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UKIMA as red flag symptom of constitutional ill-health: devolved autonomy and legislative consent

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ABSTRACT

Devolution is a fundamental principle of the United Kingdom (UK) constitution – a 'new settlement', as Tony Blair put it, that at once responded to the democratic demand to '[bring] decision-making … closer to the people who felt a strong sense of identity' and also, in so doing, 'to ward off the bigger threat of secession'. At the heart of that principle is respect for devolved autonomy; that, within the devolved sphere, it is the devolved authorities who are best placed to wield primary and secondary law-making powers free from interference from the centre. The constitutional safeguard for devolved autonomy is a political rule: that the UK Parliament will not normally legislate with regard to devolved matters without the consent of the relevant devolved legislature(s). Until the process to withdraw the UK from the European Union (EU) began, the convention was well defined, well understood and well respected. However, the UK Government's centripetal approach to EU withdrawal and to the resulting realignment of the UK constitution has marked a significant step change. In this article I take seriously the claim made by the Institute for Government that the UK Internal Market Act 2020 is the most contentious example – a red flag symptom – of damaging new constitutional dynamics: the increased willingness of the UK Parliament and UK Government to intervene in devolved matters without devolved consent. At stake as a result is not only the efficient operation of the UK internal market but, recalling Blair, the very survival of the union itself.

Keywords: UK Internal Market Act 2020; devolution; legislative consent; Sewel Convention; parliamentary sovereignty.

INTRODUCTION

The United Kingdom Internal Market Act 2020 (UKIMA) has been highly controversial for a number of reasons: for its deregulatory bias; for its top-down or centralising approach to regulatory divergence and enforcement; for its contested necessity; and, for its potential to undermine collaborative approaches to post-European Union (EU) regulatory divergence within the UK. The Act was freed from greater controversy still when clauses, purporting to enable (in the words of

the then Northern Ireland Secretary) 'specific and limited' breaches of international law[1] and to give effect to certain regulations made under the Act notwithstanding their incompatibility with any domestic or international law,[2] were removed, albeit too late to avoid resignations by the head of the Government Legal Department[3] and the Advocate General for Scotland.[4] The Act, and the controversies that surround it, have been centred and robustly analysed in these pages and elsewhere. In this article I want to shed light on a broader post-EU controversy of which UKIMA is, in the words of the Institute for Government, but 'the most contentious example'. That is, 'Westminster's [and the UK Government's] willingness to intervene in devolved matters and amend devolved matters without consent'.[5]

Devolved autonomy is a fundamental principle of the constitution,[6] even if it is not always taught as such in our law schools, treated as such in our textbooks or respected as such by our governing institutions.[7] No mere curiosity at the constitution's Celtic fringes, devolution provided both a necessary (if insufficient) answer to the various 'crises of legitimacy' suffered by *central* government as seen from Scotland, Wales and Northern Ireland during the 1980s and the early part of the 1990s[8] and an alternative constitutional future to the erosion of the UK via Scottish secession or Irish unification.[9] Devolution, in other

1 HC Deb 8 September 2020, vol 676, col 509 (Brendan Lewis).

2 Cl 45 of the Bill as introduced. See eg J Williams, 'Clause 45 of Internal Market Bill: a striking attempt to exclude judicial review' (*EU Relations Law* 10 September 2020).

3 'Senior government lawyer quits over Brexit plans' (*BBC News* 8 September 2020).

4 'Lord Keen: senior law officer quits over Brexit bill row' (*BBC News* 16 September 2020).

5 Institute for Government, 'Legislative consent after Brexit' (briefing for the CEEACC inquiry into post-EU constitutional issues) (Committee papers 19 May, 13th meeting, 2022, session 6, Annex D) 33.

6 C McCorkindale, 'Devolution: a new fundamental principle of the UK constitution' in M Gordon and A Tucker (eds), *The New Labour Constitution: Twenty Years On* (Hart 2020) ch 6.

7 Reports of very limited, if any, treatment given to devolution in English law schools is too often reflected in the treatment given to devolution in core UK public law textbooks and is reflected further still in the mixed levels of attention given to the devolution impacts of central government policy, UK legislation and (recalling some peculiar lines of questioning and comments made in extra-judicial speeches) even in the misunderstanding of certain devolution fundamentals by Justices of the Supreme Court.

8 J Mitchell, 'Has devolution strengthened the UK constitution?' in A Paun and S Macrory (eds), *Has Devolution Worked? The First 20 Years* (Institute for Government 2019) ch 10.

9 T Blair, *Devolution, Brexit and the Future of the Union* (Institute for Government 2019) 3.

words, was not primarily a response to a specific political moment – to 'increasingly unpopular Conservatives [imposing policies] on the basis of votes cast elsewhere'[10] – but, more fundamentally, was a challenge to the very 'rules of the game'.[11] As such, new (or, in Northern Ireland's case, revived) constitutional rules were needed *between* the UK and devolved authorities to condition behaviour *at the centre* in order to secure the autonomy of devolved institutions against the continuing legislative omnipotence of the UK Parliament. The most significant of these rules has been the so-called Sewel Convention: the political rule that the UK Parliament will not normally legislate with regard to devolved matters without the consent of the relevant devolved legislature(s).

During the first two decades of devolution the Sewel Convention broadly operated as intended. It facilitated UK legislation in devolved areas where such legislation was invited or welcomed by the devolved authorities, and it enabled constructive solutions, respectful of devolved autonomy, where consent was (or was likely to be) withheld.[12] However, the centripetal approach taken to EU withdrawal by the UK Government has upended that experience. Disputes between the centre and the devolved authorities about the meaning, scope and application of the Sewel Convention have been a new and recurring feature of EU withdrawal-related UK legislation. Devolved autonomy has been *overridden* where consent has been withheld, has been *undermined* where the requirement to seek consent has been contested and has been *side-stepped* where delegated law-making powers have been taken by UK ministers in devolved areas with limited, if any, requirements to seek devolved consent for their exercise.

UKIMA is the 'most contentious example' – a red flag symptom – of constitutional ill-heath because it cuts through devolved autonomy so profoundly. This is true both in procedural terms, having been enacted without the consent of the devolved legislatures, and in substantive terms. UKIMA makes restrictive amendments to the devolution statutes and constrains the effective exercise of devolved competence in the implementation of UK-wide market access principles.

What follows is an exercise in diagnosis and prognosis. Diagnosis: that UKIMA is symptomatic of a deeper lying constitutional problem

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10 Mitchell (n 8 above) 148.

11 Ibid.

12 On the early experience of Sewel in Scotland, see A Batey and A Page, 'Scotland's other Parliament: Westminster legislation about devolved matters in Scotland since devolution' (2002) Public Law 501. On the evolution of the Convention, see A McHarg, 'Constitutional change and territorial consent: the Miller case and the Sewel Convention' in M Elliott et al (eds), *The UK Constitution after Miller: Brexit and Beyond* (Bloomsbury 2018) ch 7.

– the weakness of legislative consent as a meaningful safeguard for devolved autonomy. Prognosis: that both the UK internal market and the Union that it serves are (potentially fatally) undermined where, once again, it is the very rules of the game that are contested.

After first describing the development of devolved autonomy as a constitutional principle and of consent as its safeguard, we turn to attempts made to enhance and entrench that safeguard following two reviews of devolution in Scotland and new devolution legislation in Scotland and Wales. If those steps towards the statutory recognition of Sewel marked something of a highpoint, more recently it is attempts to redefine, recontextualise and undermine the consent safeguard, beginning with the UK Government's unilateral approach to EU withdrawal, that demands our attention in the next section. The article ends by mapping reform proposals aimed at reviving legislative consent as a meaningful constitutional safeguard of devolved autonomy but also with a recognition that, if the UK constitution is to be brought back to good health, we must expand our legal imagination beyond existing constitutional norms and architecture.

DEVOLVED AUTONOMY AND LEGISLATIVE CONSENT

In 1973, the Kilbrandon Commission reported its conclusions on 'the present functions of the present legislature and government in relation to the several countries, nations and regions of the United Kingdom' and whether 'in the interests of ... prosperity and good government ... changes are desirable in those functions or otherwise in present constitutional and economic relationships'. A majority report concluded that devolution was the preferred way to 'counter over-centralisation ... to ... strengthen democracy [and to respond to] national feeling in Scotland and Wales'.[13] Other options were considered and rejected. Continuity was thought to be insufficient because the *status quo* – the over-concentration, and the unrepresentative and unresponsive nature, of executive and legislative power at the centre – was the catalyst for nationalist electoral gains[14] and, it followed, for the Kilbrandon Commission itself.[15] Independence – the *transfer* of sovereignty to the nations over all matters – was thought to lack political support.[16] Federalism too – a *division* of sovereignty between the nations and the

13 Kilbrandon Commission, *Report of the Royal Commission on the Constitution 1969–1973* (1973) para 1102.

14 The surprise wins in previously safe Labour seats by Gwynfor Evans (Plaid Cyumru) in the 1966 Carmarthen by-election and by Winnie Ewing (Scottish National Party) in the 1967 Hamilton by-election.

15 Kilbrandon Commission (n 13 above) para 269.

16 Ibid para 497.

centre – was rejected. Reform in this direction, it was said, could not bear England's dominance in terms of 'political importance and wealth' while the wider constitutional reforms necessary to give effect to federalism – 'a written constitution, a special procedure for changing it and a constitutional court to interpret it' – were thought unlikely to find general acceptance.[17] However, devolution – where significant powers are exercised at the sub-state level but where sovereignty is *retained* at the centre – seemed capable of delivering more representative and responsive government in Scotland and Wales while avoiding the kind of radical change at the centre (the loss or the division of sovereignty) that might undermine reform efforts from the outset.

When devolution was (re)established in 1998 it straddled this juxtaposition of continuity and radical change. The continuing nature and location of sovereignty was evident in a number of ways. First, the instruments of reform were themselves ordinary statutes (the Scotland Act 1998, the Government of Wales Act 1998 and the Northern Ireland Act 1998): expressions of parliamentary sovereignty and not its concession.[18] Second, the continuing power of the UK Parliament to make laws with regard to devolved matters was expressly provided for in section 28(7) of the Scotland Act 1998 and in section 5(6) of the Northern Ireland Act 1998.[19] Third, as regards Wales, the then Secretary of State for Wales, Ron Davies, said that any express provision for Parliament's continuing sovereignty would be 'meaningless' as 'Parliament is supreme' as a matter of constitutional principle and so, by necessary implication, 'any statutory assurance to that effect can be set aside by any future Parliament'.[20] Fourth, early devolution jurisprudence described the devolved legislatures, 'however important [their] role', as having been 'created by statute and [deriving their] powers from statute', with the consequence that 'like any other statutory body, [they] must work within the scope of those powers'.[21]

However, the legal rule (whether as a matter of constitutional principle or of statutory provision) that nothing in the devolution statutes affects the power of the UK Parliament to legislate with regard to devolved matters was conditioned by a political rule: the constitutional convention, articulated by Lord Sewel during the passage of the Scotland Bill, that 'Westminster [will] not normally [do so] without the consent

17 Ibid para 539.

18 HC Deb 24 July 1997, vol 298, col 1046 (Donald Dewar).

19 And, with the delivery of primary law-making powers to Wales, now in ss 97(5) (Assembly Measures) and 107(5) (Acts of the Senedd) of the Government of Wales Act 2006.

20 HC Deb 8 December 1997, vol 302, col 685 (Ron Davies).

21 *Whaley v Lord Watson* 2000 SC 340, 2000 SLT 475, 348G. See generally R Brazier, 'The constitution of the United Kingdom' (1999) 58(1) Cambridge Law Journal 96–128.

of [the relevant devolved legislature(s)]'.[22] Despite its shorthand title, the convention was not Lord Sewel's innovation. Rather, he explicitly invoked the custom of non-interference developed during the period of devolution in Northern Ireland between 1921 and 1972.

UK authority and devolved autonomy

Section 75 of the Government of Ireland Act 1920 expressly 'saved' the 'supreme authority of the Parliament of the United Kingdom' which would 'remain unaffected and undiminished over all persons, matters, and things in Ireland and every part thereof' notwithstanding the establishment of new legislatures in Southern and Northern Ireland, and the potential for a new legislature for the whole of Ireland. In addition, section 12 of the 1920 Act conferred upon the Governor of Northern Ireland a power to grant or withhold Royal Assent to Stormont Bills. This power was subject, *inter alia*, to a power to reserve a Bill for a period of up to one year at which point, if not given Royal Assent, the Bill would lapse. However, in 1922, when the then Prime Minister of Northern Ireland, Sir James Craig, threatened to collapse his government – and in reality therefore to collapse devolution itself – if the UK Government made use of that power to veto devolved legislation that was squarely within devolved competence,[23] the UK Government's retreat had significant constitutional implications.[24] From that dispute a convention emerged that, notwithstanding the UK Parliament's unambiguous intention in the 1920 Act, it would be 'unconstitutional' for the UK Parliament or Government to intervene with regard to devolved matters without devolved consent.[25] This was no mark of divided sovereignty. There was, in Calvert's words, 'no sovereignty in the Parliament of Northern Ireland, even where local matters are concerned'.[26] Rather, it was a mark of sovereignty *conditioned* by devolved autonomy. For the Northern Ireland Government this was a matter of constitutional principle: '[n]o government could carry on in Northern Ireland', Craig said, 'if it knew that the powers of the Parliament … were to be abrogated'.[27] The motivations of the UK

22 HL Deb 2 July 1998, vol 592, col 791 (Lord Sewel).

23 The Local Government Bill (Northern Ireland) which provided for the abolition of proportional representation in local government elections.

24 For detailed accounts of this episode, see B Hadfield, *The Constitution of Northern Ireland* (SLS 1989) 49–51 and A Evans, 'A tale as old as (devolved) time? Sewel, Stormont and the Legislative Consent Convention' (2020) 90(1) Political Quarterly 165–172.

25 I Jennings, *The Law of the Constitution* (University of London Press 1955) 158.

26 H Calvert, *Constitutional Law in Northern Ireland: A Study in Regional Government* (Stevens & Sons and NILQ 1968).

27 Hadfield (n 24 above) 50.

Government were rather more practical, 'an unwillingness to become once more directly involved in Irish affairs',[28] and political: there was no 'alternative government to call upon in Northern Ireland should the Unionists resign in protest against the exercise of Westminster's sovereignty'.[29] Whatever the reason, it was an episode that 'starkly revealed the limits of central control'.[30]

The parameters of the non-interference principle were further set when, after 50 years of non-interference in devolved matters, neither by primary legislation nor by executive veto, the UK Government felt compelled by the escalation of political violence – by the weight of necessity – to introduce legislation to transfer devolved legislative and executive powers back to the centre, notwithstanding the strong objections of (including a threat to dissolve) the Northern Ireland Government.[31]

The presumption of devolved autonomy, then, was a strong one, overridden only in extremis. Reflecting the experience in Northern Ireland, the majority report of the Kilbrandon Commission agreed that 'frequent recourse to [legislation without devolved consent or to the vetoing of devolved legislation] would be bound to undermine regional autonomy and the smooth working relationship between central and regional authorities which would be essential to good government'.[32] Indeed, this was how the 1998 settlements were understood to operate. Westminster legislation with regard to devolved matters might be 'sensible and proper', as Scotland's first First Minister put it, in 'exceptional and limited circumstances', but 'day in day out, it is [in the Scottish Parliament] that the law of the land will be shaped and laid down'.[33]

Sewel and devolved autonomy

Whilst the modern convention, as it was described by Lord Sewel, refers to UK legislation with regard to devolved matters (what Alan Trench has called the 'policy' arm of the convention)[34] devolution guidance notes applicable to Scotland and Wales instruct UK Government officials also to seek devolved consent to bills that would modify devolved legislative

28 Ibid 51.
29 Ibid 51.
30 Ibid 51.
31 Evans (n 24 above) 169–170.
32 Kilbrandon Commission (n 13 above) paras 763–768.
33 Scottish Parliament Official Report 16 June 1999, col 403 (Donald Dewar).
34 A Trench, 'Legislative consent and the Sewel Convention' (*Devolution Matters* updated March 2017).

or executive competence in those jurisdictions (what Trench has called the 'constitutional' arm of the convention).[35]

The convention serves a two-fold constitutional purpose. On the one hand, it facilitates shared governance by allowing for UK legislation, where welcomed or invited by the devolved authorities, to implement agreed policies in devolved areas or to make agreed alterations to devolved competence.[36] On the other hand, it protects the autonomy of the devolved authorities against unwelcome legislative or constitutional interference from the centre.

Analysis of the legislative consent process has highlighted the (in some quarters, unexpected) frequency with which it has been used[37] as well as, until recently, the mostly uncontroversial nature of its exercise.[38] By 2015, for example, before EU withdrawal changed the dynamics of legislative consent, the Sewel Convention had been engaged more than 140 times in Scotland but consent had been withheld only once, with regard to the Welfare Reform Bill.[39] On that occasion, provisions of the Bill that related to devolved policies (such as free school meals) and services (such as social care) were amended by the UK Government to allow the Scottish Parliament to enact provisions in those areas.[40]

There were a number of factors that combined to explain the positive, co-operative and sometime collaborative experience of Sewel in the pre-EU withdrawal era of devolution. These included: political alignment between Labour and Labour-led Governments at UK and devolved levels in Scotland until 2007 and in Wales until 2010; a prevailing attitude within the Scottish National Party when it won power in 2007 to be seen as a constructive and responsible party of government;[41] pre-introduction engagement between governments to anticipate and resolve potential problems at an early stage; a willingness on the part of the UK Government to give way if devolved consent was unlikely to be forthcoming; mutually agreed practical and policy advantages of some UK-wide legislation that overlapped with

35 Devolution Guidance Note 10. For a discussion of the narrower view of the Convention as it applies to Northern Ireland see *McCord's (Raymond) Application* [2016] NIQB 85, [2016] 10 WLUK 676 [109]–[122].

36 On the use of Sewel in Scotland pre-Brexit, see Batey and Page (n 12 above).

37 A Page, *Constitutional Law of Scotland* (2015 W Green) 219.

38 A Paun and K Shuttleworth, *Legislating by Consent: How to Revive the Sewel Convention* (Institute for Government 2020) 11–12.

39 Ibid 11.

40 See the Welfare Reform (Further Provision) (Scotland) Act 2012.

41 For an articulation of this mindset by Scottish Government officials see C McCorkindale and J Hiebert, 'Vetting Bills in the Scottish Parliament for legislative competence' (2017) 21(3) Edinburgh Law Review 319–351.

devolved areas; and, the 'technical' nature of many such Bills that were conducive to uncontroversial UK-wide implementation.[42]

At the same time, the fault lines of the current breakdown in the operation of Sewel were already forming. Political alignment and the informal intra-party resolution of consent issues stunted the maturation of formal constitutional processes; the results of private pre-introduction meetings to resolve boundary disputes came at the cost of transparency and legislative scrutiny; and, the advantages of inviting or welcoming UK legislation in devolved areas, sometimes explained by issues of capacity or consistency or by the 'technical' nature of legislation, occasionally spilled over into policy areas (such as gender recognition or civil partnerships) that ought jealously to have been the domain of the devolved legislatures.[43] Indeed, in Wales during this period disputes between the UK and Welsh Governments about whether or not UK legislation related to devolved matters and therefore whether legislative consent motions were necessary (and, where consent was withheld, whether that ought to be acted upon) were already being fought in areas such as crime and policing, trade union law, and housing and planning. In another instance, the refusal by the National Assembly for Wales (as it then was) to consent to UK legislation on agricultural wages led to the passage of devolved legislation that became subject to a Supreme Court reference by the Attorney General.[44]

In the pre-EU withdrawal era, then, the legislative consent process was one that was relatively well understood to include both a policy and (though not in Northern Ireland) a constitutional arm. It was respected at the centre and by the devolved authorities as a constitutional rule that facilitated shared governance and that safeguarded devolved autonomy. Decisions to withhold consent were the exception rather than the rule, but where consent was withheld this brooked a constructive dialogue between the UK Government and the devolved authorities in search of a solution. And, reflecting this, it was understood that UK legislation with regard to devolved matters would only be made where that legislation was invited or welcomed by the devolved authorities or, with a high threshold of justification, where that legislation was felt to be necessary on the part of the UK

42 For a detailed analysis of these explanations, see Batey and Page (n 12 above).

43 See, for example, P Cairney and M Keating, 'Sewel motions in the Scottish Parliament' (2004) 42 Scottish Affairs 115–134.

44 Agricultural Sector (Wages) Bill – A Reference by the Attorney General for England and Wales [2014] UKSC 43, [2014] 1 WLR 2622.

Government despite the absence of devolved consent. Such were the conditions that Nicola McEwen described as the 'former glory' of the Sewel Convention.[45]

CONSENT RECONSTITUTED

Despite the mostly uncontroversial operation of the Sewel Convention in the pre-EU withdrawal era of devolution, there were calls for the convention to be strengthened in both major reviews of the Scottish devolution settlement: the Calman Commission (2012) and the Smith Commission (2014). For the Calman Commission, while the convention had been largely successful in defending the devolved sphere from unwanted or inadvertent UK legislation, the frequency of its use,[46] as well as the executive-driven nature of the process,[47] had caused some 'suspicion and even hostility'.[48] The Commission therefore proposed (albeit in vain) to strengthen the *political* status of the convention by entrenching it within the standing orders in both Houses of the UK Parliament (recommendation 4.2) and by improving mechanisms for interparliamentary dialogue about legislative consent motions where they arose (recommendation 4.3). In 2014, the Smith Commission, convened to make proposals for further devolution in response to the narrower than expected Scottish independence referendum result, proposed to strengthen the *legal* status of the convention by placing it 'on a statutory footing'.[49] This recommendation was given form by section 2 of the Scotland Act 2016, which conditioned the continuing legislative sovereignty of the UK Parliament with the 'recogni[tion] that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament'.[50] The statutory language adopted Lord Sewel's definition and was itself later replicated in section 2 of the Wales Act 2017. The direction of travel during the pre-EU withdrawal era of devolution, this is to say, favoured *strengthening* both the political (Calman) and the legal (Smith) standing of the Sewel Convention as a tool of shared governance and as a safeguard for devolved autonomy.

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45 N McEwen, 'Is Brexit eroding the Sewel Convention?' (*Centre on Constitutional Change* 22 January 2022).

46 Commission on Scottish Devolution, *Serving Scotland Better: Scotland and the United Kingdom in the 21st Century* (Calman Commission) (2009) para 132.

47 Ibid para 135.

48 Ibid para 135.

49 *Report of the Smith Commission for Further Devolution of Powers to the Scottish Parliament* (2014) 13.

50 Scotland Act 1998, s 28(8) as amended by s 2 of the Scotland Act 2016.

THE NEGATIVE IMPACT OF EU WITHDRAWAL ON CONSENT DYNAMICS

Given the territorially divergent majorities produced by the 2016 EU Referendum,[51] the territorially divergent attitudes of the UK, Scottish, Welsh and Northern Ireland administrations about EU withdrawal and the overlap of EU and devolved competences,[52] it was inevitable that the process of unpicking the UK's EU membership would engage vexed questions of devolved consent. The catalyst for this was the UK Supreme Court decision in *Miller v Secretary of State for Exiting the European Union*.[53] There, having held that it would require an Act of Parliament to authorise notification of the UK's intention to leave the EU in accordance with article 50 of the Treaty on the Functioning of the EU, the Court nevertheless rejected the argument that – by virtue of the statutory expression given to Sewel in the 2016 Act – the Court could and should adjudicate on whether any Notification Bill would require devolved consent. Far from being placed 'on a statutory footing', as the Smith Commission had recommended, the Supreme Court took the view that the conditional language used in the 2016 Act ('it is recognised that'; 'will not normally') amounted to no more than the *recognition* in statute of the already existing political rule. The purpose of the provision, the Court said, was not to create legal rights and duties on the part of the UK Government and its devolved counterparts. Rather, it was to 'entrench [Sewel] as a convention'[54] – one that has an 'important role in facilitating harmonious relationships between the UK Parliament and the devolved legislatures' but not one that draws its authority from statute; not one that 'lie[s] within the constitutional remit of the judiciary'.[55]

On one reading, *Miller*'s impact on legislative consent was minimal: preserving but not diminishing the convention *qua* convention (indeed, recognising its particular significance) whilst giving effect to the purpose of legislation that *recognised* but did not itself *establish* a

51 Taking the UK as a whole, 51.89% voted to leave the EU and 48.11% to remain, on a turnout of 72.21%. Taking account of votes in Scotland only 62% voted to *remain* (on a 67.2% turnout) and taking account of votes in Northern Ireland only 55.78% voted to *remain* (on a 62.7% turnout). Taking account of votes in Wales only 52.53% voted to *leave* the EU (on a 71.7% turnout), albeit in Wales the position was complicated by having a strongly pro-EU Government.

52 For an analysis of this overlap, see A Page, *The Implications of EU Withdrawal for the Devolution Settlement* (Culture, Tourism, Europe and External Affairs Committee 2016).

53 *Miller v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61.

54 Ibid [149].

55 Ibid [151].

constitutional rule.[56] However, on another reading *Miller* exposed and even exacerbated the weaknesses of Sewel as a meaningful safeguard of devolved autonomy.

First, the Advocate General's argument for the UK Government – that the Convention consists only of a policy arm (that consent is required for UK legislation with regard to devolved matters) and not a constitutional arm (that consent is required for amendments to the devolution statutes) – exposed fundamental disagreement between the UK and the Scottish and Welsh Governments about the scope of the rule. Indeed, one influential conservative commentator has gone so far as to (mis)describe the very practice of seeking legislative consent at all as a 'courtesy, but not a constitutional requirement'.[57]

Not only has the *scope* of the Sewel Convention been contested, so too has its substantive content. First, because the requirement '*normally*' to obtain legislative consent is being stripped of its normative character – requiring no special justification, such as that of necessity, to be set aside. Second, because, with this, the requirement normally to *obtain* consent is giving way to a requirement merely to *seek* consent, such that any decision by the devolved legislatures to withhold consent is of little practical consequence, brooking neither retrenchment nor amendment on the part of the UK Government.

Second, it has been argued that, by reducing the risks to the UK Government of ignoring or setting aside the Sewel Convention, the judgment in *Miller* has encouraged the UK Government's unilateral approach to post-EU legislation.[58] At the time of writing, and in stark contrast to the pre-EU withdrawal era of devolution when there were no such instances, nine Acts of the UK Parliament[59] have been enacted where the UK Government has acknowledged that Sewel is engaged but where consent has been withheld.[60]

Of these, the Scottish Government has said that UKIMA is the 'most [significant]' to be enacted without consent[61] because of its legislative impacts on the devolution settlement, because it plants UK

56 Ibid [148]. See A Page, 'Brexit, the repatriation of competences and the future of the Union' (2017) 1 Juridical Review 38–47, 41.

57 Henry Hill, 'Another Cabinet clash with Gove over the Government's pro-Union approach' (*Conservative Home* 27 January 2022).

58 McHarg (n 12 above) 178.

59 They are the EU (Withdrawal) Act 2018, the EU (Withdrawal Agreement) Act 2020, the EU Withdrawal (Future Relationship) Act 2020, the UK Internal Market Act 2020, the Professional Qualifications Act 2022, the Subsidy Control Act 2022, the Trade (Australia and New Zealand Act 2023, the Retained EU Law (Revocation and Reform) Act 2023 and the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023.

60 Scottish Government, 'Devolution since the Brexit Referendum' (14 June 2023).

61 Ibid.

ministerial powers in devolved areas and because it undermines the collaborative approach to post-EU divergence being developed through common frameworks.[62] No (mere) nationalist provocation, the Labour Government in Wales has expressed its 'clear … opposition' to the Act which it has called 'an unwarranted attack on devolution and the right of the Senedd to legislate without interference in areas devolved to Wales'.[63] And, ministers from the Scottish, Welsh and Northern Ireland administrations have together '[registered their] shared concerns about the UK Government's decision to bypass democratically agreed devolution arrangements'.[64] No other legislation makes quite so clear what precisely is at stake: the constitutional principle of devolved autonomy.

UKIMA and devolved autonomy

UKIMA was enacted in order to minimise regulatory divergence, and therefore the creation of trade barriers, between England, Scotland, Wales and Northern Ireland arising as a result of EU withdrawal. This was achieved, *inter alia*, by the establishment of two 'market access principles', mutual recognition and non-discrimination, applicable between the four nations of the UK and by the creation of new spending powers for UK ministers in devolved areas. In each case devolved autonomy is undermined by design. On the one hand, any attempt by the devolved authorities to regulate the supply of goods and services in devolved areas is rendered ineffective against goods and services subject to different (including, lower) regulatory standards in the rest of the UK. Subject to narrow and successfully negotiated exceptions, goods lawfully sold, or services lawfully authorised, in one part of the UK are automatically fit for sale or provision in all other parts of the UK (mutual recognition). And, subject to narrow and successfully negotiated exceptions, rules that regulate, *inter alia*, the sale, transport, display and packaging of goods or the provision of services in one part of the UK do not apply where they would discriminate against the sale of goods or the provision of services coming from other parts of the UK (non-discrimination).[65] On the other hand, policy choices made, and spending priorities set, by the devolved authorities might be undermined by new powers conferred on UK ministers to

62 Scottish Government, 'Legislative consent memorandum: United Kingdom Internal Market Bill' (lodged 28 September 2020) (Scottish Government LCM).

63 Senedd Research, 'The UK Internal Market Act 2020: what difference is it making?' (24 March 2022).

64 Department of Finance (NI), 'Ministers call for an end to bypassing of devolved governments)' (24 March 2021).

65 UKIMA, pts 1–3. See J Sergeant and A Stojanovic, The United Kingdom Internal Market Act 2020 (Institute for Government 2021).

spend money for the purposes of promoting economic development, providing infrastructure, supporting cultural and sporting activities and supporting educational and training activities.[66] These powers extend to devolved areas, and there is no requirement that UK ministers consult or seek the consent of devolved counterparts in the exercise of those powers (that, the UK Government has hinted, might be used to side-step the devolved authorities to build roads, regenerate high streets or tackle anti-social behaviour).[67] The Act strikes at devolved autonomy in at least three more fundamental ways. First, it was enacted against the wishes of the Scottish Parliament and Senedd despite being neither necessary, inevitable nor urgent in consequence of EU withdrawal.[68] Neither necessary nor urgent because, as was the view of the devolved governments:

> the common frameworks approach [already] provides all of the claimed objectives of [UKIMA] in guaranteeing market access across the UK, while respecting devolved competence, and, crucially, effectively providing agreed minimum standards which all producers must meet, avoiding the risk of competitive deregulation while giving producers and consumers clarity and certainty.[69]

Nor was UKIMA inevitable. The management of trade arrangements between territorial units ceding (to a greater or lesser extent) their regulatory autonomy takes many forms. Each of these arrangements is uniquely shaped by the particular balance of, *inter alia*, economic, social, political, legal and constitutional considerations agreed between its members. As Dougan et al have said, these balancing exercises might lead to a 'very limited internal market … built on a thin concept of what constitutes a barrier to trade' with a focus on 'tariffs, border controls or over protectionism'. Or, they might lead to a 'more expanded' understanding that 'would include other forms of market exclusion or segmentation, addressing regulatory obstacles that arise from the mere existence of variations in how different territories regulate the production and sale of particular goods or the provision

66 UKIMA, s 50.

67 K Andrews, 'Conservatives promise to bypass Holyrood to build roads' *The Times* (London 2 October 2023).

68 M Dougan et al, 'UK Internal Market Bill, devolution and the Union' (Centre on Constitutional Change, Cardiff University, Wales Governance Centre, UK in a Changing Europe 2020) especially Q9.

69 Scottish Government LCM (n 62 above). On the potential of common frameworks to produce a collaborative approach to divergence, see T Horsley and J Hunt, 'In Praise of cooperation and consensus under the territorial constitution: the Second Report of the House of Lords Common Frameworks Scrutiny Committee' (*UKCLA Blog* 26 July 2022).

of particular services'.[70] The political choice by the UK Government (one of the participating authorities!) to impose (on the others) a particular set of arrangements – arrangements that emphasise open trade over regulatory autonomy[71] – in the absence of devolved consent undermines the UK internal market from the start. By prioritising market access over managed divergence, UKIMA diminishes the scope for devolved authorities to innovate and to tailor policies within devolved competence to the specific needs of their territory.[72] By failing to disentangle England from the UK as a territorial unit subject to regulation *by* the UK on equal terms with Scotland, Wales and Northern Ireland, the UK internal market embeds territorial dominance of a sort that, for so long, has been considered fatal to federal or quasi-federal reform of the UK's territorial constitution.[73] And, the co-option of the devolved authorities into a form of internal market to which they are fundamentally opposed stands in stark contrast to the EU internal market, where member states 'freely consented to the adoption of the EU Treaties (and their subsequent amendment) as institutional partners' and where they were also 'broadly aligned in relation to the basic principles and structures' of the market.[74] In the case of the EU, members are reasonably expected to agree *to* regulatory outcomes that they do not necessarily agree *with*. However, in the case of the UK internal market the devolved authorities have been unable to agree even *to* its market fundamentals let alone to specific regulatory outcomes. This has bred distrust and dispute both about particular regulatory outcomes (see, for example, disputes between the UK Government and the devolved authorities about the shape of proposed deposit return schemes)[75] and about the constitutional implications of UKIMA itself (see, for example, the Counsel General for Wales's judicial review

70 N McEwen et al, 'Sleeping with an elephant: devolution and the United Kingdom Internal Market Act 2020' (2022) 138 Law Quarterly Review 650–676, 654.

71 Constitution, Europe, External Affairs and Citizenship Committee (CEEAC), UK Internal Market Inquiry (1st report, 2022 (session 6)) 3–15.

72 T Horsley, 'Constitutional reform by legal transplantation: the United Kingdom Internal Market Act 2020' (2022) 42(4) Oxford Journal of Legal Studies 1143–1169; K A Armstrong, 'The governance of economic unionism after the United Kingdom Internal Market Act' (2022) 85 Modern Law Review 635–660; McEwen et al (n 70 above).

73 T Horsley, 'Reshaping devolution: the United Kingdom Internal Market Act 2020' (*UK in a Changing Europe* 10 October 2022).

74 Ibid.

75 See Scottish Parliament Information Centre, 'From single-use plastics to the deposit return scheme: how are common frameworks and the UK Internal Market Act exclusion processes operating?' (*SPICe Spotlight* 24 March 2023).

that sought declarations that UKIMA does not and cannot curtail the legislative competence of the Senedd).[76]

Second, UKIMA unilaterally 'settled' disagreement between the UK Government and devolved authorities about the constitutional status of post-EU subsidy control[77] by amending the devolution statutes explicitly to reserve the regulation of 'distortive or harmful subsidies'.[78] Consequently, both the Scottish Government, concerned that any new UK-wide subsidy control regime would be neglectful of Scotland's specific needs, and the Welsh Government, supportive of a UK-wide scheme but opposed to the unilateral amendment of reserved matters in the Government of Wales Act 2006, lodged legislative consent motions that opposed these amendments.[79]

Third, both the Scottish and Welsh Governments objected to UKIMA's self-executing protection from modification by the devolved legislatures. By amending the devolution statutes to include itself in the category of protected statutes,[80] UKIMA rubbed against the preferred approach of the devolved authorities: that any such amendments should only be made 'on a narrow basis' and 'by agreement between the [UK and devolved] legislatures'.[81] Across the devolved authorities, the 'increasing use of [protected statutes] to constrain devolved legislative competence' is a common concern.[82]

All of this is to say that UKIMA is an unambiguous symptom of constitutional ill-health, exposing the weakness of the Sewel Convention as a meaningful safeguard of devolved autonomy when it matters most. If devolved consent may be overridden merely because the UK Government has *described* circumstances that it considers not to be 'normal' (here, the mere fact of EU withdrawal writ large),[83] free from any culture of normative justification and without any political or legal channel through which that assessment might meaningfully be contested, then the safeguarding function of the convention is illusory. Under these conditions, it is of no significance that the

76 *R (on the application of Counsel General for Wales) v Secretary of State for Business, Energy and Industrial Strategy* [2022] EWCA Civ 181, [2022] 1 WLR 1915.

77 Scottish Government LCM (n 62 above).

78 UKIMA, ss 52–53.

79 Scottish Government LCM (n 62 above); Welsh Government, 'Legislative consent memorandum: United Kingdom Internal Market Bill' (laid 25 September 2020) (Welsh Government LCM).

80 Scotland Act 1998, sch 4; Government of Wales Act 2006, sch 7B.

81 Welsh Government LCM (n 79 above).

82 Scottish Government LCM (n 62 above).

83 For an example, see 'Response from the Rt Hon Michael Gove MP, Secretary of State, to "How is Devolution Changing Post EU" letter 25 May' (CEEACC 5 September 2023) 3–4.

convention operates more or less as intended in fields unrelated to EU withdrawal:[84] the constitutional safeguard of devolved autonomy cannot sustainably depend upon the good will of the UK Government and nothing more.

Delegated legislation and legislative consent

The Sewel Convention does not extend to *delegated* legislation made by UK ministers with regard to devolved matters. In the pre-EU withdrawal period of devolution this was of little consequence. The constitutional rule that executive functions transferred to devolved ministers ceased to be exercisable by UK ministers[85] was subject only to few and narrowly defined exceptions.[86] The most significant of these were concurrently held powers, regularly used with devolved consent, to implement EU obligations.[87] Those powers had a sound constitutional justification: that the UK Government, on whom responsibility fell for the implementation of EU obligations and on whom liability would fall where those obligations were not met, could intervene to give effect to EU obligations where the devolved authorities failed to do so.[88] However, the dynamics of EU withdrawal have brought about a significant 'step change' in the approach taken by the UK Government to delegated law-making in the devolved sphere.[89] The Constitution, Europe, External Affairs and Culture Committee (CEEACC) of the Scottish Parliament has identified a 'huge' number of powers delegated to UK ministers to make secondary legislation with regard to devolved matters. Of their enabling Acts, only a small number (just two of 11 such Acts passed by the UK Parliament during the current session of the Scottish Parliament) condition those powers with a requirement on the part of UK ministers to seek devolved consent for their exercise.[90]

Recognising that 'the UK Government will increasingly make use of … statutory powers to make instruments arising from the UK's withdrawal from the EU that would include provisions within the competence of the Scottish Parliament', and that 'UK Ministers will [be

84 Ibid 3.

85 On this, see Constitution, Europe, External Affairs and Culture Committee (CEEACC), *How Devolution is Changing Post-EU* (5th report, 2023 (session 6)) 6–7.

86 See, for example, Scotland Act 1998, s 53, and the Scotland Act (Concurrent Functions) Order 1999.

87 Scotland Act 1998, s 57. See *How Devolution is Changing* (n 85 above) 6–7.

88 Page (n 37 above) 138.

89 Constitution, Europe, External Affairs and Culture Committee (CEEAC), *The Impact of Brexit on Devolution* (5th report, 2022 (session 6)) 20–29.

90 Ibid 21. For examples of delegated powers exercisable within devolved competence by UK ministers, and the consent requirements (if any) that attach to those powers, see *How Devolution is Changing* (n 85 above) Annexe B.

expected to] seek the consent of Scottish Ministers' in the exercise of those powers, 'irrespective of whether there is a statutory obligation on UK Ministers to obtain such consent', the Scottish Government and the Scottish Parliament have agreed measures to ensure that the Scottish Parliament has the opportunity to exercise 'effective and proportionate' scrutiny where consent *is* sought.[91] Statutory Instrument Protocol 2 (SIP2) explains the principle that 'Scottish Ministers will normally wish to give such consent where the policy objectives of the UK and Scottish Ministers are aligned and there are no good reasons for having separate Scottish subordinate legislation'.[92]

SIP2 builds upon but expands the scope of its predecessor agreement. In common with the equivalent protocol in Wales, SIP1 applied only in relation to regulation-making powers under the EU (Withdrawal) Act 2018. However, SIP2 applies to a broader range of EU withdrawal-related regulation-making powers.[93] These include the following powers conferred only to UK ministers by UKIMA, to each of which is attached a requirement to 'seek' (not necessarily to obtain) the consent of devolved counterparts. These are powers that reinforce the 'significant degree of control [that the UK Government, and by extension that England as a territorial sub-unit, enjoys] over the scope of [UKIMA's market access principles]':[94]

- the power to 'add, vary or remove' matters within the scope of the non-discrimination principle (section 6(5)) or 'legitimate aims' for the non-discrimination principle (sections 8(7) and 21);
- the power to amend exclusions from market access principles for goods (section 10(2)) and to add, vary or remove exclusions from market access principles for services (section 18(2)).

In addition, SIP2 applies to the following powers, to which are attached only weaker requirements to 'consult' with devolved counterparts:

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91 Protocol on Scrutiny by the Scottish Parliament of Consent by Scottish Ministers to UK Secondary Legislation in Devolved Areas Arising from EU Exit (V2) (SIP2) (1 June 2020). For guidance on the equivalent process in Wales, see National Assembly for Wales, 'Scrutiny of regulations made under the European Union Withdrawal Act 2018 A guide' (January 2019). There is no equivalent process in Northern Ireland.

92 'Protocol on scrutiny by the Scottish Parliament of consent by Scottish Ministers to UK secondary legislation in devolved areas arising from EU Exit: V2' (1 June 2021) (SIP2). For analysis of the SIP process, see R Taylor and A L M Wilson, 'Legislating for a post-Brexit Scotland: Scottish Parliament scrutiny of UK statutory instruments on retained EU law' (2023) 27(1) Edinburgh Law Review 34–63.

93 SIP2 (n 93 above) Annexe A.

94 Horsley (n 73 above).

- the power to specify maximum penalties for failure to comply with CMA information-gathering requirements (section 43(4) and section 43(5)).[95]

The general perception is that the statutory instrument protocols adopted in Scotland and Wales have worked well.[96] However, this is subject to important caveats. First, under SIP2 the Scottish Parliament's scrutiny function attaches only to the Scottish Government's decision to consent to UK delegated legislation in devolved areas, not to consent to the delegated legislation itself.[97] Second, the capacity for scrutiny under SIP2 depends upon the strength of any consent mechanism provided for in the relevant UK primary legislation. Where there is a statutory requirement on the part of UK ministers to obtain the consent of devolved counterparts before making delegated legislation, the protocol has bite. The Scottish Government would not consent, and therefore the UK Government could not proceed, where the Scottish Parliament had expressed its disapproval. Where there is no statutory requirement to obtain devolved consent, but where the protocol is nevertheless engaged because of a statutory duty to consult or to *seek* the consent of devolved counterparts, or because of a political (but non-statutory) commitment on the part of the UK Government to seek consent, the impact of the Scottish Parliament's scrutiny is diluted. Here the Scottish Government is not a veto player, and therefore the Scottish Parliament's decision might bite, but it has no teeth. Finally, where there is neither a statutory requirement nor a political commitment on the part of UK ministers to consult with, or to obtain or to seek the consent of, their devolved counterparts the protocol is redundant: there is no consent decision on the part of the Scottish Government upon which the Scottish Parliament's scrutiny function can bite. Two trends identified by the CEEACC (i) that post-EU there is a clear increase in the number and scope of delegated law-making powers being conferred upon UK ministers with regard to devolved matters but (ii) that these are increasingly conditioned by weak requirements (if by any requirements at all) to consult with devolved counterparts or to seek, but not necessarily to obtain, devolved consent for their exercise attack at *two* core rules on which the constitutional principle of devolved autonomy hangs. Not only is the Sewel Convention undermined where legislative consent can be side-stepped by UK ministers taking broad powers to make

95 SIP2 (n 93 above) Annexe A.

96 R Taylor and A L M Wilson, *Brexit Statutory Instruments: Powers and Parliamentary Processes* (SPICe Briefing Paper 2011) 14.

97 Scottish Parliament Information Centre, 'The Retained EU Law (Revocation and Reform) Bill: what's changed?' (*SPICe Spotlight* 19 May 2023).

delegated legislation in devolved areas without devolved consent, but the rule that UK ministers cease to exercise functions with regard to devolved matters is undermined where broad new functions are conferred upon UK ministers with limited, if any, constraints on their exercise. If the Sewel Convention exists to regulate devolution's inherent hierarchy of legislatures, the absence of an equivalent rule indicates that there is no – and there ought not to be an – equivalent and inherent hierarchy of governments.

DIAGNOSIS, PROGNOSIS AND SUGGESTED CURES

In order to address the problems of legislative consent there are at least three prior issues that are worth our attention.

First, there has been a proliferation in the UK constitution of consent mechanisms with no consensus on when consent mechanisms are appropriate, by whom consent is sought, of whom consent is sought, the constitutional function of those mechanisms and what consent means – between a veto and a courtesy – with regard to those mechanisms. Consider the following (non-exhaustive) list of examples.

Primary (UK) legislation

- The policy arm of the Sewel Convention (which attaches to UK legislation in devolved policy areas) applies across the devolution settlements in Scotland, Wales and Northern Ireland. However, there has increasingly been disagreement about the scope of reserved matters and whether (and if so, to what extent) UK Parliament legislation engages the convention at all.[98]
- The constitutional arm of the Sewel Convention (which attaches to UK legislation that amends devolved competence) applies only to Scotland and Wales.[99] However, there has been disagreement between the UK Government and the devolved authorities about whether consent has been sought in such circumstances as a courtesy in the interests of good governance or because the requirement to seek consent falls within the scope of the constitutional rule.

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98 See, for examples, Environment Bill (regarding forest risk commodities at para 28); the Health and Care Bill (regarding the prohibition of paid-for advertising of less healthy food online at para 45); the Elections Bill (regarding information to be included in electronic campaign material at para 52); the Social Security (Additional Payments) Bill (regarding payments to people to meet their short term needs to avoid risk of harm to their wellbeing at para 7); the Levelling-up and Regeneration Bill (regarding planning data at paras 13–15).

99 *McCord* (n 35 above).

Primary (devolved) legislation

- In Wales and Northern Ireland, the devolved authorities must obtain consent from the relevant Secretary of State in order to legislate on certain matters.

Executive (devolved) consent

- As noted above, the *ad hoc* and inconsistent development of UK ministers taking powers to act in devolved areas has been accompanied by *ad hoc* and inconsistent consent mechanisms, from requirements to seek consent (but where ministers may nevertheless act where consent is not given by a specified deadline or even where the consent decision by the relevant devolved authority is 'no'),[100] to requirements merely to consult with devolved counterparts, to powers to act in devolved areas with no consent or consultation requirements at all. There seems to be no guiding constitutional principle as to when it is appropriate for UK ministers to take such powers and as to what consent mechanisms (if any) should attach to the exercise of those powers.

Popular consent

- In Northern Ireland, the principle of consent – that 'it is for the people of the island of Ireland alone, by agreement between the two parts respectively and without external impediment, to exercise their right of self-determination on the basis of consent, freely and concurrently given, North and South, to bring about a united Ireland, if that is their wish, accepting that this right must be achieved and exercised with and subject to the agreement and consent of a majority of the people of Northern Ireland' – is a key tenet of the Good Friday Agreement 1998. This is reflected in the border poll provisions of the Northern Ireland Act 1998. In addition, *cross-community consent* is required, *inter alia*, for certain 'key' decisions (such as budget allocations) and to the continuation or not of the Northern Ireland Protocol. However, as Professor Katy Hayward has said, shifting political dynamics in Northern Ireland post-EU mean that what was once thought a safeguard of the union – the requirement for (a majority unionist) Northern Ireland to consent to unification – might become instead a signpost to unification.[101]

100 European Union (Withdrawal) Act 2018, s 12.

101 K Hayward and D Phinnemore, 'Breached or protected? The "principle" of consent in Northern Ireland and the UK Government's Brexit proposals' (*LSE Blog* 11 January 2019).

- Section 1 of both the Scotland Act 1998 and the Government of Wales Act 2006 provide that devolution may only be abolished with the consent of the people of Scotland or Wales as expressed in a referendum.

Sometimes, in other words, consent must be obtained and sometimes it must be sought. Sometimes consultation is enough. Sometimes consent requirements are imposed on the UK authorities and sometimes on the devolved. Sometimes consent must be sought of legislatures, sometimes of ministers and sometimes of the people. Sometimes consent is a decision and sometimes it is merely a view. Sometimes consent is a creature of statute and sometimes it is a creature of convention. Sometimes it sits awkwardly between. Sometimes consent requirements protect devolved autonomy, and sometimes they inhibit it. Sometimes consent means something close to a veto, and sometimes it appears to be little more than a courtesy. Sometimes there is no consent requirement at all. What *is* certain about consent is that it plays a significant part in the regulation of devolution in the UK. However, with such a proliferation of use, and with rapidly changing political dynamics affecting even its more established uses, it is little wonder that there seems be no shared understanding of what consent means and what it requires both at a fundamental level and in the day-to-day functioning of the constitution.

Second, the *ad hoc* and inconsistent application of consent mechanisms, with limited, if any, means of enforcement, tilts the balance of power towards the centre. For example, there have been, until recently, relatively weak mechanisms of intergovernmental relations (IGR) and dispute resolution in the UK, in which the UK Government has been described as 'judge, jury and executioner'.[102] And, in the context of legislative consent, because the power of initiative lies with the UK Government, with no effective mechanism for dispute resolution or judicial oversight, it has been solely in the UK Government's gift to interpret the scope of reserved matters and the meaning of 'not normally' so as to avoid any requirement to seek consent (because of a broad interpretation of reserved matters) or to justify UK legislation that overrides devolved consent (because of a broad interpretation of circumstances deemed 'not [to be] normal').

Third, there is a danger that in these debates about legislative consent we talk past one another. The UK's uncodified constitution is liable to produce ambiguity at the level of fundamentals and first principles. So, on one view, the pessimistic account of consent mechanisms offered here might entirely be in keeping with the constitutional *status quo*.

102 See evidence to CEEAC by Prof McEwen and Dr Anderson quoted in *Impact of Brexit* (n 89 above) 18.

Proponents of this view might argue that the UK Parliament always retained the power to legislate with regard to devolved matters and that UK primary legislation that overrides devolved consent, or that enables UK ministers to act in the absence of devolved consent, is merely a manifestation of that power.[103] On another view, and recalling Jennings, the increasing willingness of the UK Parliament and of UK ministers to intervene with regard to devolved matters in the absence of devolved consent, might properly be called 'unconstitutional': trends that should be rolled back to fit within existing constitutional norms and architecture.[104] Finally, it might be argued that our existing constitutional norms and architecture are no longer fit for purpose. Proponents of this view might argue that political reality has changed – that UK primary or delegated legislation with regard to devolved matters, even in the absence of devolved consent, are new features of an evolving settlement. According to this view, new constitutional norms and new constitutional architecture are needed – new constitutional thinking is needed – in order to regulate the exercise of those powers.

So, what might be done?

A range of reform proposals have been made to address the problem of legislative consent. These include: placing the Sewel Convention on a more robust statutory footing and making its exercise subject to judicial review; making amendments to the UK legislative process; making new political commitments to respect devolved autonomy; establishing an entirely new constitutional settlement; conducting inter-governmental/parliamentary work on the principles and conditions that ought to govern the exercise of UK powers in devolved areas and the consent mechanisms that attach to them. These proposals have come from governments and legislatures, political parties, think tanks and academics and might be grouped as follows.

Primary legislation in devolved areas

Statutory amendment and a new justiciable rule

For some, reform should be aimed at removing the ambiguities inherent in section 2 of the Scotland Act 2016 and the Wales Act 2017. They recommend either that the phrases 'it is recognised that' and 'not normally' are removed so as unambiguously to place Sewel on a statutory footing[105] or that negotiations between the UK and

103 Ibid 28.

104 Jennings (n 25 above) 158.

105 See, for example, Labour Party, A *New Britain: Renewing our Democracy and Rebuilding our Economy* (2022) (also referred to as the Brown Commission) 102–104.

devolved authorities should clarify the conditions (the 'not normal' circumstances, their assessment and the means of contestation and dispute resolution) that would properly authorise UK legislation with regard to devolved matters in the absence of devolved consent.[106] It has also been recommended that the *scope* of the rule – does it apply *as a rule* only to the policy arm of the convention (ie to UK legislation in devolved policy area) or does it also apply *as a rule* (and not only as mere practice or courtesy) to the constitutional arm of the convention (ie to UK legislation that amends the scope of devolved powers) – should be clarified. This could be done by way of legislative amendment to tighten the language used in section 2 of the 2016/2017 Acts or by way of a public statement by both the UK Government and the devolved authorities about the constitutional importance of the rule and its application *qua* rule to the constitutional arm of the convention.[107]

For some, these measures would have the additional and welcome effect of making the rule justiciable (ie making disputes about its application subject to the jurisdiction of – and resolution by – the courts). It was ambiguity of language ('it is recognised that'; 'not normally') that persuaded the Supreme Court that the nature of section 2 of the 2016 Act was political rather than legal.[108] Removing this ambiguity would align with the commitment made by the Smith Commission to place the Sewel Convention on a statutory footing and is worthy of careful consideration in light of the Brown Commission's recommendation to a potential incoming Labour Government to do just that.[109] However, these solutions face considerable constitutional hurdles. On the one hand, any amendment in this direction will itself be vulnerable to further amendment or repeal by a future parliament. On the other hand, the pressure placed on the courts to strike down – or to take measures short of strike-down such as to disapply or to declare 'unconstitutional' – provisions of a UK statute that stray unconstitutionally into devolved areas might draw the judiciary into high-stakes political controversy at a time when the Supreme Court is sensitive to accusations of constitutional activism.[110]

106 See, for example, Paun & Shuttleworth (n 38 above) especially 27; Welsh Government, Reforming Our Union: Shared Governance in the UK (2019) especially 7–9; A McHarg briefing for CEEAC, in Institute for Government (n 5 above) Annexe C.

107 Paun & Shuttleworth (n 38 above); McHarg (n 106 above); and A McHarg, *The Contested Boundaries of Devolved Legislative Competence: Securing Better Devolution Settlements* (Institute for Government and Bennett Institute for Public Policy 2023) especially 19–20.

108 *Miller* (n 53 above) [148].

109 Brown Commission (n 105 above). See also M Hexter, 'Is it time to reform the Sewel Convention?' (IWA 24 January 2019).

110 See C Gearty, 'In the shallow end' (2022) 44(2) London Review of Books.

Reform to parliamentary procedures

For some, the political nature and consequences of the Sewel Convention mean that boundary disputes are better resolved in the legislative arena and not by courts.[111] Their focus is on reform to the role of parliament(s) to ensure better scrutiny of decisions by the UK Government to proceed with legislation with regard to devolved matters where devolved consent has been withheld or where there is a dispute as to whether the convention is engaged at all. Proposals in this direction include:

- *Ministerial statements* could be made upon the introduction of every Bill into the UK Parliament detailing its devolution implications and, if legislative consent is required, detailing the level of engagement with the devolved authorities to manage that process and to resolve any disagreements at an early stage.[112] This would serve to inform the UK Parliament about the devolution implications of its legislation and also to focus UK Government's minds in the pre-introduction stage to resolve issues with devolved counterparts as early as possible (including to avoid strong censure where committees are later engaged).
- *Enhanced role for committees* in the scrutiny of legislative consent issues. Any requirement for a ministerial statement at the point of a Bill's introduction could trigger scrutiny by a committee of the UK Parliament at which devolved authorities would have the opportunity to give reasons for any decision to withhold consent and UK ministers would have the opportunity to give reasons for any decision to proceed in the absence of devolved consent. Any such committee might have the benefit of special advisers and would have the capacity to hear expert evidence about the constitutional implications of legislating in the absence of devolved consent.[113]
- An *additional legislative stage* could give both Houses of the UK Parliament an opportunity to consider whether to proceed with a Bill in the absence of devolved consent. This stage could begin with a ministerial statement to both Houses setting out the reasons for doing so, could provide an opportunity for the devolved authorities to set out their position(s) and could enable

111 See, for example, House of Lords Constitution Committee, *Respect and Cooperation: Building a Stronger Union for the 21st Century* (10th report, 2012–22) especially paras 125–142.

112 See, for example, Paun & Shuttleworth (n 38 above); Welsh Government (n 106 above).

113 Paun & Shuttleworth (n 38 above).

committees to report on the implications of proceeding in the absence of devolved consent.[114]

- *House of Lords scrutiny* could be made more robust where legislation engages the Sewel Convention. This could include all Bills being introduced into the Lords with a devolution memorandum outlining the Bill's devolution implications and the nature and extent of any engagement with devolved authorities, or an explanation why in the view of the UK Government devolved consent is not required. The Procedure and Privileges Committee could tag the lack of devolved consent against each stage of a relevant Bill's consideration in the Lords. And, the Lords could advise on the constitutional implications of proceeding in the absence of devolved consent.[115]
- *Opportunities for early engagement between legislatures* could be developed in order to identify, manage and resolve boundary disputes as they arise.[116]
- *Parliamentary endorsement* could be given to any negotiations between the UK Government and devolved authorities about the significance and scope of the Sewel Convention or about the conditions that might properly authorise UK legislation to proceed in the absence of devolved consent. This could be done concurrently by the UK and devolved legislatures.[117]

Such approaches might, to repurpose the famous *dicta* of Lord Hoffmann, force the UK Government and the UK Parliament to 'squarely confront what it is doing and [to] accept the political cost'[118] of proceeding with legislation in the absence of devolved consent. However, the breakdown of the Sewel Convention *has been* a result of conscious choices by the UK Government about which it has priced in and accepted the political cost. What is lacking is not self-awareness on the part of the UK Government or the UK Parliament but rather a forum or other means by which the devolved authorities – *at their initiative* – might contest the application of, and enforce, the rule. Such proposals might further embed a culture of justification at the UK level – but it would be precisely that, justification after (or despite) the fact.

114 Welsh Government (n 106 above).
115 House of Lords Constitution Committee (n 111 above).
116 Ibid.
117 Paun & Shuttleworth (n 38 above); McHarg (n 106).
118 Quote adopted from Lord Hoffman's *dicta* on parliamentary sovereignty and fundamental rights in *R (Home Secretary) ex p Simms* [2000] 2 AC 115, 131.

Reform to (inter-)governmental practice

As well as these statutory or parliamentary reforms, it has been suggested that better (inter)governmental practices could ease tensions that currently inhibit the proper operation of the convention. Some of these have already featured above. For one, any requirement that a devolution statement be made by UK ministers would require pre-legislative internal scrutiny by UK Government lawyers and could be informed by pre-legislative engagement with devolved counterparts in order to identify, manage and resolve disagreement before legislation is introduced into Parliament.[119] This might help to ease tension between governments where the stakes are relatively low. However, where the stakes are high it is possible that conditions will be less conducive to constructive pre-legislative discussions. And, where conditions are ripe for meaningful dialogue, the trade-off, familiar to intergovernmental working where consensus is achieved behind closed doors, is weaker transparency, scrutiny and accountability.[120] For another, any process that engages the UK Government and devolved authorities to agree to the importance and scope of the convention and to agree to the conditions that might properly authorise UK-wide legislation in the absence of devolved consent would be politically fraught: requiring one party to cede their present power of initiative and interpretation; providing 'sign-posts to the guilty' by defining the exception as well as the rule; a defining category (what is 'not normal') that by its very nature evades substantive if not procedural definition; and requiring good faith (and the acceptance of good faith) on the part of devolved governments whose interests in restoring the UK constitution to good health might be questioned.

Other recommendations at the level of governments include: amendments made by the UK Government to embed the Sewel Convention in the Cabinet Manual and the Guide to Making Legislation;[121] the routine sharing of draft legislation by the UK Government with meaningful opportunities to hear and respond to views from devolved counterparts;[122] and, the agreement of a new Memorandum of Understanding between the UK Government and devolved authorities 'based on a clear constitutional design' for devolution outside the EU.[123]

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119 Paun & Shuttleworth (n 38 above).

120 See, for example, the account of pre-legislative exchanges between the Scottish Government and UK Government lawyers given by McCorkindale and Hiebert (n 41 above).

121 House of Lords Constitution Committee (n 111 above).

122 Paun & Shuttleworth (n 38 above).

123 *How Devolution is Changing* (n 85 above) 15–16.

For some, recently reformed arrangements for IGR in the UK – arrangements that promote 'collaboration'; that seek to resolve or manage 'disagreement'; and, that commit to clear and agreed processes initiated by any UK administration – provide a promising space for the resolution of disputes about legislative consent. At the very least, and as McEwen has said, if the new IGR arrangements are invoked, 'the UK Government [can no longer] deny the existence of a dispute [as] now any administration can escalate a disagreement to a formal dispute'.[124]

However, such solutions might encounter problems of practice and principle. As to the former, to date new IGR arrangements have done little to promote positive IGR. At the time of writing, five UK statutes have been enacted in the absence of devolved consent since the new arrangements took effect, none of which were referred for resolution in that space. How effective these new arrangements might be – indeed, whether they will come to be used at all when the stakes are high – remains to be seen.[125] As to the latter, IGR arrangements might be thought an 'inappropriate' forum in which to resolve what are in principle (if not entirely in practice) inter-*parliamentary* disputes about legislative consent.[126]

Constitutional entrenchment

For some – acutely aware that constitutional entrenchment rubs against still dominant accounts of parliamentary sovereignty – more fundamental change is necessary. Recommendations in this direction range from: new institutional means of entrenchment, achieved by placing enhanced legislative powers in the hands of a reformed second chamber;[127] an entirely new written constitution built according to federal principles;[128] and, a new constitutional convention of the people of the UK.[129] Yet, as Morgan and Wyn Jones have said, the size of the task can barely be exaggerated. To achieve meaningful entrenchment would require 'nothing less than a constitutional revolution' – at least a revolution of our constitutional thought – resulting in a level of upheaval '[without] precedence in the modern history of the state'.[130]

124 Quoted in *Impact of Brexit* (n 89 above) 18. See generally House of Lords Constitution Committee (n 111).

125 See A McHarg, written evidence to the Scottish Affairs Committee's inquiry Intergovernmental Relations: 25 Years since the Scotland Act 1998 (17 October 2023).

126 Ibid.

127 Brown Commission (n 105 above).

128 Welsh Government (n 106 above).

129 Hexter (n 109 above).

130 K Morgan and R Wyn Jones, 'Brexit and the death of devolution' (2023) Political Quarterly (online first) 9.

Secondary legislation in devolved areas

A number of proposals have addressed the *ad hoc* and inconsistent application of consent mechanisms to the exercise of delegated law-making powers taken by UK ministers in devolved areas. To the extent that reform proposals in this direction accept in principle that such powers might be 'sensible and proper' in certain circumstances, they seek agreement between the UK Government and devolved authorities about the principles at stake and their proper use and regulation. The UK Government should be subject to a strong duty of justification where such powers are taken so as to avoid their normalisation; ambiguous legitimacy and accountability for the exercise of powers in devolved areas;[131] and the hollowing out from within of the reserved powers model of devolution.[132] This could require consultation by UK ministers with devolved counterparts about potentially problematic Bills at an early stage and by a prescribed deadline before introduction. It could require agreement between the UK and devolved authorities about the nature and strength of consent mechanisms and about whether consent for delegated law-making powers should be obtained or sought from devolved ministers only or also from the devolved legislatures.[133] Means could be devised to update Parliament on the extent and nature of engagement between the UK and devolved authorities and about the existence, scope and exercise of such powers.[134] And, an interpretative presumption, created by statute and rebuttable only by express words in subsequent legislation, could require UK ministers to obtain devolved consent for the exercise of delegated law-making powers with regard to devolved matters.[135]

Here, the problem of constitutional ambiguity – our capacity to talk past one another – becomes clear. On one reading, these new executive powers might simply be unconstitutional: incompatible with a devolution settlement that established a hierarchy of legislatures but no equivalent hierarchy of governments. According to this reading, the most elegant solution is to repeal such powers and to restore the *status quo ante* of very narrow exceptions agreed on a consensual basis between the UK and devolved authorities. Another reading might be that – for better or for worse – UK ministerial powers in devolved areas are now a feature of the devolution settlement, not a bug. According to this reading, the new political reality requires new constitutional

131 A McHarg, 'Ministerial powers and devolved competence' (*Policy Exchange* 17 March 2023).

132 McHarg (n 106 above).

133 Hansard Society, Proposals for a New System for Delegated Legislation (2023) 36–37; McHarg (n 107 above).

134 Hansard Society (n 133 above).

135 McHarg (n 107 above) 21.

norms and architecture to regulate the exercise of those powers. This could mean, for example, statutory means by which the devolved legislatures can call UK ministers and their departments directly and routinely to account to them for the exercise of delegated law-making powers in devolved areas. Or, it could mean new IGR mechanisms that allow for the meaningful resolution of disputes where the exercise of those powers undermines policy decisions taken in devolved areas by democratically elected and democratically accountable devolved institutions.

To illustrate the issue, let us return to UKIMA as a red flag symptom of constitutional ill-health. Consider the prospect raised by the UK Government that it might exercise its section 50 spending powers to build a motorway relief road in Wales in the face of the Welsh Government's decision (squarely within devolved competence) not to do so.[136] This invites questions of democratic legitimacy and of democratic accountability that are not adequately answered by existing constitutional norms and architecture. As to the question of legitimacy: how does the democratic mandate of the UK Government weigh against the democratic mandate of the Welsh Government to make decisions for Wales in devolved areas; how is this to be measured; and, to what extent is the legitimacy of UK ministers undermined here by the absence of devolved consent to UKIMA and by the absence of consent mechanisms within section 50 of UKIMA? As to the question of democratic accountability: how, if at all, can UK ministers meaningfully be held to account for the expenditure of public money in devolved areas as well as for the inevitable impact of that expenditure on the environment and related emissions targets set by the devolved authorities. Reflecting on this theme, the CEEACC of the Scottish Parliament concluded its unanimous report into *How Devolution is Changing Post-EU* with an important reminder of the constitutional stakes: the 'starting point', they said, of any review of the devolved legislatures' role in the post-EU landscape should be the '*fundamental constitutional principle* [emphasis added]' that 'the [devolved legislatures] should have the opportunity to effectively scrutinise the exercise of all legislative powers [exercised] within devolved competence'.[137] To do so will require new lines of accountability to be drawn *across* the jurisdictions of the UK and not only *within* those jurisdictions.

136 For details of the proposed use of these powers in relation to Wales, see I Wells, 'M4 relief road: UK ministers "could bypass Welsh Government"' (*BBC News* 10 October 2020); and analysis by Professor Daniel Wincott, 'The M4 and the Internal Market Bill' (Thinking Wales – Meddwl Cymru 13 October 202).

137 *How Devolution is Changing* (n 85 above) 36–37.

CONCLUSION

Of course, and as McHarg has said, finding solutions to the pernicious problem of legislative consent is not easy: 'parliamentary sovereignty', after all, 'is a barrier to implementing any systematic or mandatory constitutional solution'.[138] However, meaningfully to accept devolved autonomy as a fundamental principle of the constitution is meaningfully to accept devolved consent as the essential core of that principle. To do so requires us to engage in an exercise of constitutional imagination – breaking down traditional understandings of where and how sovereignty lies, of where and how power is held, of with whom and how power is shared and where and how the powerful are held to account for exercise of that power. UKIMA as a symptom of constitutional ill-health is indicative of its cure. Parliamentary sovereignty was invoked to override consent and to legislate for a particular, and territorially contested, form of internal market. Parliamentary sovereignty was invoked to place UK ministerial powers in devolved areas and to do so with only weak requirements, if any, to seek devolved consent for their exercise. And, the failure to decouple England as a territorial unit from the UK Government and from the sovereignty of the UK Parliament has created an unsustainable advantage for one component unit of the market over the rest. If we are to be lifted from 'an extended period of constitutional purgatory' – a period in which the current devolution settlement(s) persist 'not because it has any real supporters, not because it has any continuing vitality, but simply because no alternative is possible'[139] – it is to parliamentary sovereignty that we must turn. It was not necessary in 1921 to cede sovereignty to, or to divide sovereignty with, Northern Ireland to establish the constitutional principle of devolved autonomy. Quite the opposite, it was the assertion of devolved autonomy – a constitutional principle that carried its own justification independent of devolution's statutory basis – that conditioned the exercise of parliamentary sovereignty. If that seems too significant an obstacle to clear, the very achievement of devolution in the UK is evidence enough that fundamental constitutional reform is only impossible until it is not. The first step on the road is to acknowledge the existence and the nature of the problem. That has been the purpose of this article. The second, enabled and armed with that knowledge, is to see and to seize the unpredictable opportunities for change that present themselves

138 McHarg (n 107 above).
139 Morgan and Wyn Jones (n 130 above).

in unpredictable ways at unpredictable moments. *That* is the work of our constitutional imagination.[140]

140 On this, see the account given of Scottish devolution in M Goldoni and C McCorkindale, 'Why we (still) need a revolution' (2013) 14(2) German Law Journal 2197–2227.