Statutory interpretation and legislative competence: section 101 of the Scotland Act 1998

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I. Introduction

A public lawyer at the Scottish Bar tells of the first time that they invited the Court of Session to strike down an Act of the Scottish Parliament (ASP) on the basis that it was ultra vires in terms of section 29 of the *Scotland Act 1998*. According to that provision an ASP 'is not law' – and therefore may be declared by the courts to be invalid – where, inter alia, it 'relates to' a matter reserved to the United Kingdom (UK) Parliament, is incompatible with the *European Convention on Human Rights* (ECHR) or is incompatible with EU law. In the words of Ewing and Dale-Risk, the *1998 Act* created a 'clear and unambiguous power (and duty) to strike down legislation passed by a democratically elected Parliament.'[1] Yet when, in the early days of devolution, our protagonist asked the Court to do just that the response from the bench was somewhat sceptical: 'we can't do that…can we?' So alien to judicial culture in the UK was the role of courts to review the validity of primary legislation that not even the explicit instruction to do so in the *Scotland Act* was comfort enough for some members of the judiciary at that time to avail themselves of that power.

The source of such discomfort is easy to locate. A defining feature of the UK constitution has been the *absence* of constitutional review 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*:[2]

> 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 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.[3]

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.'[4]

Those concerns barely registered when Scottish 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.'[5] At the same time, the judiciary was beginning to shed its own inhibitions. As it was put by Lord Rodger in *Whaley v Lord*

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[1] Keith D Ewing & Kenneth Dale-Risk, *Human Rights in Scotland: Text, Cases and Materials* (Edinburgh: W Green, 2004) at 61.

[2] *Cheney v Conn (Inspector of Taxes)*, [1968] 1 WLR 242, [1968] 1 All ER 779 (HC ChD (Eng)).

[3] *Ibid* at 247.

[4] James Mitchell, *Devolution in the UK* (Manchester: Manchester University Press, 2009) at 120-21.

[5] Bernard Crick & David Millar, *To Make the Parliament of Scotland a Model for Democracy* (Edinburgh: Centre for Scottish Public Policy, 1995) at 9.

Watson of Invergowrie,[6] 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.'[7] 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*,[8] 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.'[9]

If this new power of the judiciary - to strike down primary legislation passed by a democratically elected parliament - could be defended on constitutional grounds it was also likely to give rise to concerns of a similar nature: on the one hand, a concern from democracy about the proper constitutional 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]

Reflecting these concerns, the *Scotland Act 1998* makes provision for a sympathetic reading to be given to ASPs in the form of a statutory requirement for judges, where possible, to read down legislation in order to achieve and give effect to its intra vires interpretation. According to section 101 of the *1998 Act*, where legislation 'could be read in such a way as to be outside competence' the contested provision(s) must 'be read as narrowly as is required for it to be within competence'.[12] In this chapter we will consider the impact that this obligation has had on the exercise of constitutional review in devolved Scotland. After setting out the judicial and parliamentary modes of constitutional review that co-exist in the devolution settlement we will examine the impetus and the aims which underpin the interpretative obligation. Whilst section 101 has rarely been relied upon by judges in the devolution jurisprudence, it will be seen that the provision has nevertheless been impactful in at least two senses, the former positive and the latter (perhaps more) negative: first, section 101 sends a signal to the UK and devolved legislatures about the proper balance of their respective powers; second, section 101 has more regularly been relied upon by the Scottish Government during the process of *parliamentary* constitutional review to encourage that a generous benefit of the doubt be given at the various check points for legislative competence.

II. Constitutional review under the *Scotland Act 1998*

In recent years public law scholarship has sought to describe, and to defend, a so-called 'third way' of constitutionalism. No clean break, this approach builds upon antecedent models of legislative supremacy and judicial supremacy, in which either parliament or the courts have the last word on the

[6] 2000 SC 340, 2000 SLT 475 (CS (Scot)).
[7] *Ibid* at 349.
[8] [2005] UKHL 56, [2006] 1 AC 262.
[9] *Ibid* at para 102, per Lord Steyn.
[10] See Ewing & Dale-Risk, *supra* note 1.
[11] Aidan O'Neill, "The Scotland Act and the Government of Judges" (1999) 9 Scots Law Times (News) 61 at 66.
[12] *Scotland Act 1998* (UK), c 46, s 101(2) [*Scotland Act 1998*].

legality of legislation.[13] Two fundamental characteristics distinguish this approach. One is constrained judicial remedial powers. For Westminster-based parliamentary systems, the very idea of introducing a bill of rights with judicial review represents a fundamental departure from previously held assumptions that a bill of rights clashes with the core constitutional principle of parliamentary supremacy. However, by distinguishing between judicial *review* and judicial *remedies*, here judicial review does not displace the idea that parliament has the final say on the validity of legislation. The second fundamental characteristic is that this approach envisages a more important role for rights review at the legislative stage than is usually associated with a bill of rights. By including a statutory obligation to report to parliament when a Bill is inconsistent with rights this particular legislative focus reflects the following three ideals:[14] identifying whether and how proposed legislation implicates rights; encouraging more rights-compliant ways of achieving legislative objectives (and in the extreme discourage the pursuit of objectives that are fundamentally incompatible with rights); and facilitating parliamentary deliberation about whether legislation implicates rights, and thereby increasing parliament's capacity to pressure government to justify, alter or abandon proposed legislation that unduly infringes upon rights.[15]

In some respects Scotland's devolution scheme fits neatly with the model of judicial supremacy. First, the Scottish Parliament is not a sovereign legislature but rather is one for which constitutional limits have been enshrined in statute. Second, and perhaps most obviously, it is the UKSC– and not the Scottish Parliament - that has the last word on whether an ASP is law. Indeed, Lord Neuberger has said that this power bestows upon that court some of the characteristics of a constitutional court. Just as in a country with a constitution 'the Supreme Court (as in the US) or the Constitutional Court (as in Germany) can, indeed must, strike down legislation which has been enacted by the democratically elected parliament if the court concludes that the legislation does not comply with the Constitution,' he said, so too the (UK) Supreme Court must strike down any legislation that has passed through the democratically elected devolved legislatures if the court concludes that it falls outwith legislative competence as defined in statute.[16] Third, when vetting Bills for legislative competence, officials across the Scottish Government, the Scottish Parliament and the UK Government apply a method of assessment that anticipates what (in their view) the Supreme Court would decide if asked to rule on the matter. In this way the jurisprudence of the court might impact upon Bills as they pass through the policy development, pre-introduction and parliamentary stages even if the resulting legislation itself is never made subject to a legal challenge. However, and despite the court's strong powers of constitutional review, the judicial role is tempered in two ways. On the one hand, the *Scotland Act* encourages the courts to approach legislative competence in a way that respects the political

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[13] See for example, Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge: Cambridge University Press, 2013); Jeffrey Goldsworthy, "Homogenizing Constitutions" (2003) 23:3 Oxford J Leg Stud 483; Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton: Princeton University Press, 2009); George Williams, "The Victoria Charter of Human Rights and Responsibilities: Origins and Scope" (2006) 30 Melbourne UL Rev 880; Francesca Klug, *Values for a Godless Age: The Story of the United Kingdom's New Bill of Rights* (London: Penguin, 2000).

[14] These reporting obligations vary. Some are made by the Attorney General (NZ; ACT (Austl)) or Justice Minister (Can), whereas others are made by the sponsoring minister (UK; Vic (Austl)); some include only government bills (Can; UK); and some require reports only for inconsistency (Can; NZ) whereas others report both affirmative and negative reports of compatibility (UK; ACT (Austl); Vic (Austl)).

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

[16] Lord Neuberger, "The UK Constitutional Settlement and the Role of the UK Supreme Court" (Address delivered at the Legal Wales Conference, 10 October 2014), online: <https://www.supremecourt.uk/docs/speech-141010.pdf>.

legitimacy of the Scottish Parliament, first by requiring the judiciary – where possible – to construct a sympathetic reading of legislation so as to avoid it being struck down as invalid; second, the court has the power to remove or to suspend the retrospective effect of a decision that legislation is outwith competence,[17] or to suspend the effect of a decision so as to allow the Scottish Parliament to cure any defect so as to bring the legislation within competence.[18] On the other hand, the primary responsibility for the constitutional review of *all* bills falls on political actors and officials engaged in the *parliamentary* review of legislative competence, which if properly exercised should minimise the opportunities for judicial censure.

For those engaged in the law-making process – from civil servants, to legislators, to courts, to those public bodies and private actors who rely on the rights and duties conferred by legislation – the consequences of legislating beyond the Parliament's competence are severe, for a number of reasons. First, there is a clear risk of reputational damage both to the Scottish Government and to the Scottish Parliament where legislation is found to be defective. Second, because legislation might have been in force for some time, and/or have been widely and deeply relied upon, there may be uncertainty as to the status of any rights or obligations that arise therein at least until such time as the matter has been settled by a court. Third, there are serious concerns for the Scottish Government if elements of its legislative agenda face delay and defeat. Fourth, there is an associated remedial cost both in terms of the parliamentary time required to cure defective legislation and in terms of damages or other remedies that might arise as a result of an adverse ruling. Finally, there is a possibility that courts themselves might suffer reputational damage where they are perceived to have overstepped the mark in striking down primary legislation passed by a democratically elected legislature.[19] In order to protect legislation against this vulnerability the Scotland Act 1998 established a framework of pre-enactment checks and cross-checks for *all* Bills which engage the Scottish Ministers or, in the case of a non-Government Bill, the responsible Member[20] with both the Scottish Parliament and the UK Government in the exercise of vetting Bills for legislative competence:

(1) On or before the introduction of a Bill, the responsible Minister must report to Parliament that in his or her view the Bill *is* within the Parliament's legislative competence;[21]
(2) On or before the introduction of a Bill, the Presiding Officer must report to Parliament his or her view as to *whether or not* the Bill is within the Parliament's legislative competence;[22]
(3) Following the completion of the Bill's parliamentary stages, the Presiding Officer must withhold submission of the Bill for Royal Assent for four weeks,[23] during which period the Scottish and UK Law Officers – the Lord Advocate on behalf of the Scottish Government, and the Advocate General for Scotland and the Attorney General on behalf of the UK

[17] *Scotland Act 1998*, *supra* note 12, s 102(2)(a).
[18] *Ibid*, s 102(2)(b).
[19] Whilst the political reaction to adverse rulings about legislative competence has so far been measured, the opportunity for friction was highlighted by the criticisms made of the Supreme Court's influence by the then First Minister, Alex Salmond, and Justice Secretary, Kenny MacAskill, following adverse rulings by the Supreme Court in relation to aspects of Scots criminal law. See Alan Trench, "The Cadder Case and Legal Advice for Suspects in Scotland" (28 October 2010), *Devolution Matters* (blog), online: <https://devolutionmatters.wordpress.com/2010/10/28/the-cadder-case-and-legal-advice-for-suspects-in-scotland/>, as well as the relevant links therein.
[20] As extended by the *Scotland Act 2012* (UK), c 11, s 6.
[21] *Scotland Act 1998*, *supra* note 12, s 31(1).
[22] *Ibid*, s 31(2).
[23] *Ibid*.

Government – may refer the question of legislative competence directly to the Supreme Court.[24]

Whilst on some accounts the Scottish devolution scheme would be excluded from the new category – this 'third way' - of constitutional review on the basis that the final say on the legality of ASPs rests with the judiciary exercising a strong-form of constitutional review,[25] we can see that both in relation to the new powers of the judiciary and in relation to the enhanced form of parliamentary review the intention has been to engender a form of dialogue *between* institutions about the boundaries to legislative competence, about the extent to which legislation might overstep the mark and about the appropriate remedies that might follow as a result.[26] It is in this context – the effort taken to avoid constitutional conflict through the promotion of inter-institutional dialogue - that we should analyse both the positive and the pernicious effects of devolution's interpretative obligation.

III. Safeguarding the Devolution Settlement

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.[27] 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.[28] 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,'[29] including any provision purporting to entrench prior legislation even of a constitutional nature.[30] 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.[31] 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

[24] *Scotland Act 1998*, *supra* note 12, s 33.
[25] Gardbaum's account, *supra* note 13, identifies parliament's last word as the defining feature of what he calls "new Commonwealth constitutionalism".
[26] In Hiebert & Kelly's account, *supra* note 15, for example, it is this emphasis on the parliamentary stage that distinguishes these new models of constitutional review from the traditional models.
[27] Alan Page, *Constitutional Law of Scotland* (Edinburgh: W Green, 2015) at 28.
[28] *Scotland Act 1998*, *supra* note 12, s 28(7).
[29] Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed (London: Macmillan, 1915) at 3, 37-38.
[30] 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* (Oxford: Bloomsbury Hart Publishing, 2015).
[31] UK, HC, "Rights Brought Home: The Human Rights Bill", Cm 3782 in *Sessional Papers* (1997) 1 at para 2.13.

'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.'[32]

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'[33] – 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.[34] Contrary to the expectation that UK legislation in devolved areas would be an infrequent occurrence, in practice there have been approximately 30-35 legislative consent motions tabled during a typical session of the Scottish Parliament, only one of which has 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.[35] 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.[36] As well as the specific transfer of powers, however, the commission also

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[32] Lord D Irvine, "A Skilful Advocate" in Wendy Alexander, ed, *Donald Dewar: Scotland's First First Minister* (Edinburgh: Mainstream, 2005) at 128.

[33] UK, HL, *Parliamentary Debates*, vol 592, col 791 (21 July 1998) (Lord Sewel).

[34] 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*, *supra* note 12. 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 Constitutional Law Association* (blog), online: <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 L 501.

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

[36] See Scot, Smith Commission, *Report of the Smith Commission for Further Devolution of Powers to the Scottish Parliament* (Edinburgh: Smith Commission, 2014), online: <http://webarchive.nationalarchives.gov.uk/20151202171059/http://www.smith-commission.scot/smith-commission-report/>, ch 1.

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.[37] 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 and the Scottish Government' their abolition may proceed only 'on the basis of a decision of the people of Scotland voting in a referendum.'[38] 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' the *Scotland Act*. 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.[39] 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,[40] it would appear that the answer to this question is 'yes': the impact on legislative competence being one reason why the UK Government has conceded that it will require to seek legislative consent from the devolved legislatures for the EU (Withdrawal) Bill 2017-19 before it becomes law.[41] Second, does statutory 'recognition' of the convention lend it legal and justiciable bite. In *Miller v Secretary of State for Exiting the European Union*[42] the Supreme Court took a narrow approach to this question, holding that the requirement to seek legislative consent remains a convention (one that is recognised rather than given effect to by legislation) and, as such, that the court has no role to play either in its interpretation or in its enforcement.[43]

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 unreformed and unchanged the principle of parliamentary sovereignty – can be made at least two arguments from constitutional *law*. First, there is judicial authority from the UKSC that the *Scotland Act* can properly be described as a 'constitutional statute' with the legal and justiciable effect that its

[37] *Ibid* at 13.
[38] *Scotland Act 2016* (UK), c 11, s 1.
[39] *Ibid*, s 2.
[40] UK, HL, *Parliamentary Debates*, vol 769, col 305 (24 February 2016) (Lord Keen of Elie).
[41] UK, Department for Exiting the European Union, *Exiting the EU with Certainty* (London: Her Majesty's Stationary Office, 2017), online: <https://www.gov.uk/government/news/exiting-the-eu-with-certainty>.
[42] [2017] UKSC 5, [2017] 1 WLR.
[43] *Ibid* at paras 136-51.

provisions are protected from *implied* repeal,[44] 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, two features of the *1998 Act* combine to realign the centre of gravity back towards the devolved institutions. On the one hand, Lord Hope has drawn attention to the construction of the *Scotland Act* which provides a mechanism for determining whether legislation is outwith (rather than for determining whether legislation is *within*) legislative competence, such that – 'within carefully defined limits' – he could say that the devolution scheme can properly be described as a 'generous settlement of legislative authority',[45] and that acting within those limits ASPs 'enjoy…the highest legal authority.'[46] On the other hand, 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.[47]

IV. A Bias in Favour of Devolution?

The explanatory notes to the *Scotland Act 1998* explain the nature of this 'bias' in favour of devolution. The purpose and effect of section 101, we are told, is to 'enable the courts to give effect to legislation, wherever possible, rather than to invalidate it' and, in so doing, 'to ensure that the courts will not invalidate such legislation merely because it could be read in such a way as to make it outside competence.'[48] However, whereas the analogue provision in section 3 of the *Human Rights Act* (HRA)[49] defines the *purpose* of the interpretative obligation - to read primary legislation compatibly with Convention rights, so far as it is possible to do so – but leaves to judicial discretion the *method* of achieving such a reading (to read the provision expansively or narrowly; to 'read in' words or phrases, to 'read down' the provision or to stretch the meaning of the words used), section 101 of the *Scotland Act* (and in relation to Acts of the National Assembly for Wales, section 154 of the *Government of Wales Act 2006*) directs courts *both* as to the purpose and to the method of inquiry: that legislation must be construed 'as narrowly as is required' so as to be within competence.[50] During the passage of the Scotland Bill the then Lord Advocate, Lord Hardie, illustrated this approach by way of an example:

> An Act of the Scottish Parliament might make general provision enabling the Scottish ministers to hold a referendum on any matter. It would be possible to read that Act as enabling Scottish ministers to hold a referendum on some reserved matters such as independence or the monarchy. The Act would be ultra vires to that extent. However, in order to preserve the validity of that Act, the new clause would require the courts to read the Act as narrowly as is required for it to be intra vires, so far as it is possible

[44] *H v Lord Advocate*, [2012] UKSC 24 at para 30, [2013] 1 AC 413 at 426, per Lord Hope [*H v Lord Advocate*].
[45] *Imperial Tobacco v Lord Advocate*, [2012] UKSC 61 at para 15, 2013 SC (UKSC) 153, per Lord Hope [*Imperial Tobacco v Lord Advocate*].
[46] *AXA General Insurance v Lord Advocate,* [2011] UKSC 46 at para 46, [2012] 1 AC 868, per Lord Hope [*AXA v Lord Advocate*].
[47] 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 L 189.
[48] National Archives, "Explanatory Notes to the Scotland Act 1998", online: <http://www.legislation.gov.uk/ukpga/1998/46/notes/contents>.
[49] *Human Rights Act 1998,* c 42, s 3 [*HRA*].
[50] *Scotland Act 1998*, *supra* note 12, s 101(2).

> to do so. In other words, the courts will be required to read the Act of the Scottish parliament as enabling only the holding of referendums on matters within the competence of the parliament. In that way, the Act is not rendered ultra vires to any extent.[51]

In contrast to section 3 HRA a court would *not* be permitted to 'read in'[52] or otherwise expansively to interpret the meaning of the words used in an ASP[53] in order to find a reading of the legislation that is within competence.

The adoption by the government of this more restrictive formulation was the subject of legislative debate in the House of Lords. Lord Hope, then a sitting Law Lord, intervened with a 'plea' that 'the various rules which the court is being asked to apply in construing legislation [both in the *Scotland Act* and in the *Human Rights Act*] be cast in the same terms.'[54] For Lord Mackay of Drumadoon, himself a pre-devolution Lord Advocate to the UK Government who would later be elevated to the bench, it was 'desirable' that the *Scotland Act* and HRA should create interpretative obligations that were broadly similar, and along the lines of the latter.[55] However, and on the advice of parliamentary counsel following Lord Hope's intervention, the government took the view that the narrow approach 'was the more favoured and more appropriate.'[56] As Lord Hope would later observe from the bench, this more negative approach[57] to interpretation was adopted so as to constrain the Scottish Parliament from expanding its legislative competence by reliance on a favourable interpretation:

> The explanation for the choice of language in sec 101(2) is to be found in the way the limits of the legislative competence of the Scottish Parliament are defined in sec 29(2) . The matters listed there extend well beyond incompatibility with the Convention rights. They include legislation relating to reserved matters as defined in sch 5 and legislation which is in breach of the restrictions in sch 4 . An attempt by the Scottish Parliament to widen the scope of its legislative competence as defined in those schedules will be met by the requirement that any provision which could be read in such a way as to be outside competence must be read as narrowly as is required for it to be within competence.[58]

Thus we see a more nuanced picture begin to emerge of the impetus behind section 101 than that of a 'bias in favour of devolution'. Whilst an interpretative obligation that favours competence may well tilt the centre of gravity as between the centre and the devolved nations back towards (but not quite reaching) the latter, its negative framing reinforces the constrained nature of the devolution project, limiting judicial as well as (on the part of the devolved institutions who have tended to legislate with a degree of caution as to the limits of their powers)[59] legislative and executive freedom at devolution's contested outer edges.[60]

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[51] UK, HL, *Parliamentary Debates*, vol 593, col 1953 (28 October 1998) (Lord Hardie).
[52] For an expansive (and controversial) 'read in' under *HRA,* section 3 see, *R v A*, [2001] UKHL 25, [2002] 1 AC 45.
[53] For the leading case on the application of section 3, see *Ghaidan v Godin-Mendoza*, [2004] UKHL 30, [2004] 2 AC 557 [*Ghaidan v Godin-Mendoza*].
[54] UK, HL, *Parliamentary Debates*, vol 592, col 788 (21 July 1998) (Lord Hope of Craighead).
[55] UK, HL, *Parliamentary Debates*, vol 593, col 1954 (28 October 1998) (Lord Mackay of Drumadoon).
[56] UK, HL, *Parliamentary Debates*, vol 593, col 1955 (28 October 1998) (Lord Hardie).
[57] See *ibid* for Lord Hardie's reference to the "positive" (*HRA*) and "negative" (*Scotland Act*) formulations used in each Act.
[58] *DS v HM Advocate*, [2007] UKPC D1 at para 21, 2007 SC (PC) 1, per Lord Hope [*DS v HM Advocate*].
[59] See Christopher McCorkindale & Janet L Hiebert, "Vetting Bills in the Scottish Parliament for Legislative Competence" (2017) 21:3 Ed L Rev 319.
[60] On the constraining force of devolution's legal boundaries, see Chris Himsworth, "Rights Versus Devolution" in Tom Campbell, Keith D Ewing & Adam Tomkins, eds, *Sceptical Essays on Human Rights* (Oxford: Oxford University Press, 2002), ch 8.

In Northern Ireland the more positive approach to interpretation has been adopted. Whilst it was argued that the inclusion of (in addition to section 3 HRA and section 101 *Scotland Act*) a third rule of interpretation, which nevertheless shared 'the objective of sympathetic interpretation', might 'lead to much confusion when the judges get a hold of it'[61] the UK Government justified the distinct approach in Northern Ireland with reference to devolution's inherent asymmetries. Assuring colleagues in the Lords that the Scottish and Northern Irish provisions 'closely resemble each other in effect', and recognising that 'there are instances where it is appropriate to replicate the Scottish legislation in [the Northern Irish] legislation', it was, in the UK Government's view, nevertheless appropriate in this instance to take a divergent approach reflective of the idiosyncrasies of the latter, which were at least two-fold.[62] First, a positive approach to interpretation was seen to be desirable in light of the combination of ECHR and EU restrictions with additional cross-cutting limitations - unique and essential to the Northern Irish context - relating to non-discrimination on the grounds of religious or political beliefs.[63] Second, a more positive formulation would lessen the opportunities for strike down and a consequent re-balancing of legislative power in favour of UK institutions whose own legislative record and authority in Northern Ireland was (and remains) hotly contentious. Thus the positive approach to the interpretative obligation is not intended in Northern Ireland to permit the Assembly any greater freedom than is enjoyed by its Scottish and Welsh counterparts to push at the boundaries of legislative competence. Instead it too is intended to constrain: constraining the devolved institutions to act in a way that is non-discriminatory on religious or political grounds, and constraining the UK Government or Parliament from expanding *its* role as primary legislator in Northern Ireland where devolved legislation is too readily struck down as being ultra vires.

V. A Presumption of Competence?

Whilst section 101 has an important signalling function to play in relation to the balance of powers as between the devolved legislatures and the UK Parliament, as a tool of statutory interpretation its most immediate purpose is, of course, to provide guidance to the courts about the approach that they should adopt in relation to the validity of ASPs – 'to ensure that legislation made by the parliament and the executive can be given effect in relation to matters within their competence and does not have to be struck down merely because it could, on a broad reading, also potentially relate to matters outwith their competence'[64] – and in so doing to 'reduce the risk of conflict between the Parliament and the [newly empowered] courts.'[65]

At common law, statutory interpretation has been a useful tool in the armoury of the judiciary for the way that it has allowed the courts to establish a weak-form of constitutional review under the folds of a still sovereign Parliament. As it was put by Lord Steyn in an oft cited passage:

> Parliament can, if it chooses, legislate contrary to fundamental principles of human rights [however] [t]he principle of legality means that Parliament must squarely confront what it is doing and accept the political cost… In the absence of express words or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of

[61] UK, HL, *Parliamentary Debates*, vol 594, col 1219 (17 November 1998) (Lord Kingsland).
[62] UK, HL, *Parliamentary Debates*, vol 594, col 1220 (17 November 1998) (Lord Dubbs).
[63] *Ibid*.
[64] UK, HL, *Parliamentary Debates*, vol 593, col 1953 (28 October 1998) (Lord Hardie), *supra* note 51.
[65] Page, *supra* note 27 at 263.

> Parliament, apply principles of constitutionality little different from those where the power of the legislature is expressly limited by a constitutional document.[66]

Those principles of constitutionality have included, inter alia, the following:

- Before Convention rights were given domestic effect via the HRA and the devolution statutes, courts in England & Wales, and later in Scotland,[67] were willing to use the ECHR as an aid to the interpretation of statutes and to presume in the absence of express words to the contrary that Parliament had intended to legislate compatibly with Convention rights;[68]
- Contrary to the Diceyan view that 'neither the Act of Union with Scotland nor the Dentists Act 1878 has more claim than the other to be considered a supreme law',[69] courts have been willing to protect (so-called) 'constitutional' statutes from implied repeal by later statutes of either an ordinary[70] or of a constitutional[71] nature, whether the latter is expressed in general or even in particular terms;[72]
- There is a now well-established line of jurisprudence to the effect that fundamental rights as well as other constitutional values such as the rule of law cannot be overridden by vague or ambiguous words in ordinary or in constitutional statutes alike.[73]

As with the interpretative obligation created in section 3 HRA, the section 101 exercise departs from the common law principles of constitutional interpretation in at least two ways. First, the requirement does not depend upon legislative ambiguity or silence: even express words in a statute may be read down or re-interpreted so as to construct an intra vires interpretation. Second, and contrary to the principle that courts should 'give effect to the intention of [in this case, the Scottish] Parliament' or that they should discover and apply 'the true meaning of what [here, the Scottish Parliament] said,' section 101 requires courts to adopt a purposive approach to the interpretation of ASPs: preferring an intra vires reading where such a reading is possible (within the confines of a negatively framed test), the intention of the legislature notwithstanding.[74]

During the passage of the Scotland Bill it was argued that section 101 merely transplanted into the devolution context another common law principle: the so-called 'principle of efficacy' or 'presumption of constitutionality'.[75] The 'presumption of constitutionality' may refer to a 'principle of validity' – that courts presume legislation to be valid according to constitutional procedures and

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[66] *R v Secretary of State for the Home Department, Ex Parte Simms*, [2002] 2 AC 115 at 131, [1999] 3 WLR 328, per Lord Hoffmann (HL (Eng)) [*Simms*].
[67] *T, Petitioner*, 1997 SLT 724, 1996 SCCLR 897 (Ct Sess).
[68] *Ibid* at 733-34, per Lord Hope.
[69] Dicey, *supra* note 29 at 145.
[70] *Thoburn v Sunderland City Council*, [2002] EWHC 195 (Admin) at para 60-67, [2003] QB 151, per Laws LJ.
[71] *R (on the application of Buckinghamshire County Council and others) v Secretary of State for Transport*, [2014] UKSC 3, [2014] 1 WLR 324, better known as the *HS2* case. For commentary on the hierarchy of constitutional statutes see Mark Elliott, "Reflections on the HS2 Case: A Hierarchy of Domestic Constitutional Norms and the Qualified Primacy of EU Law" (23 January 2014) *UK Constitutional Law Association* (blog), online: <https://ukconstitutionallaw.org/2014/01/23/mark-elliott-reflections-on-the-hs2-case-a-hierarchy-of-domestic-constitutional-norms-and-the-qualified-primacy-of-eu-law/>.
[72] *H v Lord Advocate, supra* note 44 at para 30, per Lord Hope.
[73] *Simms*, *supra* note 66 at 131, per Lord Hoffmann; *AXA v Lord Advocate*, *supra* note 46 at paras 136-54, per Lord Reed.
[74] These point were made forcefully in relation to section 3 of the *HRA 1997* by Lord Nicholls in *Ghaidan v Godin-Mendoza*, *supra* note 53 at paras 29-30.
[75] UK, HL, *Parliamentary Debates*, vol 593, col 1953 (28 October 1998) (Lord Hardie), *supra* note 51.

norms, placing the onus on an aggrieved person or group to overturn the presumption - or to a more general rule of construction, albeit (and as we have seen in Canada) that the object of that rule is itself contested.[76] On one view, and as it was put by Mr Justice Strong in *Severn v The Queen*,[77] the object of interpretation might be the *constitutive* Act itself, it being the duty of the Supreme Court of Canada (SCC) to:

> make every possible presumption in favour of such legislative acts, and to endeavour to discover a construction of the British North America Act [BNA Act] which would enable us to attribute an impeached statute to a due exercise of constitutional authority.[78]

On another view, and as put by Mr Justice Cartwright in *McKay v The Queen*,[79] the proper object of interpretation is the specific legislation made *under the authority of* the constitutive act:

> [I]f words in a statute are fairly susceptible to two constructions of which one will result in the statute being intra vires and the other will have the former result, the former is to be adopted.[80]

This is underpinned by second order presumptions as to the *intention* of the legislature – 'to confine itself to its own sphere' and not to act beyond or, through the use of general wording, to expand the boundaries of its legislative competence - as well as to its *bona fides*: that widely drawn powers will not be struck down merely because their ultra vires abuse is *possible*.[81]

It is this second limb that has been given its statutory footing in section 101: a method of construction that is deployed so as to distinguish and choose between possible interpretations of specific ASPs made under the authority of the *Scotland Act 1998*. However, any analysis of the second limb as it applies to Scotland should not lose sight of the first, for two reasons. First, because what is 'possible' – how far it is plausible to stretch the interpretation of an ASP – is inextricably bound to the interpretation given to the devolution legislation itself. On this question the jurisprudence is far from settled. In *Robinson v Secretary of State for Northern Ireland*,[82] which concerned the interpretation to be given to section 32(3) of the *Northern Ireland Act 1998*, according to which 'the Secretary of State shall propose a date for the poll for the election of the next Assembly' where (as was the case here) the roles of First Minister (FM) and Deputy First Minister (DFM) have not been filled within the statutory six week period following an election.[83] For the majority, the *Northern Ireland Act* 'is in effect a constitution' with the effect that it should be 'interpreted generously and purposively, bearing in mind the values which the constitutional provisions are intended to embody.'[84] Those values might include the resolution of political problems by recourse to the ballot box, but they include also the principle that 'government should be carried on, that there be no governmental vacuum,'[85] and it was the latter which prevailed here: there being no requirement to hold a further election where the election (by the Assembly) of the FM and DFM had exceeded the six week period. Such a reading accords with Magnet's view that the first limb – interpretation of the constitutive act - is 'a great source of richness and strength for [Canadian] constitutional law', freeing the SCC to review and to

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[76] Joseph Eliot Magnet, "The Presumption of Constitutionality" (1980) 18:1 Osgoode Hall LJ 87.
[77] [1878] 2 SCR 70.
[78] *Ibid* at 103.
[79] [1965] SCR 798.
[80] *Ibid* at 804.
[81] Magnet, *supra* note 76 at 121.
[82] [2002] UKHL 32, [2002] NI 90 [*Robinson*].
[83] *Northern Ireland Act 1998* (UK), c 47, s 16(1), (8).
[84] *Robinson*, *supra* note 82 at para 11, per Lord Bingham.
[85] *Ibid*.

expand the scope and meaning of the *BNA Act* more closely to conform with or to reflect current conditions.[86] However, in *Imperial Tobacco*, Lord Reed – sitting in the Inner House of the Court of Session, took a much more narrow view: that the *Scotland Act* 'is not a constitution, but an Act of Parliament'[87] in respect of which 'it is necessary to bear in mind that the Act of Parliament setting limits to devolved competence is itself "the authentic expression of the will of the people", and that respect for their will as so expressed requires those limits to be enforced.'[88] On appeal to the Supreme Court, Lord Hope found something of a middle ground: that 'whilst the description of the Act as a constitutional statute cannot be taken, in itself, to be a guide to its interpretation,' concern must nevertheless be given to the principle that 'the Scottish Parliament should be able to legislate effectively' in devolved areas and that the purpose of any ASP should therefore provide 'the context for any discussion about legislative competence.'[89] The constitutional intensity of the devolution statutes therefore remains somewhat fluid. Second, this *matters* because whilst the judicial method is constrained by the negative formulation adopted in relation to the interpretation of ASPs, the same constraints do not apply in relation to the interpretation of the *Scotland Act* itself. Put differently, it might be possible for counsel or for the judiciary to free themselves from those statutory constraints by interpreting the meaning and the scope of reserved powers in the *Scotland Act* itself more or less generously according to their context rather than by strictly focussing on the content of the contested ASP.

VI. Section 101 and Judicial Constitutional Review

Despite the expectation that the Scottish Parliament would differ in nature from Westminster's so-called 'legislative sausage factory',[90] the Scottish Parliament has been something of a hyper-active legislature, passing upwards of 265 ASPs since its first, the *Mental Health (Public Safety and Appeals) (Scotland) Act 1999*. Perhaps giving credence to the prediction that the new powers of the judiciary in Scotland would give rise to a 'government of judges' who would regularly be invited to review the validity of primary legislation,[91] the *1999 Act* – section 1 of which provided that patients in mental hospitals should remain in hospital on 'public safety' grounds even where they were not susceptible to treatment – was itself made subject to judicial review in *Anderson v Scottish Ministers*.[92] This case afforded to the Privy Council (the predecessor to the UKSC in devolution cases) an early opportunity to define the approach that the courts should take to the application of section 101(2). For one of the petitioners (as distinct from the others) the reason that he sought discharge from the state hospital was not to be returned to the community at large but instead to serve the remainder of his sentence in prison. The challenge presented a particular quirk to the test for legislative competence as drafted: that legislation must be struck down as ultra vires even where the class of persons for whom an incompatibility issue arises is restricted to just one individual. As Lord Hope put it:

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[86] Magnet, *supra* note 76 at 120. In *Robinson*, *supra* note 82, those conditions were the prospect of the more hard-line DUP and Sinn Fein replacing the more moderate UUP and SDLP as the largest unionist and nationalist parties in the Assembly and executive.
[87] *Imperial Tobacco, Petitioner*, [2012] CSIS 9 at para 71, 2012 SC 297, per Lord Reed.
[88] *Ibid* at paras 61-62.
[89] *Imperial Tobacco v Lord Advocate*, *supra* 45 at para 15, per Lord Hope.
[90] Page, *supra* note 27 at 201.
[91] O'Neill, *supra* note 11.
[92] [2001] UKPC D5, [2002] 2 AC 602.

> [I]t is open to any individual who claims that [a] provision is incompatible with his Convention rights to challenge its legislative competence on this ground irrespective of whether anyone else is affected by the provision in this way. It is fundamental to a proper understanding of this new system to appreciate that the Convention exists to protect the fundamental rights of and freedoms of each and every individual. This is not a situation in which a solution that is good for most people must be accepted as good for everybody.[93]

In the view of Lord Hope, but for the interpretative obligation, this provision would have to fall, albeit that - on the basis that 'it would not be in the public interest for section 1 of the *1999 Act* to be struck down simply because it was incompatible with [one individual's] Convention rights' - the court would have made use of section 102(1) in order to suspend the effect of that decision and allow the Scottish Parliament to correct the particular defect.[94] Applying the section 101(2) test, however, it was held that 'public' – for the purposes of defining 'public safety' - could possibly be given both a broad and a narrow reading: in the case of the former, the public in general with whom the appellant would not come into contact (thus placing the legislation outwith competence); in the case of the latter, 'a section of' the public, which would include prison officers, fellow inmates and others who visit the prison for a range of purposes, who would require to be protected from serious harm at the hands of the appellant in the event of his transfer.[95] With preference to be given to the narrow reading, the legislation could thus be saved without further amendment.

In reaching this decision Lord Hope followed his own reasoning in the section 3 HRA case *R v Lambert*[96] as to the proper scope of the interpretative obligation, which is limited by the requirement only to give effect to a Convention rights compatible reading where such a reading is 'possible'. For Lord Hope, a sympathetic reading is *not* possible where the judicial re-construction of the statutory scheme would '[do] such violence to the statute as to make it unintelligible or unworkable'.[97] In *DS v HMA*[98] Lord Hope expanded upon the overlap between section 101 of the Scotland Act and section 3 HRA:

> The word 'narrowly in sec 101(2) of the Scotland Act looks awkward where the question is whether a provision in an Act of the Scottish Parliament is incompatible with the Convention rights. Where incompatibility with the Convention rights is in issue, the obligation under sec 3(1) of the Human Rights Act is to construe the provision in any way that is compatible with them. Various techniques may be used to achieve this result. Section 3(1) defines the purpose of the exercise, not the way of achieving it. This is left to the court to work out according to the demands of each case.[99]

Whilst the requirement to read ASPs 'narrowly' was seen to be defensible as it applied to the reserved/devolved boundary, where the issue is one of the Convention rights compatibility of an ASP the 'proper starting point' is not section 101 at all, but is to 'construe the legislation as directed by section 3(1) of the *Human Rights Act*.'[100] The obligation to construe a provision of an ASP so far as it is possible to do so in a manner that is compatible with Convention rights – and in so doing to set aside the negative formulation of section 101 for the more positive formulation in section 3 HRA – is a strong one. 'The courts,' Lord Hope continued, 'must prefer compatibility to incompatibility.'[101]

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[93] *Ibid* at 617.
[94] *Ibid*.
[95] *Ibid*.
[96] [2001] UKHL 37, [2002] 2 AC 545 [*Lambert*].
[97] *Ibid* at 585.
[98] *DS v HM Advocate*, *supra* note 58.
[99] *Ibid* at para 22.
[100] *Ibid* at para 24.
[101] *Ibid*.

Although not yet tested in court, given (for now) the UK's requirement to comply with its obligations under EU law it would seem unlikely that the courts would forgo the more positive formulation in relation to interpretation under the *European Communities Act 1972* in order to achieve a reading of legislation that is compatible with EU law.[102] Thus, the overlap as between section 101 and analogue provisions in the HRA and ECA – and the preference for the latter where the issue relates to the spheres of Convention rights and one presumes also of EU law – serves to restrict the application of section 101 to a particular boundary and elsewhere to release the judiciary from its methodological constraints. Put differently, in *DS* Lord Hope was able to achieve from the bench (at least within limits) what he was unable to achieve from his seat as a legislator in the House of Lords: an alignment between the interpretative tests to be applied to legislation made by the Scottish and by the UK Parliaments.

This alignment becomes significant when we turn to consider the devolution case load. Contrary to expectations the high volume of devolved legislation has not been met with a high volume of challenges to legislative competence. At the time of writing the validity just 18 ASPs (approximately one per year) have been challenged. Amongst these Convention rights have been the dominant ground of challenge with just three challenges at the reserved/devolved boundary and three at the EU law boundary. Of the five successful challenges,[103] all of those have been on Convention rights grounds. If the judges have squeezed section 101 from the sphere of Convention rights (and perhaps also) EU law cases this leaves only a small number in which to develop the interpretative obligation as constructed in the *Scotland Act*. What is more, given the particular focus that is given during the process of parliamentary constitutional review to the reserved/devolved boundary, most notably by OAG protecting the interests of - and the reservations held by - the UK Government, as well as the caution of the Scottish Government and the legislative instincts of the Scottish Ministers and MSPs for what matters are reserved and devolved,[104] it seems likely that the pattern of a higher volume of Convention rights challenges – thus favouring a turn to section 3 HRA instead of section 101 - will continue. Section 101(2) *was* applied to a reserved matters challenge in *Henderson v HMA*.[105] There it was held that the imposition of a lifelong restriction order under section 210F of the *Criminal Procedure (Scotland) Act 1995* (as amended by section 1 of the *Criminal Justice (Scotland) Act 2003*) encroached upon the reserved matter of the *Firearms Act 1968* (which had prescribed the maximum penalty for offences convicted under that Act). Thus, notwithstanding the broad terms of section 1 of the *2003 Act*, of which section 210F was but one part, the court read the provision narrowly so as not to extend the requirement to make lifelong restriction orders in relation to offences under the reserved statute.[106]

In the application of its powers to interpret ASPs within competence the court must therefore adopt a staggered approach. First, to ask whether on a plain reading of the words used, the legislation can be read as being within competence.[107] If not, second, to determine the particular boundary or boundaries which on a *prima facie* reading have been crossed. Third, if (as in the vast majority of challenges) the boundary dispute relates to compatibility with Convention rights (or, it is likely, with EU law), can

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[102] See for example the application of the interpretative obligation in relation to EU law by the UKSC in *P v Commissioner of Police of the Metropolis*, [2017] UKSC 65 at paras 33-34, per Lord Reed.
[103] A detailed discussion of devolution jurisprudence is beyond the scope of this paper; See Christopher McCorkindale, Aileen McHarg & Paul Scott, "The Courts, Constitutional Review and Devolution" (2017) 36(2) UQLJ 289-310.
[104] McCorkindale & Hiebert, *supra* note 59.
[105] [2010] HCJAC 107, 2010 SCCR 909.
[106] *Ibid* at 909.
[107] *Imperial Tobacco v Lord Advocate*, *supra* note 45 at para 15, per Lord Hope.

any reading be given to the statute (a) that renders it compatible and (b) which '[goes] with the grain' of the legislative scheme.[108] Or, if the dispute relates to the reserved/devolved boundary, can the legislation be construed 'narrowly' (a) so as to construct a reading of the provision that is within competence and (b) in a way which goes with the grain of the legislative scheme. Fourth, if a sympathetic interpretation under section 3 or section 101 is not 'possible' (for example, because a competent reconstruction would stray too far from interpretation and towards amendment,[109] or because to do so would have political, economic or other effects that stray beyond the court's institutional role and capacity[110]) should the court apply section 102 to remove, limit or suspend the effect of its decision, in the case of the latter in order to allow the Scottish Parliament to cure the defect.

VII. Section 101 and Parliamentary Constitutional Review

Whilst section 101 has been a limited feature of devolution jurisprudence – certainly when compared to recourse to section 3 HRA - at a second site of constitutional review its impact *has* been more often and more keenly felt. During the process of *parliamentary* constitutional review section 101 has been described to be an important card which the Scottish Government will play during the iterative processes that inform the decisions made at the various check points for legislative competence.[111]

Formally, vetting for legislative competence takes place during two distinct phases - the customary three week pre-introduction period and the statutory four week period which precedes Royal Assent – in reality the heavy lifting on all fronts is done prior to introduction, by which point the Scottish Government will have engaged in three separate vetting processes. First, an internal process with SGLD and with the Lord Advocate which will inform the decision by the responsible Minister to *affirm* the legislative competence of the Bill at introduction, as well as the decision by the Scottish Government's Law Officers whether or not to exercise their discretion to refer a Bill to the UKSC during the four-week period. Second, a process *between* SGLD and OSSP which will inform the decision by the Presiding Officer to issue a positive *or a negative* statement of competence at introduction. Third, a process *between* the Scottish Government and OAG that will inform the decision whether or not the UK Law Officers will exercise their discretion to refer a Bill to the UKSC. At each of these stages the key *legal* test for each of SGLD, the Lord Advocate, OSSP and OAG is to put themselves in the shoes of the UKSC and to reach a view – based on the legal tests set out in the *Scotland Act* as well as the available jurisprudence of the UKSC and, where relevant, of the ECtHR and CJEU - on what they believe the likely outcome would be if a Bill (or the subsequent ASP) was subject to challenge. Where it is thought to be more likely than not that legislation would survive a

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[108] *Ghaidan v Godin-Mendoza*, *supra* note 53 at para 33, per Lord Rodger.
[109] *Ibid*. See also *Lambert*, supra note 96, per Lord Hope at 586.
[110] See, for example, *Re S (Minors) (Care Order: Implementation of Care Plan),* [2002] UKHL 10, [2002] 2 AC 291 where an interpretation under the *HRA*, section 3 which placed obligations on local authorities to report to back to courts where key 'milestones' within care plans for children in care were not met was held by the House of Lords to have gone beyond the proper judicial role because, inter alia, such reporting "would not come free from additional administrative work and expense" that could place a strain on scarce resources and therefore upon the local authorities' ability to discharge their responsibilities in relation to other children in care, at para 43, per Lord Nicholls.
[111] This section is based on interviews conducted with officials currently and formerly of the Scottish Government, Scottish Parliament and/or UK Government, mostly during the month of September 2015. This section focuses on the role of section 101 within the vetting process. For a more detailed and holistic account, see McCorkindale & Hiebert, *supra* note 59; Bruce Adamson, "The Protection of Human Rights in the Legislative Process in Scotland" in Murray Hunt, Hayley Hooper & Paul Yowell, eds, *Parliaments and Human Rights: Redressing the Democratic Deficit* (Oxford: Hart Publishing, 2015) ch 13; Page, *supra* note 27, ch 7.

legal challenge the benefit of the doubt will be given to the Scottish Government (meaning that the Lord Advocate will approve the section 31 report by the responsible Minister; the Presiding Officer will make a positive statement of competence; and/or, the Law Officers will allow the Bill to proceed to Royal Assent without making a reference to the Supreme Court).

Despite the Scottish Government's relatively clean bill of health thus far – at the time of writing there has been just one government Bill introduced with a negative statement,[112] and no Bills have been referred to the Supreme Court - on one or two occasions per year there will arise serious disagreement as between the Scottish Government and one or more of the SGLD, the Lord Advocate, OSSP and OAG as to what the likely outcome of a challenge in the UKSC would be. These disagreements tend to focus on specific provisions within a Bill, and on the means of achieving an objective, rather than on the legislative scheme or on the policy objective as a whole. Where disagreement persists it would seem that the Scottish Government is likely (in the view of some, too likely) to give way – that is, to make amendments to the legislation in order to secure its safe passage. These amendments might be made as much for practical reasons – for example to avoid delay to the passage of the legislation and any knock on effect to a tightly constructed legislative programme - as for principled ones (i.e. being genuinely persuaded that the relevant provision crosses one or more of the boundaries to legislative competence). Indeed, it would appear to be the case that – despite the Presiding Officer's view being just that, a view, and not a veto on the introduction of a Bill; despite the possibility that the Scottish Government's Law Officers might pro-actively use the reference procedure to *defend* contentious legislation from post-enactment challenges raised by private parties; and, despite the as yet unmet expectation that the UK Law Officers' reference might become a regularly exercised feature of the constitutional settlement – the Scottish Government has adopted a position, barely short of a presumption, that its legislation should be introduced with a positive statement by the Presiding Officer and, as far as is reasonably practicable, in a way that is unlikely to require or to provoke a reference by the Law Officers, even where that means making significant concessions on a Bill prior to introduction.

It is during these iterative processes that the impact of section 101 has been most pronounced. Where serious disagreement persists between the Scottish Government and SGLD, the Lord Advocate, OSSP and/or OAG about legislative competence, and where Scottish Ministers are *not* minded to make amendments in order to resolve a specific disagreement, section 101 has been deployed by the Scottish Government as a reason why its view as to legislative competence should be preferred. This is to say that, in the face of concerns about the legislative competence of provisions within a legislative scheme (rather than about the legislation as a whole) a typical response by the Scottish Government is that any incidental incursion across the boundaries to competence are likely to be read down by the UKSC. Thus, during the process of vetting Bills in the Scottish Parliament for legislative competence, the question 'is the legislation as introduced likely to survive judicial scrutiny' must be answered in light of a second set of considerations about whether it is possible to construe the legislation narrowly so as to bring it within competence (or to give any possible reading so as to render the legislation compatible with Convention rights) and, if so, how the UKSC might conduct that exercise (taking account of the proper scope of interpretation of the devolution statutes

[112] On the exceptional instance of a government Bill being introduced with a negative statement by the Presiding Officer see Aileen McHarg & Christopher McCorkindale, "Continuity and Confusion: Legislating for Brexit in Scotland and Wales" (6 March 2018) *UK Constitutional Law Association* (blog), online: <https://ukconstitutionallaw.org/2018/03/06/christopher-mccorkindale-and-aileen-mcharg-continuity-and-confusion-legislating-for-brexit-in-scotland-and-wales-part-i/>.

themselves that as we have seen remains unsettled) - the combination of which might reasonably be thought to stretch the benefit of doubt quite considerably.

A two-fold set of concerns flows from this invocation of section 101 by the executive to leverage the benefit of the doubt during the vetting process. First, officials engaged in the vetting process have suggested that there is a constitutional problem where the Scottish Government presents to MSPs and to the public at large a power to do X in legislation knowing (and possibly conceding to the Presiding Officer during the vetting process) that it is likely that the power will be interpreted more narrowly by the UKSC in the event of a legal challenge. As David Mead has argued in relation to section 3 HRA:

> Does it not offer an incentive to ministers to agree to term X on the floor of the House or in Committee, knowing when it is argued in the courts – at the instigation no doubt of someone who stands to lose by term X being applied – they will simply succumb and agree to term Y instead? There are grave difficulties with the constitutional suitability and propriety of such a course – and who knows in how many…cases it has occurred?[113]

Second, and following from this, we have seen that the Scotland Act 1998 envisages a dialogic approach between the Scottish Parliament and the courts in the process of judicial constitutional review and between the Scottish Government and the legislature in the process of parliamentary constitutional review. In this sense recourse to section 101 is doubly problematic. On the one hand, the absence of any reporting work done by government or by parliament to map where and why primary legislation has been made subject to section 101 (or to section 3 HRA) interpretations by the courts hinders the dialogic potential of the exercise. On the other hand, recourse to section 101 by the government, in order leverage the benefit of the doubt in *undisclosed* discussions during the parliamentary vetting process, conceals from MSPs the information that they need (for example, the true or likely nature of the intended power or its exposure to judicial censure) in the exercise of their scrutiny function.[114] *Meaningful* dialogue, in other words, demands from parliamentarians a more robust approach to the analysis of legislative competence than the prevailing culture of ignorance of and/or deference to the bureaucratic and judicial processes that surround the passage of legislation.

VIII. Conclusion

The interpretative obligation in section 101 of the Scotland Act has symbolic and practical significance. The former is to be found in the signal that it sends – to the UK Parliament as well as to the judiciary – about the autonomy and the authority of the Scottish Parliament in the new constitutional landscape. Whilst a hard legal boundary has been erected around the legislative competence of the devolved legislatures in the shape of strong-form judicial constitutional review, section 101 sits alongside the remedial discretion in section 102 in order to preserve, where possible, the validity of legislation in a way which presumes that the democratically elected Scottish Parliament intends to legislate within the scope of its powers and which encourages judicial restraint in the exercise of the strike down power. The latter is to be found in the guidance that it gives to judges as to the method by which the interpretative power must be exercised: by reading provisions as *narrowly* as possible so as to bring them within competence. The interpretative obligation therefore highlights in at least two ways the tension at the heart of the devolution settlement: its simultaneously enabling and constraining force. On the one hand, it enables the Scottish Parliament to legislate close the boundaries of legislative competence, comforted by the 'bias in favour of devolution' implicit in the

[113] David Mead, "Talking about Dialogue" (15 September 2012) *UK Constitutional Law Association* (blog), online: <https://ukconstitutionallaw.org/2012/09/15/david-mead-talking-about-dialogue/>.
[114] See also Adamson, *supra* note 111.

provision, whilst at the same time constraining the Scottish Parliament by applying a negatively formulated test in order to prevent the expansion of legislative competence by judicial rather than legislative means. On the other hand, it enables the judiciary – as in *Anderson v HMA* - to save legislation that it would otherwise (and with some reluctance) be required to strike down, whilst at the same time constraining the judiciary by directing them not only to the object of their task (the sympathetic interpretation of legislation) but also – and in contrast to the discretion entrusted to the judiciary by the analogue provision in section 3 HRA – to the method to be applied in the performance of that task. The argument that flows from this has been three-fold. First, that the practical significance of section 101 has been diluted by the willingness of the courts to avoid its constraining force by preferring in Convention rights cases (those which constitute the bulk of the devolution case load) to apply the more liberal test in section 3 HRA. Second, that the symbolic force of section 101 during the passage of the Scotland Bill was an effective means by the Labour government of straddling two contradictory positions: on the one hand, satisfying devolution sceptics with the assurance that unwelcome intrusion into reserved areas (including the Union between Scotland and England) would be controlled by a robust judicial power; on the other hand, satisfying proponents of devolution that the judicial power would only be exercised in its fullest form as a last resort where a sympathetic reading of legislation was not possible. Third, that whereas the symbolic face of section 101 was directed to the relationship between the centre and the devolved legislature and executive, and whereas its practical face was directed to the relationship between the courts and the devolved legislature and executive, arguably the most significant impact of section 101 has been on the relationship between the Scottish Government and the various actors with whom they engage during the process of *parliamentary* constitutional review. This has a doubly pernicious effect: on the one hand, recourse to section 101 might be said to dilute the standard of parliamentary review by lowering the threshold that the Scottish Government is required to cross in order to be afforded the benefit of the doubt and with that the relatively safe passage of a Bill into law; on the other hand, MSPs themselves might be deprived of the information that they need robustly to scrutinise legislation where the true nature of powers taken under the Act are concealed behind a confidential concession made during bureaucratic exchanges within the vetting process – and undisclosed to MSPs themselves during a Bill's legislative stages - as to their likely interpretation by the UK Supreme Court.