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Devolution and declaratory judgments: the Counsel General's legal challenge to the UK Internal Market Act 2020

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ABSTRACT

This commentary will focus on the Counsel General's legal challenge to the United Kingdom Internal Market Act 2020 (UKIMA). While the application for an advisory declaration in this case was refused by both the Divisional Court and Court of Appeal, this commentary argues that the substance of the application, and accompanying decision of the court, offer three points of constitutional significance regarding the Welsh devolution settlement: (i) the decision clarifies the position on the use of declaratory judgments in reference to premature questions on legislative competence; (ii) the application sets out the substance of the Welsh Government's ongoing concern regarding the content and operation of UKIMA, and its potential impact upon the Senedd's legislative competence; (iii) the application by a devolved government for judicial review of UK Parliamentary legislation marks a significant moment in the relationship between the Welsh and UK Governments.

Keywords: Brexit; devolution; UKIMA; Wales; Welsh devolution.

INTRODUCTION

In *R (Counsel General) v The Secretary of State for Business, Energy and Industrial Strategy*,[1] the claimant sought to appeal the decision of the Divisional Court to dismiss an application for an advisory declaration.[2] The claimant sought an advisory declaration on two grounds regarding the effect of the United Kingdom internal market Act 2020 (UKIMA) on the Welsh devolution settlement. Both grounds centred on the principle of legality: the first sought to contain the effect of UKIMA's classification as a protected enactment from impliedly repealing parts of the Government of Wales Act 2006 (GOWA); the second then sought to limit the exercise of delegated powers to amend primary legislation – as set out under UKIMA – to incidental and consequential amendments, subject to the principle of legality. The

1 *R (Counsel General) v The Secretary of State for Business, Energy and Industrial Strategy* [2022] EWCA Civ 118.

2 *Counsel General v The Secretary of State for Business, Energy and Industrial Strategy* [2021] EWHC 950 (Admin).

Divisional Court refused the claimant's petition on both grounds, on the basis that the application was premature in the absence of specific legislative proposals having been introduced in the Senedd.[3]

The Court of Appeal, consisting of Sir Geoffrey Vos MR, LJ Nicola Davies and LJ Dingemans, refused the appeal and upheld the Divisional Court's decision. In the Court of Appeal's view, the action was indeed premature in the absence of specific legislation and 'it would be unwise for the court to attempt to resolve technical difficulties as between restrictions and reservations in the abstract'.[4] The claimant further appealed to the United Kingdom (UK) Supreme Court but was refused permission on 9 August 2022.[5]

This commentary will consider the constitutional significance of the Divisional Court and Court of Appeal's decision. First, it will present a view that the court's decision provides an unequivocal guide on the procedure for considering an advisory declaration on the Senedd's legislative competence, in the absence of specific legislation. Second, it will set out how the matters of constitutional significance raised in the application regarding whether UKIMA may impliedly amend or repeal parts of the Welsh devolution settlement remain unanswered. Third, it will argue that the decision of the Counsel General to submit an application for judicial review against the UK Government is illustrative of a wider culture of unsettlement in the constitution of devolution.

DEVOLUTION AND THE UK INTERNAL MARKET ACT 2020

The UK's withdrawal from the European Union has presented significant challenges to the devolution settlement. Since the referendum in 2016, a series of events have served to highlight the vulnerability of the constitution of devolution when met with a unitary state mentality at Westminster. This has taken form in specific examples, such as the case of *Miller (No 1)*[6] and subsequent breaches of the Sewel Convention on key pieces of Brexit legislation,[7] as well as in political actions such as the marginalisation of the devolved

3 Ibid para 37.

4 *R (Counsel General) v The Secretary of State* (CA) (n 1 above) para 33.

5 Welsh Government, 'Written Statement: Legal challenge to the UK Internal Market Act 2020' (18 August 2022).

6 *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61.

7 See: Jess Sargeant, 'The Sewel Convention has been broken by Brexit – reform is now urgent' (Institute for Government 21 January 2020).

governments during the Brexit negotiations.[8] Taken together, these events should be understood as contributing to the emergence of a period of 'uncooperative devolution', characterised by a deterioration in trust between the UK and devolved governments, and an increase in attempts by the Scottish and Welsh Governments to challenge the UK Government on a number of its key Brexit positions.[9]

The passage of UKIMA has served to further entrench these attitudes within the UK's territorial constitution. As its name suggests, the Act works to safeguard the UK's internal market, and regulate the movement of goods and services between the four constituent nations of the UK post-Brexit. To achieve this end, UKIMA establishes market access principles comprising two elements: the principle of mutual recognition and the principle of non-discrimination within the UK's internal market.[10] Within this framework for market regulation are two points that are of particular significance for the devolution settlement. The first concerns the decision of the UK Parliament to include UKIMA as a protected enactment under GOWA[11] which prevents its modification by the Senedd, including on matters concerning an area of devolved competence. The practical impact of this decision raises questions as to UKIMA's potential to impliedly repeal parts of GOWA and restrict, and potentially reverse, the scope of devolved competence. The second point is attached to the normative effect of the market access principles which, in targeting measures that seek to establish barriers to intra-UK trade, hold the potential to limit the exercise of devolved competence in those areas. Both individually and together, these two elements of UKIMA have been perceived by the Welsh and Scottish Governments as an attempt to limit, and potentially reverse, the degree of legislative freedom and self-rule provided for under the devolution settlement, and have further damaged relations between the UK and devolved governments.[12]

In its legislative consent memorandum on the UK internal market Bill, dated 25 September 2020, the Welsh Government set out that, while it was not opposed to the principle of a UK internal market:

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8 Nicola McEwen, 'Negotiating Brexit: power dynamics in British intergovernmental relations' (2021) 55(9) Regional Studies 1538.

9 Richard Rawlings, 'Brexit and the territorial constitution: devolution, reregulation and inter-governmental relations' (The Constitution Society 2017) 28.

10 UKIMA, s 1.

11 In Wales this is provided for by UKIMA being listed as a protected enactment under sch 7B of the Government of Wales Act 2006.

12 Michael Dougan, Jo Hunt, Nicola McEwen and Aileen McHarg, 'Sleeping with an elephant: devolution and the United Kingdom Internal Market Act 2020' (2022) 138 Law Quarterly Review 650, 662.

> the proposals in the Bill go far beyond the structure that may be needed to ensure economic and regulatory cooperation between the nations of the UK and, if enacted, would undermine the long-established powers of the Senedd and Welsh Ministers to regulate in relation to matters within devolved competence.[13]

Similar concerns were raised in reports by three separate Senedd Committees[14] and included statements on the 'profound effect'[15] of the Bill on the devolution settlement, and its potential to 'undermine the devolution settlement'.[16] These concerns were also shared by the Scottish Government in its legislative consent memorandum to the Scottish Parliament.[17]

Following a series of amendments made to the Bill in the UK Parliament, the Welsh Government published a supplementary legislative consent memorandum on 3 December 2020. While welcoming the amendments, the supplementary memorandum set out the reasons for the Welsh Government's continued recommendation to withhold consent:

> A key concern for the Welsh Government is that the entirety of the Bill has been designated a protected enactment. No amendment was tabled in respect of the Bill's status and this provision therefore still stands. This, as well as the amendments already made, would need to be addressed before the Welsh Government could consider recommending consent.[18]

On 8 December 2020 the Senedd voted to withhold consent on the Bill, a decision which followed the Scottish Parliament's vote to withhold consent the previous day. Despite this, the UK Parliament proceeded to pass the Bill with royal assent being granted on 17 December. Viewing this episode in the round, we find a characteristic, but nonetheless sobering example of the practice on legislative consent exhibited on key pieces of Brexit legislation; namely, the decision to proceed to pass

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13 Welsh Government, 'Legislative Consent Memorandum – United Kingdom Internal Market Bill' (25 September 2020) para 72.

14 External Affairs and Additional Legislation Committee, *UK Internal Market Bill Legislative Consent* (November 2020); Finance Committee, *The Welsh Government's Legislative Consent Memorandum on the United Kingdom Internal Market Bill* (November 2020); Legislation, Justice and Constitution Committee, *The Welsh Government's Legislative Consent Memorandum on the United Kingdom Internal Market Bill* (November 2020).

15 Legislation, Justice and Constitution Committee (n 14 above) para 111.

16 Finance Committee (n 14 above) para 1.

17 Scottish Government, 'Legislative Consent Memorandum – United Kingdom Internal Market Bill' (28 September 2020).

18 Welsh Government, 'Supplementary Legislative Consent Memorandum (Memorandum No 2) – United Kingdom Internal Market Bill' (3 December 2020) para 22.

legislation in the UK Parliament despite consent being withheld by the devolved legislatures. As previously discussed, this pattern of practice did little to rejuvenate trust between Westminster and the devolved governments and can be viewed as a contributing factor in the Welsh Government's decision to move outside of political processes and introduce legal action against UKIMA.

THE COUNSEL GENERAL'S APPLICATION FOR JUDICIAL REVIEW

Following UKIMA coming into force on 31 December 2020, the Welsh Government moved swiftly to initiate legal proceedings against the UK Government. On 19 January 2021, then Counsel General, Jeremy Miles, issued a statement that an application for judicial review had been submitted regarding UKIMA's effect on the Welsh devolution settlement.[19]

The grounds for review, published alongside the Counsel General's statement, set out two submissions. First, that the operation of section 54(2) UKIMA, which inserts the Act as a protected enactment under schedule 7B GOWA, works to impliedly repeal areas of the Senedd's legislative competence and 'must be interpreted in accordance with the principle of legality so that it does not prevent the Senedd legislating inconsistently with the mutual recognition principle'.[20] Second, that those delegated powers to amend primary legislation set out under UKIMA 'must be limited in application in relation to UKIMA and GOWA to incidental and consequential amendments, in accordance with the principle of legality'.[21]

Citing the existence of issues of potential constitutional importance, the application was referred to an oral hearing before a Divisional Court on 16 April 2021.[22] The Divisional Court, consisting of Lord Justice Lewis and Mrs Justice Steyn, handed down its decision on 19 April 2021.

Divisional Court

In considering the application, the Divisional Court moved to establish the legal basis for bringing the action. The court held that the absence of Senedd legislation, or proposals by the Secretary of State, meant that

19 Jeremy Miles MS, 'Written Statement: Legal challenge to the UK Internal Market Act 2020' (Welsh Government 19 January 2021).

20 Grounds for Judicial Review: The Counsel General for Wales v The Secretary of State for Business, Energy and Industrial Strategy (19 January 2021) para 3.

21 Ibid para 3.

22 *Counsel General v The Secretary of State* (HC) (n 2 above) para 7.

questions on the meaning and validity of UKIMA had not yet arisen.[23] In this regard, the court referred to the general rule on prematurity, per *Yalland*, stating that while a court may produce an advisory declaration on a point of law of general importance in the public interest, it would rarely be appropriate for a court to do so in the absence of specific issues of law having been raised.[24]

The court then moved to establish that, despite the Counsel General and Welsh Government's wish to know the extent of the Senedd's legislative competence in regard to UKIMA before proposing legislation – a matter which the claimant argued would offer legal certainty on the boundaries of the Welsh devolution settlement – this 'does not justify the granting of advisory declarations either generally or in this particular case'.[25] Expanding on this point, and in response to the claimant's submissions that no factual issue needed to be identified in order to allow the court to hand down an advisory declaration, the court dismissed this position on the basis that a wider factual context was required in order to show how the proposed legislation would operate in reference to UKIMA.[26] The court thus rejected the application for judicial review on the ground of prematurity.

Court of Appeal

On 23 June 2021, permission was granted to appeal the decision of the Divisional Court. This was on the basis that the case raised important points of principle regarding the constitutional relationship between the Senedd and the UK Parliament.[27] The grounds for appeal contested that the Divisional Court was wrong to refuse the application for a declaration of principle, brought swiftly after the introduction of UKIMA, in the absence of specific legislation.[28] The appeal was heard on 18 January 2022, with judgment being handed down on 9 February.[29]

Addressing the matter on appeal, the Court of Appeal agreed with the decision of the Divisional Court in rejecting the application on the

23 Ibid para 28.

24 Ibid para 29. See *R (Yalland) v Secretary of State for Exiting the European Union* [2017] EWHC 630 (Admin) paras 23–25.

25 *Counsel General v The Secretary of State* (HC) (n 2 above) para 33.

26 Ibid para 36.

27 *R (Counsel General) v The Secretary of State* (CA) (n 1 above) para 4.

28 Ibid para 5.

29 The same court handed down a separate judgment on 16 February 2022 concerning the violation of an embargo on the publication of the 9 February judgment provided in confidence to counsel for the claimant. This matter will not be discussed here, but nevertheless raised important points regarding a breach of the CPR PD 40. See *R (Counsel General) v The Secretary of State* (CA) (n 1 above) .

ground of prematurity. Delivering the main judgment, Nicola Davies LJ offered three reasons in response to the arguments put forward by the appellant.[30] First, that the general rule regarding prematurity, per *Yalland*, is applicable in this case and it would not be appropriate for the court to issue an advisory declaration in the absence of the full factual or legal context. Second, that the appellant's argument that waiting until a specific Act is passed by the Senedd in order to bring an action would make such action susceptible to be time barred pursuant to CPR PD 54.4 did not apply in this case. Third, that Parliament has created a route to address issues of competence in light of specific legislation (per section 112 GOWA) and that the appellant's claim should thus await determination in the context of specific legislation being introduced.[31]

DISCUSSION

Having addressed the main points in the Counsel General's application, this commentary will now turn to consider the constitutional significance of the decision and its implications for the Welsh devolution settlement.

Pre-legislative review of devolution questions

The main substantive point emerging from this case sits outside of the legal effects of UKIMA and refers to the court's procedural guidance on questions regarding legislative competence. The decision of the court on this point, and its significance for future actions seeking advisory declarations, can be separated into two parts.

The first part refers to the general practice of granting advisory declarations on academic or hypothetical questions. As discussed, the Court of Appeal, affirming the decision of the Divisional Court, moved to apply the general rule regarding prematurity set out in *Yalland*; to normally refuse permission on matters regarding academic or hypothetical questions. The rule in *Yalland* builds upon the longer-standing practice that the primary role of the courts is to resolve existing disputes between parties where the outcome will have immediate and practical consequence, and to limit the danger of enunciating a position without full appreciation of the facts.[32] However, this is on the understanding that the courts do hold jurisdiction to hear hypothetical questions, and that any refusal to grant a remedy is an act of the court exercising its jurisdiction, due

30 Ibid para 25.

31 Further detail on this third point is provided at ibid paras 35–36.

32 See Lord Phillips's statement in *R (Burke) v General Medical Council* [2005] EWCA Civ 1003, [2006] QB 273, para 21.

to the reasons already discussed, as opposed to indicating a lack of jurisdiction.[33]

In the present case, the Court of Appeal's decision to refuse permission affirmed this general rule:

> When matters may depend upon or be affected by future legislation, it would generally not be appropriate to make rulings on questions of law until the precise terms of any legislation are known. In the event that the court did grant an advisory declaration, the court should proceed with caution.[34]

Subsequent caselaw has further confirmed the merits of this approach, for, when handing down its decision in the *Scottish Independence Referendum Bill* case, the Supreme Court stated that the decisions in *Counsel General*, and the earlier case of *Keatings*, were 'eminently sensible' in seeking to limit references where it was not possible to have full appreciation of their implication in practice.[35] It therefore follows that the decision in the present case affirms the general rule that discretionary limits exist on the consideration of academic or hypothetical questions, even in matters of constitutional importance.

In order to gain a complete understanding of the Court of Appeal's decision to refuse the application, however, it is necessary to also consider the influence of the devolution settlement on judicial procedure regarding questions on legislative competence. In the present case, this second part of the court's decision concerned the statutory procedure regarding questions on the legislative competence of Senedd legislation. This relates specifically to section 112 GOWA which allows for competence questions on the content of a Senedd Bill to be submitted directly to the UK Supreme Court within a four-week intimation period after a Bill has been passed by the Senedd, but prior to it receiving royal assent.[36]

On this point, the Court of Appeal relied upon the decision in *Keatings* which, on similar facts, concluded that the presence of a statutory reference procedure under the Scotland Act 1998[37] provided an additional factor, separate from the general rule on hypothetical questions, for rejecting an application for a declarator. As in the present case, the question before the court in *Keatings* was not connected to specific legislation, but concerned the hypothetical

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33 For more detail, see Lord Woolf, *Zamir and Woolf: The Declaratory Judgment* 4th edn (Sweet & Maxwell 2011) 140–145.

34 *R (Counsel General) v The Secretary of State* (CA) (n 1 above) para 26.

35 *In re Scottish Independence Referendum Bill* [2022] UKSC 31, [2022] 1 WLR 5435, para 52; *Keatings v Advocate General* [2021] CSIH 25, (2021) SC 329.

36 Equivalent provisions exist under s 33 of the Scotland Act 1998 and s 11 of the Northern Ireland Act 1998.

37 Scotland Act 1998, s 33. This provision has equivalence to section 112 GOWA.

question of whether the Scottish Parliament held competence to legislate for a second independence referendum.[38] In the present case, the existence of an equivalent statutory reference procedure under section 112 GOWA led the Court of Appeal to acknowledge the 'good constitutional reason to abide by the parliamentary process' and to apply the route created by Parliament for addressing competence concerns, prior to royal assent.[39] Despite the Court of Appeal offering limited detail in this part of its decision, the outcome in the present case follows the decision in *Keatings*, to the extent that the presence of a statutory reference procedure further narrows the general jurisdiction of the court to consider a question on legislative competence, prior to royal assent.[40]

However, as both *Keatings* and the present case arose through ordinary litigation, it is necessary to consider if a difference in approach would be applied should an academic or hypothetical question arise through a devolution issue. Guidance on this question was handed down later in the same year in the *Scottish Independence Referendum Bill* case.[41] In this case, the Supreme Court recognised certain exceptional circumstances where a court may consider a question of legislative competence, in the absence of specific legislation having been passed by a devolved legislature. In this case, the question before the Supreme Court arose as a devolution issue under schedule 6 of the Scotland Act 1998 and concerned the question of whether the Scottish Independence Referendum Bill – a draft Bill produced by the Scottish Government which had not yet been introduced before the Scottish Parliament – would fall outside of the competence of the Scottish Parliament. The draft Bill included only eight clauses and specified its purpose as 'ascertaining the views of the people of Scotland on whether Scotland should be an independent country'.[42]

While the material facts of the *Scottish Independence Referendum Bill* case are different to those arising in *Keatings* or *Counsel General*, referring specifically to the presence of draft legislation, the case nonetheless offers an insight on the approach for considering questions on competence outside of the statutory reference procedure. It was on this point that the Supreme Court offered its opinion on what constituted an exceptional circumstance: First, that the question has practical importance for the Lord Advocate's advice to ministers

38 *Keatings* (n 35 above).

39 *R (Counsel General) v The Secretary of State* (CA) (n 1 above) para 35.

40 For an analysis of the outcome in Keatings, see Robert Brett Taylor, 'Public law declarators, the jurisdiction of the court, and Scottish independence: Keatings v Advocate General' (2021) 25(3) Edinburgh Law Review 362.

41 *Scottish Independence Referendum Bill* (n 35 above).

42 Ibid cl 1.

and so would not be seen to be premature; second, that the subject matter of the Bill is certain and will not change; third, the certainty of the subject matter will discount the possibility of a later action arising under section 33 of the Scotland Act (equivalent to section 112 GOWA).[43] Thus, in *Scottish Independence Referendum Bill*, we find the Supreme Court was willing to use its jurisdiction to hear the case when only draft legislation was present due to the level of certainty attached to the subject matter of the Bill. Due to this level of certainty, the question in *Scottish Independence Referendum Bill* moved from being a hypothetical scenario to focus on a clear and measurable point of law and so is distinguishable from the present case.

In making this distinction, however, we are brought back to the conditions of the general test already discussed. Specifically, the test expresses that the presence of a legal question which is of practical importance, and which is unlikely to see a change to its subject matter, would satisfy the threshold for the court to exercise its discretion and hear an application. Indeed, this is an approach which the courts have been willing to apply in the context of ordinary litigation not concerning the devolution settlement.[44] In this regard, the difference in treatment between the present case and the *Scottish Independence Referendum Bill* case relates to the facts of the reference – and the presence of draft legislation – as opposed to whether they arose through ordinary litigation or as a devolution issue.

Moreover, while offering an important moment in the understanding of the courts' approach to devolution issues, the decision in *Scottish Independence Referendum Bill* does not alter the effect of the present case which is to impose discretionary limits to only hear matters prior to royal assent through section 112. Reading both cases together, we find that in the absence of draft legislation that affords a relevant level of certainty – itself an exceptional circumstance – the approach remains to interpret competence questions raised prior to a Bill having been passed as hypothetical due to the potential for the legal question to change in future. Thus, the decision in *Counsel General* stands, whereby a question of legislative competence will generally remain a political consideration to be answered by the Llywydd (per section 110(3) GOWA)[45] or the sponsor of the Bill, up until legislation has been passed by the Senedd.[46]

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43 Ibid para 53.

44 See Woolf (n 33 above) 142–143.

45 On or before the introduction of a Bill into the Senedd, the Llywydd is required to provide a statement on whether or not, in their opinion, the provisions of a Bill fall within the Senedd's legislative competence.

46 See the decision of the Divisional Court at *Counsel General v The Secretary of State* (HC) (n 2 above) para 33.

Legislative competence and UKIMA

Outside of the main substantive points already discussed, the subject matter of the Counsel General's application also offers a clear pronouncement of the Welsh Government's concern regarding the risk that UKIMA poses to the devolution settlement. Due to the court rejecting the application, at the time of writing these points remain unanswered.

The main point refers to the general operation of UKIMA and its impact upon the Senedd's legislative competence. As already outlined, the fundamental purpose of UKIMA is to promote the continued functioning of the UK's internal market following withdrawal from the European single market and customs union. While the Welsh Government has stated that it is not opposed to the principle of a UK internal market, it holds concerns regarding the status of UKIMA as a protected enactment under schedule 7B GOWA, as well as the extent of Westminster's powers under the market access principles.

In the interests of brevity, this discussion will focus on one specific element of the market access principles – the principle of mutual recognition – where we find evidence of a wider discussion of its terms within the Welsh devolution settlement. Under this principle, goods produced in, or imported into, one part of the UK, and which can be sold in that part of the UK without contravening any 'relevant requirements', should be able to be sold in any other part of the UK, 'free from any relevant requirements that would otherwise apply to the sale'.[47] The question of what constitutes a 'relevant requirement' is provided in section 3 of UKIMA and includes statutory requirements that prohibit the sale of goods which fall within the scope of the mutual recognition principle.[48] In other words, the operation of the mutual recognition procedure would work to disapply any relevant requirements passed by an Act of the Senedd that fall within the scope of the mutual recognition principle in relation to goods produced in, or imported into, another part of the UK.

The Welsh Government's concern regarding this principle refers to the risk that such provisions may effectively re-reserve areas of devolved competence. As discussed, the court was silent on this question on the basis that such matters cannot be determined without reference to specific proposals. However, we find additional consideration of this issue within wider Senedd business, such as in reference to the Genetic Technology (Precision Breeding) Bill in the UK Parliament. Under the Bill (now enacted),[49] certain plants and animals created using gene-

47 UKIMA, s 2(1).
48 Ibid s 3(2).
49 Genetic Technology (Precision Breeding) Act 2023.

editing technology are removed from the regulations on genetically modified organisms. When considering the effect of these provisions, the Welsh Government set out in its legislative consent memorandum that, while the Bill works to modify the regulatory framework in England, its effect would have 'significant implications'[50] for Wales, as a result of UKIMA, and is of 'constitutional concern'.[51]

In a Senedd debate on the Bill, the Minister for Rural Affairs and North Wales set out that it would be possible to 'correct' the position caused by the Bill by enacting future legislation to remove its effect in Wales.[52] However, in relation to Acts of the Senedd passed subsequently to UKIMA,[53] the principle of mutual recognition applies except insofar as the exclusions listed in UKIMA[54] apply. Due to fact that any Senedd legislation would come into force subsequent to UKIMA, and in the absence of an agreed exclusion, the Welsh Government's proposal would therefore fall outside of either category of exception. Thus, at the time of writing, the question remains open as to the full effect of UKIMA on the devolution settlement, and the powers of the devolved institutions to prevent such engagement.

Outside of this specific example exists an additional point on the general operation of UKIMA in respect to the UK's territorial constitution. On the one hand, the Act provides a mechanism for the regulation of the UK's internal market post-Brexit which, while beset by disagreement as to its operation, is in principle required to regulate the transfer of goods and services between the four parts of the UK. On the other hand, the market access principles work to achieve these ends through requiring the devolved governments to consider, and give effect to, external interests in other parts of the UK. The nature of this second point has been interpreted by the devolved governments as a direct threat to the normative understanding of devolution as a model of democratic self-rule.[55] Thus, while the substantive questions as to the legal effect of UKIMA on the devolution settlement remain unanswered, their potential impact extends beyond the practical operation of the market access principles and raises additional questions as to the wider legal and normative understanding of devolution.

50 Welsh Government, 'Legislative Consent Memorandum – The Genetic Technology (Precision Breeding) Bill', 8 December 2022, para 10.

51 Ibid para 24.

52 Senedd Plenary, 17 January 2023, para 439.

53 Certain requirements existing before the commencement of UKIMA are excluded. See UKIMA, s 4.

54 Ibid s 10, s 18, sch 1, sch 2.

55 Thomas Horsley, 'Managing the external effects of devolved legislation: virtual representation, self-rule and the UK's territorial constitution' (*UK Constitutional Law Blog* 5 October 2023).

Constitutional dynamics

In addition to those matters set out above, the political context surrounding the Counsel General's application for judicial review also raises important questions regarding the constitutional dynamics of the devolution settlement. As discussed, the backdrop to the Counsel General's legal action was built upon an apparent lack of trust and disagreement between the devolved governments and Westminster. That this escalated to the Welsh Government choosing the previously unchartered path of formal legal action to challenge the effect of UK legislation points to a further breakdown in relations between the two governments on the issue of Brexit.

In order to explain the Welsh Government's decision to take legal action against the UK Government, and to invoke the principle of legality against UKIMA, it is necessary to view this constitutional moment from two contrasting perspectives. On the one hand, the application for judicial review is illustrative of the Welsh Government's growing confidence to challenge Westminster and to assert, protect and advance the constitutional status of the Welsh devolution settlement. The origins of this position may be viewed as being partly rooted in the maturing of the Welsh devolution settlement following the Wales Act 2017, as well as also being a response to the periods of constitutional unsettlement during the Brexit process,[56] and the Covid-19 pandemic.[57] On all points, the result has been the emergence of a more assertive Welsh Government that is willing to openly challenge Westminster and to seek to proactively protect the Welsh devolution settlement against perceived dangers, including UKIMA.

On the other hand, the decision to instigate formal legal proceedings against the UK Government also works to highlight the vulnerability of the devolution settlement. As previously discussed, the events associated with the Brexit process have served to demonstrate that the devolution settlement is not sufficiently robust to handle 'constitutional shocks'.[58] A prominent example of this position during the Brexit process came through the litigation on the Sewel Convention in *Miller (No 1)*, and the subsequent examples of the UK Parliament breaching the Convention and passing legislation despite the devolved legislatures withholding legislative consent. The limited

56 See Gregory Davies and Daniel Wincott, 'Ripening time? The Welsh Labour Government between Brexit and parliamentary sovereignty' (2022) (25(3) British Journal of Politics and International Relations 462–479.

57 Gareth Evans, 'Devolution and Covid-19: towards a "new normal" in the territorial constitution?' [2021] Public Law 19.

58 Noreen Burrows and Maria Fletcher, 'Brexit as constitutional "shock" and its threat to the devolution settlement: reform or bust' [2017] Juridical Review 49.

legal recourse available to the devolved governments to counteract such actions has been a significant factor in demonstrating the vulnerability of the devolution settlement and may, to some degree, explain the decision to seek to test the limits of the legal protection available in the present case.

From both perspectives, however, it is apparent that the introduction of UKIMA has created a new arena for disagreement between the devolved governments and Westminster. In Wales, the facts of the present case suggest that UKIMA will continue to serve as a target to test the limits of the Senedd's legislative competence, while also being a provision to be proactively defended against.

CONCLUDING REMARKS

Although the Counsel General was ultimately unsuccessful in applying for judicial review on the effect of UKIMA, the case is nonetheless significant and marks a notable development in the law on devolution in Wales. The case clarifies the requirements on the correct procedure for raising questions of legislative competence prior to royal assent in Wales, and has done much to highlight the concerns of the Welsh Government regarding the potential effect of UKIMA on the devolution settlement. Additionally, the case affirms the continued unsettlement between the Welsh Government and UK Government regarding the Brexit process and offers a landmark in being the first instance of a devolved government seeking to use the principle of legality to challenge UK legislation. Finally, the case offers a notable example of how the Welsh Government has come of age and confidence, while also illustrating a continuation of the constitutional unsettlement and legal vulnerability present in the devolution settlement.