup>72</sup> first, identifying 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

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<sup>70</sup> See Robert Leckey, ‘The Harms of Remedial Discretion’ (2016) 14(3) *International Journal of Constitutional Law* 584.

<sup>71</sup> See for example, S Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (CUP, 2013); M Tushnet, *Weak Courts, Strong Rights. Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton, 2008); G Williams, ‘The Victoria Charter of Human Rights and Responsibilities: origins and scope’ (2006) 30 MULR 880; F Klug, *Values for a Godless Age: The Story of the United Kingdom’s New Bill of Rights* (Penguin, 2000).

<sup>72</sup> 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, New Zealand) whereas others report both affirmative and negative reports of compatibility (UK, ACT and Victoria).

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.<sup>73</sup>

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.<sup>74</sup> 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.'<sup>75</sup> 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 senior courts.

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<sup>73</sup> James B Kelly and Janet L Hiebert, *Parliamentary Bills of Rights: The Experiences of New Zealand and the United Kingdom* (CUP, 2015) 1-6.

<sup>74</sup> HL Deb Vol 592, col 1353, 28 July 1998 (Baroness Ramsay of Cartvale).

<sup>75</sup> Ibid col 1350 (Lord Mackay of Drumadoon).

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 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<sup>76</sup> there have been *no* instances 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 not yet manifested in the reference of a Bill by the Advocate General to the Supreme Court during the four week pre-enactment period.<sup>77</sup> Instead 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.<sup>78</sup>

A holistic analysis of these processes is beyond the scope of this article.<sup>79</sup> 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

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<sup>76</sup> McCorkindale and Hiebert, above n 64.

<sup>77</sup> Unlike the reporting requirement placed on UK Ministers by the Human Rights Act it is *ultra vires* for Scottish Ministers knowingly to introduce legislation that would be outwith competence.

<sup>78</sup> McCorkindale and Hiebert, above n 64.

<sup>79</sup> See articles by Adamson and by McCorkindale and Hiebert, above n 64.

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 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. So, the exclusion of prisoners from the franchise in the 2014 independence referendum seemed to proceed not from a principled position on the merits or not of allowing (to some) prisoners the right to vote in a referendum of such constitutional significance but instead to a narrow reading of the scope of the right to vote.<sup>80</sup>

#### IV DEVOLUTION JURISPRUDENCE

This third section draws out certain of the themes of the case law in which the devolution settlement has been considered. It works outwards from the question which most neatly captures the tension, already identified, between two understandings of the judicial role within that settlement: on one hand, the notion that the courts' role thereunder is a marker of the subordinate status of the devolved institutions and, on the other, the claim that their new functions have in fact an inescapably constitutional essence, with implications beyond the devolution context. That question is the status of the devolution statutes, and - in turn - the approach that is to be taken to their interpretation.

##### A *Review of the Scotland Act 1998*

With regard to the interpretation of the devolution statutes themselves we might usefully distinguish between two levels of judicial power: the first order power of interpretation and the second-order power to choose which approach is to be taken to the task. In the early case law the status of the Parliament was contested. Lord Rodger, then in the Inner House, noted in *Whaley* that the court at first instance had given 'insufficient weight to the fundamental character of the Parliament as a body which — however important its role — has been created by statute and derives

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<sup>80</sup> Here reliance was placed upon the exclusion of referendums from the scope of Article 3 Protocol 1, which has been held only to apply to elections concerning the choice of the legislature. See *Moohan*, above n 56, paras 7-17.



its powers from statute’ and which must therefore (and ‘like any other statutory body’) ‘work within the scope of those powers’.<sup>81</sup> However, the question of the status of the Parliament does not itself determine the status (and correct approach to the interpretation) of the instrument which created it, and these questions persisted even after the status of the devolved legislature was settled, prompted most clearly by attempts to employ certain dicta of the House of Lords in the Northern Irish case of *Robinson* in order to argue that the devolution statutes (as the House of Lords had said of the *Northern Ireland Act 1998*) were ‘in effect’ constitutions, and so were to be interpreted ‘generously and purposively’.<sup>82</sup>

The alleged implication of these remarks – that an approach be taken to interpretation that was special to the devolution statutes and which would in effect give the benefit of the doubt to the Parliament in deciding whether or not ASPs were within competence – was consistently rejected in later cases. In *Imperial Tobacco*, Lord Hope stated that ‘the description of the Act as a constitutional statute cannot be taken, in itself, to be a guide to its interpretation’;<sup>83</sup> instead, the rules in the 1998 Act ‘must be interpreted in the same way as any other rules that are found in a UK statute’. Though the system it created must ‘be taken to have been intended to create a system for the exercise of legislative power by the Scottish Parliament that was coherent, stable and workable’, that factor was not unique to it, but was common to all statutes.<sup>84</sup> ‘The best way of ensuring that a coherent, stable and workable outcome is achieved’, Lord Hope continued, ‘is to adopt an approach to the meaning of a statute that is constant and predictable’, an end achieved by constituting the statute ‘according to the ordinary meaning of the words used.’<sup>85</sup> The approach ultimately taken therefore amounts in the first place to a multiple renunciation of judicial power: first, the power to depart from the ordinary meaning of words; second, the power to infer the purpose of the devolution statutes and to use it to place on the language therein a construction which the ordinary meaning of the words may not be capable of bearing. It remains the case, however, that this renunciation of a first order judicial power is itself an exercise of the second order power identified above, where – albeit within important limits – judges can and do decide what they get to decide. The courts have been willing to acknowledge the constitutional status of the Scotland Acts when little or nothing is at stake in doing so, but have been mostly unwilling to accept that the fact of devolution effected any constitutional change

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<sup>81</sup> *Whaley*, above n 9, 348.

<sup>82</sup> *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32, 11.

<sup>83</sup> *Imperial Tobacco*, above n 68, para 15. In the Inner House, Lord Reed had said that ‘[t]he Scotland Act is not a constitution, but an Act of Parliament’ and that there are ‘material differences’, including its density and detail, as well as the ease of amendment as compared to a typical constitution: *Imperial Tobacco Ltd v Lord Advocate* [2012] CSIH 9, 71.

<sup>84</sup> *Ibid* para 14.

<sup>85</sup> *Ibid*.

beyond what is immediately apparent from the terms of those statutes and their counterparts elsewhere.

One partial exception to this approach is the decision of the Supreme Court in *H v Lord Advocate*,<sup>86</sup> in which Lord Hope held (applying Lord Justice Laws' obiter dictum in *Thoburn*)<sup>87</sup> that the Scotland Act, as a constitutional statute, could not be impliedly repealed. The issue here was whether the *Extradition Act 2003*, which excluded an appeal from the High Court of Justiciary to the Supreme Court in relation to a decision under that Act, overrode the provisions in Schedule 6 of the Scotland Act for dealing with devolution issues. The court held that they did not. Ahmed and Perry argue that Lord Hope's ruling about the inability to impliedly repeal the Scotland Act was itself merely obiter,<sup>88</sup> since he ultimately found no inconsistency between the two statutes. However, his reasoning is ambiguous, and complicated by the fact that he noted a general presumption of statutory interpretation against implied repeal which, he argued, 'is even stronger the more weighty the enactment that is said to have been impliedly repealed'.<sup>89</sup> Though this was ultimately, therefore, a case in which the constitutional status of the Scotland Act *was* relevant to the resolution of the issues before the court, it is striking that no attempt was made to link the question of the Scotland Act's status in *Thoburn* terms to superficially analogous dicta in the early devolution case law.

## B *Review of Acts of the Scottish Parliament*

If one key issue resolved by Lord Hope in *Imperial Tobacco* was the significance of the constitutional quality of the Scotland Act both for the interpretation of that Act and of the legislation made under its authority, a second was the approach to be taken to resolving boundary disputes as between reserved and devolved matters. In the earlier case of *Martin*, Lord Hope had already eschewed the 'pith and substance' approach – common to federal constitutions such as Canada as well as to the earlier devolution of legislative powers to Northern Ireland under the 1920 Act, and according to which a view is taken as to the statute as a whole in order to determine if it sits within or outwith competence – in favour of a close reading of the rules set out in the devolution legislation itself. As Lord Hope said there, the 'pith and substance' test might have informed the approach adopted in the modern devolution schemes, but 'the Scotland Act provides its own dictionary' as to the rules to be

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<sup>86</sup> [2013] 1 AC 413.

<sup>87</sup> *Thoburn v Sunderland City Council* [2003] QB 151.

<sup>88</sup> Farah Ahmed and Adam Perry, 'Are Constitutional Statutes "Quasi-Entrenched"?' UK Const L Blog, (25 November 2013) (available at: <http://ukconstitutionallaw.org>).

<sup>89</sup> *BH v Lord Advocate* [2012] UKSC 24, 30.

applied to the question of legislative competence.<sup>90</sup> In *Imperial Tobacco*, Lord Hope restated this principle.<sup>91</sup> The judicial role, he said, was not to determine where legislation is best made – that choice has already been made and set out in some considerable detail and nuance by the UK Parliament in the Scotland Act – but instead is to apply the rules in the 1998 Act ‘bearing in mind that a provision may have a devolved purpose and yet be outside competence as it contravenes one of the rules.’<sup>92</sup> On one hand this principle provides clarity as to how one should identify the ‘purpose’ of a provision in order to determine whether that provision ‘relates to’ a reserved matter and therefore falls foul of the section 29 test. First because, by rejecting the singular approach to the purpose of legislation that characterises the ‘pith and substance’ test, the Supreme Court has admitted the possibility that legislation may have more than one purpose – in which case ‘the fact that one of its purposes relates to a reserved matter will mean that the provision is outside competence’ unless that purpose can be shown to be ‘consequential and thus of no real significance’ with regard to what the provision ‘overall seeks to achieve.’<sup>93</sup> Second, because it clarifies factors that may be taken into account when interpreting what is reserved – including the headings and sidenotes in schedule 5 as well as the notes which accompanied the introduction of the Scotland Bill. Third, because a focus on the language of the Scotland Act (which provides a mechanism for determining whether legislation is outwith – and not, instead, within – legislative competence) clarifies that – ‘within carefully defined limits’ – the devolution scheme was intended to be a ‘generous settlement of legislative authority’<sup>94</sup> such that the test is thought by the relevant *legislative* actors to give the benefit of the doubt to the purpose(s) of ASPs as set forth by the Scottish Government and therefore to authority of the devolved institutions.<sup>95</sup> On the other hand, however, because the ‘rules’ set out in the Scotland Act – and the reservations to which those rules attach – are at times narrowly construed and technical it has been said that case law on the reserved/devolved boundary is of limited value: telling us much about the specific reservations upon which a challenge has been raised but leaving to another day the proper approach to be taken to the interpretation of the other reservations about which there is as yet no case law.<sup>96</sup>

A secondary limitation on reserved competence reflects the fact that – whilst not themselves reserved - Scots private law and Scots criminal law encompass a vast

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<sup>90</sup> *Martin*, above n 15, para 15.

<sup>91</sup> In *Christian Institute* this principle had to once again be restated by Lord Reed, rebuking the ‘pith and substance’ approach taken to the impugned legislation in favour of the ‘purpose’ test set out in the Scotland Act itself (above n 7, para 32).

<sup>92</sup> *Imperial Tobacco*, above n 68, para 13.

<sup>93</sup> *Ibid* para 43.

<sup>94</sup> *Ibid* para 15.

<sup>95</sup> See McCorkindale and Hiebert, above n 64.

<sup>96</sup> *Ibid*.

range of topics that do not easily or necessarily respect the boundaries reserved and devolved matters.<sup>97</sup> For that reason, a provision of an ASP which ‘makes modifications of Scots private law, or Scots criminal law, as it applies to reserved matters’ is to be treated as relating to such matters – and therefore outwith the Parliament’s competence – ‘unless the purpose of the provision is to make the law in question apply consistently to reserved matters and otherwise.’<sup>98</sup> This, however, is not the end of the matter: a second, and partially overlapping, limitation on competence (found in Schedule 4) provides that an ASP ‘cannot modify, or confer power by subordinate legislation to modify, the law on reserved matters’, where the latter formulation includes ‘any enactment the subject matter of which is a reserved matter and which is comprised in an Act of Parliament or subordinate legislation under an Act of Parliament’ and ‘any rule of law which is not contained in an enactment and the subject matter of which is a reserved matter.’<sup>99</sup> This limitation is subject to two exceptions: the first that it ‘applies in relation to a rule of Scots private law or Scots criminal law... only to the extent to that the rule in question is special to a reserved matter’;<sup>100</sup> nor does it apply to modifications of the law on reserved matters which ‘are incidental to, or consequential on, provision made... which does not relate to reserved matters’ and ‘do not have a greater effect on reserved matters than is necessary to give effect to the purpose of the provision.’<sup>101</sup> Though there is a ‘strong family likeness’ between the two restrictions on competence, the Supreme Court has clarified that they reflect a distinction ‘between a rule of Scots criminal law which is special to a reserved matter on the one hand and one which is general in its application on the other because it extends to both reserved matters and matters which have not been reserved.’<sup>102</sup>

In *Martin*, the court split on the question of whether the provision under challenge – section 45 of the *Criminal Proceedings etc (Scotland) Act 2007*, which increased the maximum sentence which could be imposed by the Sheriff Court exercising summary jurisdiction – was ‘special to a reserved matter’. The majority (including Lord Hope) took the view that it was not, understanding that limitation to reflect a desire to prevent ‘the fragmentation of rules of Scots criminal law which are of general application into some parts which are within the Scottish Parliament’s competence and some parts which are not.’<sup>103</sup> Lord Rodger, in the minority, expressed the view that ‘a statutory rule of law is “special to a reserved matter” if it has been specially, specifically, enacted to apply to the reserved matter in question –

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<sup>97</sup> *Imperial Tobacco*, above n 68, para 19.

<sup>98</sup> *Scotland Act 1998* s 29(4).

<sup>99</sup> *Scotland Act 1998* sch 4, paras 2(1) and (2).

<sup>100</sup> *Scotland Act 1998* sch 4, para 2(3).

<sup>101</sup> *Scotland Act 1998* sch 4, para 3(1).

<sup>102</sup> *Martin*, above n 15, para 21.

<sup>103</sup> *Ibid* para 38.

as opposed to being a general rule of Scots private or criminal law which applies to, inter alia, a reserved matter'.<sup>104</sup> At the heart of that disagreement, however, lay a deeper tension as to the appropriate extent of judicial control over the exercise of devolved powers. Whilst for Lord Hope the Scottish Parliament was plainly intended to regulate the Scottish legal system and therefore a 'generous application...which favours competence' – and which requires the aid of Westminster 'to do no more than dot the i's and cross the t's of the necessary consequences' – is to be preferred,<sup>105</sup> for Lord Rodger a narrower approach was required. According to the latter view the Scottish Parliament is barred from 'modifying any enactment which must be taken to reflect the conscious choice of Parliament to make special provision for the particular circumstances, rather than to rely on some general provision of Scottish private or criminal law.'<sup>106</sup> Offering a more restrictive approach to the interpretation of ASPs, Lord Rodger continued that '[w]hether or not to modify such an enactment involves questions of policy which must be left for the UK government and Parliament which are responsible for the matter.'<sup>107</sup>

### C *Review across the Devolution Statutes*

One further question regarding the themes of the case law is that of whether the Scottish jurisprudence stands alone or whether the cases discussed below form part of a wider 'devolution jurisprudence' common to the three nations and regions to which power has been devolved; something that is more than the mere aggregate of the different decisions made by the various courts regarding the relevant provisions of the Scotland, Wales and Northern Irish devolution legislation. The question arises in the first place because of devolution's asymmetries. Leaving aside the particular historical factors which made a form of consociationalism necessary in Northern Ireland, the Scottish and Welsh models of devolution initially differed in fundamental ways: the Welsh Assembly had no primary legislative power under the first of the Welsh devolution statutes,<sup>108</sup> and when it acquired a legislative competence the model used was a 'conferred powers' one (whereby all was reserved apart from that explicitly devolved),<sup>109</sup> in contrast to the 'reserved powers' model used in Scotland.<sup>110</sup> Though both regimes continue to evolve (with the Wales Act 2017 moving the Welsh Assembly to a reserved-powers model),<sup>111</sup> the numerous

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<sup>104</sup> Ibid para 139.

<sup>105</sup> Ibid paras 38 and 66.

<sup>106</sup> Ibid para 139.

<sup>107</sup> Ibid.

<sup>108</sup> *Government of Wales Act 1998*.

<sup>109</sup> *Government of Wales Act 2006* s 108.

<sup>110</sup> *Scotland Act 1998* s 29(2)(b).

<sup>111</sup> *Government of Wales Act 2006* s 108A, as substituted by the *Wales Act 2017*. The provision in question is not yet in force.

differences prevented the early emergence of an over-arching devolution jurisprudence.<sup>112</sup> The possible emergence of such a thing has been belatedly facilitated by the use, in the Welsh context, of the power to make a reference to the Supreme Court to determine the legality of Acts of the Assembly, which has been employed three times since the Assembly acquired powers to make primary legislation.<sup>113</sup> In its judgment, the Supreme Court drew on the approach taken in *Martin*, though Lord Neuberger noted that despite the close similarity of the words used, ‘they are found in different statutes, and one must therefore be wary of assuming that they have precisely the same effect’.<sup>114</sup> Similarly, Lord Hope presented principles developed in the Scottish context as relevant to the question of the legislative competence of the Welsh Assembly.<sup>115</sup> This willingness to read over from the Scottish context to the Welsh one was reaffirmed in the Agricultural Sector (Wales) Bill reference,<sup>116</sup> where the Supreme Court also confirmed that a Bill which relates to a conferred power would be within competence even if ‘in principle it might also be capable of being classified as relating to a subject which has not been devolved.’<sup>117</sup>

This read across has occurred also in the opposite direction: in *Christian Institute* the Supreme Court deliberately wove dicta from the Welsh *Agricultural Wages* reference into that from the challenge to an ASP in *Imperial Tobacco* in order to clarify the proper approach to be taken to the ‘object and purpose’ test when determining whether or not devolved legislation ‘relates to’ a reserved matter.<sup>118</sup> In the *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* case,<sup>119</sup> however, Lord Mance had pointed out the difficulty of this assimilation, noting that though the formulation ‘relates to’ is defined identically in the Scottish and Welsh legislation it is ‘used in the *Scotland Act 1998* to define not the competence conferred to the devolved Parliament, but the competence reserved to the Westminster Parliament.’<sup>120</sup> The effect of this distinction was that to give the formulation a broad or a narrow interpretation would have opposite effects on the scope of the competence of the

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<sup>112</sup> For an early consideration of the overlapping elements of the devolution statutes, see Aidan O’Neill, ‘Judicial Politics and the Judicial Committee: The Devolution Jurisprudence of the Privy Council’ (2001) 64 MLR 603. It is notable that all of the ‘devolution jurisprudence’ discussed by O’Neill relates to the work of the Scottish Parliament and Scottish Executive (as it was then called).

<sup>113</sup> *Local Government Byelaws (Wales) Bill 2012 – Reference by the Attorney General for England and Wales* [2012] UKSC 53.

<sup>114</sup> *Ibid* para 50.

<sup>115</sup> *Ibid* paras 78-81.

<sup>116</sup> *Agricultural Sector (Wages) Bill – Reference by the Attorney General for England and Wales* [2014] UKSC 43, 5-6.

<sup>117</sup> *Ibid* para 67.

<sup>118</sup> *Christian Institute*, above n 7, para 30.

<sup>119</sup> *Re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill – Reference by the Counsel General for Wales* [2015] UKSC 3.

<sup>120</sup> *Ibid* para 25.

devolved legislatures: restricting that of the Scottish Parliament as it broadened out that of the Welsh Assembly, or vice versa.<sup>121</sup> A distinct and unitary body of devolution jurisprudence is likely only fully to emerge in the context of a unitary approach to devolution such as might be engendered by the shift in Wales towards a reserved powers model.

### C *Review Beyond the Scotland Act 1998*

Some of the same dynamics are evident in the courts' treatment of the question of whether the grounds of review enumerated in the *Scotland Act* are exhaustive of those on which the legality of ASPs might be challenged. The argument in *AXA General Insurance*<sup>122</sup> that ASPs might be subject to challenge on common law grounds of irrationality was only partially successful, the Supreme Court holding that the possible grounds of review were more limited both than those which apply to executive acts and those which the Outer House of the Court of Session had, by analogy with 'subordinate legislation carrying direct parliamentary approval', held to be appropriate: 'extremes of bad faith; improper motive or manifest absurdity'.<sup>123</sup> Instead, it was held, that the degree of common law review appropriate for ASPs is the irreducible minimum required to secure the rule of law, as understood in the (in)famous dicta of Baroness Hale, Lord Steyn and Lord Hope in *Jackson v Attorney General*.<sup>124</sup> In *AXA*, Lord Hope related this common law backstop to the nature and composition of the Scottish Parliament, including the feature – its unicameral nature – which most clearly distinguishes it from the Westminster Parliament:

We now have in Scotland a government which enjoys a large majority in the Scottish Parliament. Its party dominates the only chamber in that Parliament and the committees by which bills that are in progress are scrutinised. It is not entirely unthinkable 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. Whether this is likely to happen is not the point. It is enough that it might conceivably do so. The rule of law requires that the judges must retain the power to insist that legislation of that extreme kind is not law which the courts will recognise.<sup>125</sup>

Lord Reed identified a broader basis for common law review of ASPs, justified by reference to the principle of legality as applied to the *Scotland Act 1998*, by which the (Westminster) Parliament it created could only have empowered the (Scottish) Parliament it created to legislate contrary to certain rights and values had

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<sup>121</sup> A point made by Richard Rawlings, 'Riders on the Storm' (2015) 42 *Journal of Law and Society* 471, 486.

<sup>122</sup> *AXA General Insurance Ltd*, above n 4.

<sup>123</sup> *Ibid* para 135.

<sup>124</sup> *Jackson v Attorney General* [2005] UKHL 56.

<sup>125</sup> *AXA General Insurance Ltd*, above n 4, para 51.

it used express words to that effect, words which the 1998 Act does not in fact contain:

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.<sup>126</sup>

An implication of this distinction is that a body possessing the same majoritarian features as are identified by Lord Hope (features which were of course a function of the contingent political circumstances of the period) might – on Lord Reed’s account – be granted the power to act incompatibly with the rule of law by a statute employing suitably explicit language.<sup>127</sup> The basis of Lord Hope’s decision is worth dwelling upon, however, for it is striking that many of the most aggressive public law decisions in recent decades have demonstrated a similar lack of confidence in the ability of the political organs of the state to obstruct the doing of illiberal acts or, at times, any act at all which the executive might wish to take. Amongst the most quietly scathing of such remarks are those of Lord Steyn in *Jackson*, where the suggestion that ‘the courts may have to qualify a principle [the sovereignty of Parliament] established on a different hypothesis of constitutionalism’ was linked to the possibility that the availability of judicial review is a ‘constitutional fundamental’ which ‘even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish.’<sup>128</sup> Given that the electoral system employed at the Scottish Parliament makes majority government less likely (and effectively excludes the possibility of a party enjoying the sort of super-majority which was until recently the norm at Westminster) the fairly casual – and not entirely convincing – assimilation of the Scottish with the Westminster political apparatus suggests that whether or not the scepticism as to the effectiveness of political scrutiny is empirically justified is neither here nor there. Judicial power in respect of ASPs, this is to say, has been extended by the Supreme Court partly on the basis of a suspicion about the quality of the political elements of the (Scottish) constitutional order which the judgments in *AXA* do too little to substantiate.<sup>129</sup>

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<sup>126</sup> *Ibid* para 153.

<sup>127</sup> *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 131: ‘Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights... The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost.’

<sup>128</sup> *Jackson*, above n 124, para 102.

<sup>129</sup> Though much earlier Lord Hope had expressed significant concerns regarding the quality of scrutiny in the Scottish Parliament, and endorsed – in order to address that defect – the creation of a second chamber: Lord Hope of Craighead ‘What a Second Chamber Can Do for Legislative Scrutiny’ (2004) 25 *Statute Law Review* 3. Even these remarks, however, would seem to do too little to justify the majoritarian concern Lord



## V CONCLUSION

Although fears of ‘*un gouvernement des juges*’ have proved unfounded, the constitutional limits imposed on the Scottish Parliament, and the mechanisms established by and in the shadow of the Scotland Act for policing those limits, are clearly a fundamentally important feature of the way in which the contemporary devolution settlement operates. Perhaps surprisingly, there has been no popular or political backlash against the constraints these impose on the Scottish democratic process. It is striking that the debates which *have* arisen regarding judicial power in Scotland—who should exercise it; what approach they should take in doing so; how far the common law should be allowed to augment the statutory mandate given to the courts – have nevertheless *not* featured a basic question which has defined contemporary constitutional debate at the United Kingdom (and, indeed, international) level: whether the existence of judicial power to strike down or otherwise impugn legislative acts should exist at all.

Thus, the reaction of the Scottish Government on those occasions when its legislation has been invalidated by the courts has been notably restrained, despite occasionally undiplomatic or politically insensitive language from the courts,<sup>130</sup> and despite the fact that strike down has sometimes caused further significant legal headaches.<sup>131</sup> As noted above, the major controversy that has arisen has concerned the role of the JCPC/Supreme Court in criminal cases, but this was an incidental effect of the devolution arrangements, which happened to inflame much longer-standing nationalist sensitivities (of both political and legal varieties) about the ‘intrusion’ of London-based courts into Scottish legal affairs.

This relative comfort with the judicial role in Scottish political discourse is perhaps evidenced most clearly by the Scottish Government’s proposals in advance of the 2014 independence referendum for an interim constitution, as well as an ‘inclusive and participative’ process for replacing it with a permanent instrument, reflecting – said the First Minister, Nicola Sturgeon – ‘the fundamental constitutional principle that the people, rather than politicians or state institutions, are the

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Hope later expressed in *AXA* – not least because they were made so early in the life of the Holyrood Parliament.

<sup>130</sup> See, eg, the criticism of ministerial motives in relation to the impugned provision in *Salvesen v Riddell*, or the unfortunate reference to the spectre of totalitarianism in *Christian Institute*.

<sup>131</sup> For example, the remedial order enacted in response to the ruling in *Salvesen v Riddell* that s72 of the *Agricultural Holdings (Scotland) Act 2003* was ultra vires subsequently gave rise to a successful action for damages by the farmers thereby deprived of their expectation of gaining security of tenure – *McMaster v Scottish Ministers* 2017 SLT 586.

sovereign authority in Scotland.<sup>132</sup> That popular sovereignty was reasserted by the draft bill itself, which provided that '[i]n Scotland, the people have the sovereign right to self-determination and to choose freely the form in which their State is to be constituted and how they are to be governed' and that '[a]ll State power and authority accordingly derives from, and is subject to, the sovereign will of the people, and those exercising State power and authority are accountable for it to the people.'<sup>133</sup> These radical assertions of popular sovereignty were set against the claim that the sovereign will of the people was to be expressed in a constitution which then limited that sovereign will.<sup>134</sup> In the interim constitution the relevant limitations were the same as those applicable to the devolved Scottish Parliament: Scots law was to be of no effect if incompatible with either EU law or those rights under the ECHR specified by the interim constitution.<sup>135</sup> These proposals, which again were not seriously questioned, seemed to reflect an implicit belief that a written constitution (and the judicial power which almost invariably accompanies it) is the natural condition of modern polities.<sup>136</sup> Thus, in the context of continued membership of the UK rather than independence, the major criticism of the role of constitutional review concerns, not the existence of limits on the powers of the Scottish Parliament, but rather the *absence of* equivalent constraints on the powers of the UK Parliament, particularly insofar as they potentially threaten the security of Scottish autonomy.<sup>137</sup>

Attitudes to constitutional review in the Scottish context do therefore seem to be indicative of new constitutional thinking which is antithetical to the insulation of primary legislation from judicial control. However, the attitudes displayed by the courts themselves in exercising their powers of constitutional review in the devolved context are more ambivalent. On the one hand, there are times at which the courts appear to approach their task self-consciously as one of *constitutional* review – a matter of determining, on a principled basis, the balance of control and respect that is due to a primary legislator empowered by a constitutional instrument; an attitude which may spill beyond the devolution context to colour (or be coloured by) the courts' approach to UK Parliament legislation as well. The striking similarity of Lord Hope's reasoning as regards common law review of the Scottish Parliament and of the UK Parliament in *AXA* and *Jackson* is one example; the extension to the Scotland Act of the protection from implied repeal due to a constitutional statute is another. On the other hand, the statutory basis of the Scotland Act is sometimes seen as decisive,

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<sup>132</sup> 'Foreword' in Scottish Government, *The Scottish Independence Bill: A consultation on an interim constitution for Scotland* (2014), 4.

<sup>133</sup> *ibid*, clause 3, pages 12-13. See also clause 2: 'In Scotland, the people are sovereign.'

<sup>134</sup> Scottish Government, *above n 132*, clause 3(3) and (4).

<sup>135</sup> *Ibid* clauses 24 and 26.

<sup>136</sup> See, eg, Scottish Government, *Scotland's Future: Your Guide to an Independent Scotland* (2013) 332, 334 – 5.

<sup>137</sup> See Aileen McHarg, 'The Constitutional Case for Independence' in Aileen McHarg et al (eds), *The Scottish Independence Referendum: Constitutional and Political Implications* (OUP, 2016) 115 – 121.

with the courts' powers of review therefore being regarded as no more than the application in a novel context of their familiar powers to supervise the legality of acts of subordinate bodies. On the whole, more conventional constitutional attitudes have been displayed in cases where the practical stakes are higher. This is not unusual in constitutional adjudication, particularly in recent UK experience. Nevertheless, it may be problematic in a political context in which the constitutional status and security of devolution is a highly sensitive issue. Ultimately, the willingness of the courts to shift to a new constitutional paradigm which can accommodate the idea of the Scottish Parliament as an institution with independent rather than derivative (albeit limited) constitutional authority, and which encompasses equivalent constraints on the UK Parliament may be an important factor in determining whether Scotland's constitutional future lies inside or outside of the Union.