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NORTHERN IRELAND

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Spring Vol. 75 No. 1 (2024)

Special Issue:
Undoing Devolution by the Back Door? The Implications of the United Kingdom Internal Market Act 2020

Guest editors: Tom Hannant and Karen Morrow

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Editors' introduction: Undoing devolution by the back door? The implications of the United Kingdom Internal Market Act 2020

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Public awareness of tensions between the constituent Governments of the United Kingdom (UK) has been raised in recent years by high-profile issues such as the varying responses to the Covid pandemic. However, what is likely to prove by far the most significant site of contention between the Westminster and devolved Governments is rather more mundane and has failed to gain much attention at all outside of professional legal and political circles.[1] The blandly titled UK Internal Market Act 2020 (UKIMA) – enacted ostensibly to maintain the fluidity of the UK's internal market post-Brexit – has, despite its failure to capture sustained media and popular attention, been a reliable source of political and legal controversy since its introduction as a Bill in September 2020.[2] During the Bill's passage, the most attention-grabbing[3] controversy concerned the Government's ultimately defeated attempt to absolve the UK of its international legal obligations, albeit in a 'very specific and limited way'.[4] Motivated primarily by the aim of ensuring that the newly established UK internal market would extend to Northern Ireland, the Bill as introduced would have both violated the terms of the UK–European Union (EU) Withdrawal Agreement[5] *and* empowered UK Government ministers to subsequently disapply parts

1 Philip Sim, 'What is the row over UK "internal markets" all about?' (*BBC News* 22 December 2020) provides a rare example of coverage in the mainstream press.

2 For an overview of the main controversies during UKIMA's passage, see: J Deans, 'The Internal Market Bill: a specific and limited controversy?' [2021] Juridical Review 48–58.

3 Indeed, this aspect of the Bill was sufficiently controversial that it led to front page headlines in four national newspapers – all 'broadsheets' – on 9 September 2020.

4 HC Deb 8 September 2020, vol 679, col 509.

5 Specifically, art 4, under which the UK–EU Withdrawal Agreement must be given direct effect and supremacy over conflicting domestic law.

of the Northern Ireland Protocol to that Agreement.[6] The prominence of this debate to a large degree overshadowed other concerns with the Bill, especially the serious misgivings about the impact on the UK's devolution arrangements. Whilst the abortive attempt to evade international law was subject to robust criticism for the damage it stood to incur on the UK's external standing, the internal threat posed by UKIMA's central provisions to the devolution settlement was not subject to criticism of comparable prominence, and so it proceeded largely as the Westminster Government intended.

To anyone with an interest in constitutional law and politics, the profound implications of UKIMA for devolved government and what it signals about the devolved administrations' future relationship with the Westminster Government raised considerable disquiet. We initially discussed our concerns in Swansea Law School's Governance and Human Rights Research Group and, recognising the broader reach of the issues, successfully applied for funding from the Society of Legal Scholars to host a conference entitled 'Undoing Devolution by the Back Door? The Implications of the United Kingdom Internal Market Act 2020'. This event, held at Swansea University in July 2022, focused squarely on UKIMA's impact on devolution. The conference – and this special issue drawing on it – consciously sought contributions drawn from across the UK, with particular emphasis on the devolved administrations, and, recognising the generational significance of what is at stake, encouraged participation across a range of established and early career authors.

UKIMA came into force in January 2021. The primary purpose of the Act was to 'guarantee the continued seamless functioning of the UK Internal Market',[7] filling a perceived regulatory gap that would be left once EU law ceased to fulfil that function, post-Brexit. In pursuit of this aim, UKIMA introduces two market access principles – mutual recognition and non-discrimination[8] – which are designed to ensure a seamless flow of goods and provision of services between the constituent parts of the UK, albeit with distinctive arrangements for Northern Ireland,[9] reflecting its unique position under the UK–EU Withdrawal Agreement.[10] Apart from these trade-

6 For an analysis of the Bill to this effect, see House of Lords Select Committee on the Constitution, *United Kingdom Internal Market Bill* (HL 2019–21, 151) ch 4.

7 Department for Business, Energy and Industrial Strategy, *UK Internal Market* (White Paper CP 278 2020) 10.

8 UKIMA 2020, especially pts 1, 2 and 3.

9 Ibid pt 5.

10 For a discussion, see, in this issue Lisa Claire Whitten, 'Northern Ireland and the United Kingdom internal market: the exception that disproves the rules?' (2024) 75(1) Northern Ireland Legal Quarterly 154–167.

focused provisions, the Act also empowers the UK Government to provide financial assistance for projects across the UK,[11] replacing the function formerly fulfilled by the EU structural funds, and reserves powers over subsidy control to the UK Parliament.[12] While these mechanisms are ostensibly similar to the EU arrangements they replace,[13] the internal market they establish differs in several respects: the absence of established forms of co-decision in respect of positive harmonisation;[14] the drastically more limited range of public policy exceptions to the market access principles;[15] and the now disproportionate size – and therefore influence – of the English economy and its regulatory arrangements,[16] to name but a few.

Scholarship on its impact is growing and this special issue contributes meaningfully to the crucial analysis and debate in this area. Initial coverage saw several major surveys of the architecture of the Act.[17] These invaluable contributions provide a bird's eye perspective of its main features and functions. A major focus of these articles is comparing – and to a large degree distinguishing – the provisions of UKIMA from the EU and other approaches to internal market governance. The potential impact of UKIMA on devolution is also brought into focus at a general level. It should be noted that parliamentary committees across the UK have undertaken significant work assessing the impact of UKIMA, both during the passage of the Bill[18] and in relation to

11 UKIMA 2020, pt 6.

12 Ibid pt 7.

13 See, for example, 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 650–676; Thomas Horsley, 'Constitutional reform by legal transplantation: the United Kingdom Internal Market Act 2020' (2022) 42(4) Oxford Journal of Legal Studies 1143–1169.

14 Dougan et al (n 13 above)

15 Horsley (n 13 above); Jan Zglinski, 'The UK internal market: a global outlier?' (2023) 82(3) Cambridge Law Journal 530–562.

16 Dougan et al (n 13 above).

17 Kenneth Armstrong, 'The governance of economic unionism after the United Kingdom Internal Market Act' (2022) 85(3) Modern Law Review 635–660; Dougan et al (n 13 above); Horsley (n 13 above); Zglinski (n 15 above).

18 For examples, see House of Lords Select Committee on the Constitution (n 6 above); Welsh Parliament External Affairs and Additional Legislation Committee, *UK Internal Market Bill Legislative Consent* (Welsh Parliament 2020); Welsh Parliament Legislation, Justice and Constitution Committee, *The Welsh Government's Legislative Consent Memorandum on the United Kingdom Internal Market Bill* (Welsh Parliament 2020); Scottish Parliament Finance and Constitution Committee, *Response to the UK Internal Market White Paper* (Scottish Parliament 2020).

its implementation.[19] This special issue builds upon that invaluable groundwork and adds a novel dimension to scholarship in the area with articles, commentaries and notes that consider specific questions about the impact of UKIMA on different aspects of devolution.[20]

Each of the articles, commentaries and notes in this issue contributes an original perspective on some matter of controversy arising from UKIMA in relation to devolution. The contributions that follow are varied but at the same time coalesce around a number of crucial themes and dialogues. One important theme is the tension between centralisation and consent. Thomas Horsley and Jo Hunt's article considers the balance between negative and positive harmonisation mechanisms in the post-Brexit UK internal market, demonstrating that the negative (and frequently centralising) tendency of the UKIMA Market Access Principles is in tension with – perhaps even undermines – a more positive, consensual and potentially productive approach to managing the UK internal market through common frameworks.[21] Christopher McCorkindale also considers the importance of consent in devolution, but in more general terms, arguing that the heavy-handed, top-down approach taken by the UK Government in relation to UKIMA provides further evidence that existing consent mechanisms – vital tools in managing the relations between devolved institutions

19 For example, Committees have reported on the impact of UKIMA on proposed devolved legislation (eg Welsh Parliament Legislation, Justice and Constitution Committee, *Report on the Environmental Protection (Single-use Plastic Products) (Wales) Bill* (Welsh Parliament 2022); Welsh Parliament Economy, Trade and Rural Affairs Committee, *Agriculture (Wales) Bill Committee Stage 1 Report* (Welsh Parliament 2023)); the potential impact of new England-only legislation on devolved competences in light of UKIMA (eg Welsh Parliament Legislation, Justice and Constitution Committee, *The Welsh Government's Legislative Consent Memorandum on the Genetic Technology (Precision Breeding) Bill* (Welsh Parliament 2023)); and reported – or commissioned research – on the continuing impact of UKIMA on devolved governance more generally (eg Scottish Parliament Constitution, Europe, External Affairs and Culture Committee, *UK Internal Market Inquiry* (SP 2022 113-I); Aidan Stennett, with Eileen Regan and Emma Dellow Perry, *Internal Market Act 2020 and the Protocol on Ireland/Northern Ireland* (Northern Ireland Assembly Research and Information NIAR 64-21 Service 2021)). Committees have also undertaken valuable work concerning the utilisation of common frameworks (eg House of Lords Common Frameworks Scrutiny Committee, *Common Frameworks: An Unfulfilled Opportunity?* (HL 2022–23 41-I)).

20 A less general article, albeit one which does not substantively overlap with any of the pieces in the special issue, considers the impact of the Act in the area of food law: Emily Lydgate and Chloe Anthony, 'Brexit, food law and the UK's search for a post EU identity' (2022) 85(5) Modern Law Review 1168–1190.

21 Thomas Horsley and Jo Hunt, 'Internal market governance by consensus rather than conflict? Common frameworks and the potential for positive harmonisation' (2024) 75(1) Northern Ireland Legal Quarterly 7–44.

and Westminster – are not fit for purpose and that the constitutional principle of devolved autonomy which these mechanisms serve to secure is at grave risk.[22] Gareth Evans, in his commentary, addresses one of the consequences of the UK Government's top-down, heavy-handed approach,[23] discussing the Counsel General for Wales's unprecedented – but ultimately ill-fated – attempt to secure through the courts what the Senedd had been unable to achieve by refusing legislative consent to the UK Internal Market Bill. Lisa Claire Whitten considers the unique circumstances of Northern Ireland, where issues of centralisation and consent have a long and contentious resonance that once again comes to the fore, in new guises, in relation both to UKIMA and a number of related post-Brexit trade matters, including the UK–EU Withdrawal Agreement, the Northern Ireland Protocol and the recent Windsor Framework.[24]

A second key theme is the concept of legislative competence. Nicholas Kilford[25] and Anurag Deb[26] confront this issue directly in their articles. Kilford considers the matter conceptually, drawing attention to the lack of a settled and cohesive notion of legislative competence in the UK constitution. In so doing he contrasts the highly formal notion of devolved legislative competence implicit in UKIMA with the far more expansive notion of competence applied in relation to the Westminster Parliament. Deb's article sheds historical and comparative light on these distinct notions of competence by charting the meaning of the idea in imperial constitutional history and contrasting these understandings with that reflected in UKIMA. Other articles contribute indirectly to this same theme. Horsley and Hunt, demonstrate the way in which the very design of UKIMA poses threats to the practical extent of devolved competence. McCorkindale's article shows how the erosion of consent mechanisms undermines the principle of devolved autonomy in significant areas of competence. Evans articulates and evaluates the Welsh Government's contention that UKIMA impliedly amends the competence provisions of the Government of Wales Act 2006 and – consequently – ought to be read-down under the doctrine that the

22 Chris McCorkindale, 'UKIMA as red flag symptom of constitutional ill-health: devolved autonomy and legislative consent' (2024) 75(1) Northern Ireland Legal Quarterly 45–76.

23 Gareth Evans, 'Devolution and declaratory judgments: the Counsel General's Reference on the UK Internal Market Act 2020' (2024) 75(1) Northern Ireland Legal Quarterly 140–153.

24 Whitten (n 10 above).

25 Nicholas Kilford, 'The market access principles and the subordination of devolved competence' (2024) 75(1) Northern Ireland Legal Quarterly 77–105.

26 Anurag Deb, 'Lessons from the age of empire: the UK Internal Market Act as a rupture in the understanding of competence' (2024) 75(1) Northern Ireland Legal Quarterly 106–139.

UK Parliament itself lacks competence to impliedly repeal or amend a constitutional statute.

A final – and in our view vital – contribution of the issue is the collection and connection of perspectives from all constituent parts of the UK. It goes without saying that UKIMA has impacts across the UK. But these impacts, and perceptions of them, undoubtedly differ: concern about UKIMA may vary markedly, both in terms of the substance of that concern and its severity, depending on whether one is sat in London, Cardiff, Edinburgh, or Belfast. And yet, a great deal of concern is also shared across the UK. The assembled papers, with their roots in the concerns of the UK's constituent nations, bring attention both to what is shared and to that which differs. The differences in perception and impact are brought out throughout the special issue: sometimes implicitly – by the authors' choice of focus – and sometimes explicitly – especially in the genuinely exceptional case of Northern Ireland.[27] But perhaps the overwhelming theme of the papers is one of shared *unease*. Unease, in particular, about the experience of UKIMA in the context of an increasingly top-down, confrontational approach of the UK Government to devolution in general. In this regard, the papers collectively demonstrate latent – arguably now realised and growing – tensions within the constitution of devolution and the deep irony that the talismanic but ultimately notional issue of the UK 'taking back control' from the EU has simultaneously, though with little fanfare, seen Westminster actually achieve this in an entirely different way, at the expense of the devolved administrations. This special issue exposes the undermining nature of UKIMA and also demonstrates the importance of an inclusive dialogue, bringing together different perspectives on particular issues of concern across the devolved nations and finding not just difference but also common ground.

The wider applications of these themes are considered in a short afterword, co-authored by members of the Governance and Human Rights Group at Swansea University.[28] This commentary sketches how the themes of the issue apply to devolution-focused research relating to a wider range of policy areas, specifically, constitutional reform, human rights and environmental protection.

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27 See, especially, Whitten (n 10 above).

28 Gareth P Evans, Tom Hannant, Simon Hoffman, Victoria Jenkins and Karen Morrow, 'Beyond UKIMA: challenges for devolved policy-making in the post-Brexit era' (2024) 75(1) Northern Ireland Legal Quarterly 168–184.

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Internal market governance by consensus rather than conflict? Common Frameworks and the potential for positive harmonisation*

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ABSTRACT

This article connects theories of positive and negative harmonisation with perspectives on self- and shared rule to examine emerging approaches to managing domestic (ie intra-United Kingdom (UK)) trade post-Brexit. Our particular focus is on a new tool of governance: the Common Frameworks – a consensus-based collaborative intergovernmental approach to policymaking in areas of devolved competence previously falling within the scope of the European Union Treaties. We explore the potential of the Frameworks as instruments of positive harmonisation with reference to emerging practice and consider their relationship with the United Kingdom Internal Market Act 2020. Our analysis unmasks internal market governance post-Brexit as a contested space, reflecting deepening divisions between the UK and devolved governments regarding self- and shared rule under the UK's territorial constitution. We identify three key drivers of contestation: a lack of consensus on the UK internal market as a regulatory object; changes in political context; and enduring structural and attitudinal imbalances favouring political control from the centre.

Keywords: Common Frameworks; UK Internal Market Act 2020; UK internal market; devolution; shared rule; harmonisation; Brexit; UK constitution.

INTRODUCTION

Any multilevel governance system in which competence is distributed across different legislative sites will confront the issue of internal regulatory divergence. The extent to which this is perceived as a problem to be solved and the mechanisms available to do so will depend on the specific constitutional arrangements and political choices made

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within that system. In its five-decade exercise in market-making, the European Union (EU) has served as a test bed for the development of governance tools and theorising about internal markets in systems of multilevel governance.

Scharpf famously identified two main mechanisms for market-making and diagnosed in the EU an imbalance between the two.[1] The deregulatory impulse of negative harmonisation, which involves the removal of national rules violating the free movement imperative, accompanies re-regulatory positive harmonisation, which involves the joint adoption of new, common EU-wide regulatory standards.[2] However, as a consequence of 'the combined impediments facing consensual intergovernmental and pluralist policy-making',[3] positive harmonisation in the EU was for many years relatively underutilised and underdeveloped, in contrast to negative harmonisation.[4] In other multilevel systems, meanwhile, particular institutional and constitutional factors have sometimes meant that there has been less opportunity for a clear negative harmonisation dynamic to take hold.[5] Strong traditions of sub-state constitutional autonomy in Canada, for example, accompany narrower readings of their federal inter-state free movement clause than seen in other systems, leaving more space for local policy choices to be maintained.[6]

Theorising internal regulatory divergence with reference to positive and negative harmonisation (and the balance between them) intersects with ideas of self- and shared rule within systems recognising distinct layers of political authority. Self-rule references the capacity in federal, and federal-type, orders for each level to determine matters itself, whilst shared rule relates to the arrangements for the different levels of government to work together in the interests of the state

1 F Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press 2019).

2 Ibid 45.

3 Ibid 50–51.

4 Ibid 50. On negative integration and the development of the EU legal order, see eg E Stein, 'Lawyers, judges and the making of a transnational constitution' (1981) 75 American Journal of International Law 1 and J H H Weiler, 'The transformation of Europe' (1991) 100 Yale Law Journal 2403.

5 G Anderson (ed), *Internal Markets and Multi-Level Governance: The Experience of the European Union, Australia, Canada, Switzerland and the United States* (Oxford University Press 2012).

6 See W Dymond and M Moreau, 'Canada' in Anderson (n 5 above) and N McEwen, 'The limits of self rule without shared rule' in Ferran Requejo and Marc Sanjaume-Calvet (eds), *Defensive Federalism: Protecting Territorial Minorities from 'The Tyranny of the Majority'* (Routledge 2023) 67.

overall.[7] Negative harmonisation, involving the removal of barriers to free movement, presents as a challenge for self-rule, requiring political institutions to justify policies against a set of recognised overriding public interest requirements. This is designed to ensure the representation of external interests within national (or sub-national) political processes.[8] With its focus on coordination from the centre, positive harmonisation, in contrast, speaks primarily to the dynamics of shared rule. National (or sub-national) actors are brought together at the centre to agree on common approaches (or the limits of divergence) in policy areas affecting cross-border activity.

In this contribution, we engage positive and negative harmonisation alongside discussion of self- and shared rule to examine emerging approaches to regulating domestic (ie intra-UK) trade post-Brexit. Adopting this perspective, we look beyond the enduring lawyerly concern with questions of legislative competence[9] and the political scientists' primary interest in the study of devolution through the prism of intergovernmental relations (IGR).[10] Our particular focus is on a new tool of governance for the United Kingdom (UK) – the Common Frameworks, a consensus-based collaborative intergovernmental approach to policymaking in areas of devolved competence previously falling within the scope of the EU Treaties. The Frameworks approach to managing intra-UK trade post-Brexit was introduced by intergovernmental agreement in 2017[11] and subsequently joined, and

7 On self- and shared rule, see especially D J Elazar, *Exploring Federalism* (University of Alabama Press 1987) and L Hooghe, G Marks, A H Schakel, S Chapman Osterkatz, S Niedzwiecki and S Shair-Rosenfield, *A Postfunctionalist Theory of Governance. Volume I: Measuring Regional Authority* (Oxford University Press 2016) 23–28.

8 See here eg D H Regan, 'Judicial review of member-state regulation of trade within a federal or quasi-federal system: protectionism and balancing, da capo' (2001) 99(8) Michigan Law Review 1853. See also, with respect to art 34 TFEU, M Maduro, 'Reforming the market or the state? Article 30 and the European Constitution: economic freedom and political rights' 3 European Law Journal (1997) 55. For criticism on limits, see eg J Jaakkola, 'Enhancing political representation through the European economic constitution? Regressive politics of democratic inclusion' (2019) 15(2) European Constitutional Law Review 194.

9 As Page and Batey observe, '[w]hether a problem is a Scottish one demanding a Scottish solution or a UK one demanding a UK solution cannot necessarily be worked out from whether its subject-matter is devolved or reserved under the Scotland Act'. See A Page and A Batey, 'Scotland's other parliament: Westminster legislation about devolved matters in Scotland since devolution' (2002) Public Law 501, 513.

10 See eg N McEwen and B Petersohn, 'The challenges of shared rule after the Scottish Referendum' (2015) 86 Political Quarterly 192–200; see also eg N McEwen, 'The limits of self-rule without shared-rule' in Requejo and Sanjaume-Calvet (n 6 above).

11 Joint Ministerial Committee (EN) Communiqué, 16 October 2017.

challenged, in this governance space by the UK Internal Market Act 2020 (UKIMA). The latter Act, presented by the Johnson Government as a necessary solution to an assumed problem of potential regulatory divergence within the UK, is a stark example of market-making through negative harmonisation, and one with profound consequences for the effective policy choices available to the devolved governments at the sub-state level.

In section 1, we explore the practice of positive harmonisation in the EU context and its impact on the devolution settlements in the UK, before examining existing domestic mechanisms for positive harmonisation. Section 2 turns to explore the Common Frameworks as tools of positive harmonisation, drawing attention to their potential functioning as instruments for shared rule in areas of devolved policymaking that were previously within the scope of the EU Treaties. In section 3, we place the Frameworks alongside the UKIMA as an instrument of negative harmonisation and consider the emerging balance being struck between negative and positive harmonisation post-Brexit. Section 4 then reflects on factors conditioning the operation of the Common Frameworks as positive harmonisation tools. Here we identify three issues restricting their potential as instruments for effective substantive policy coordination between the UK and devolved governments: a lack of consensus around the UK internal market as a regulatory object; the polarising effect of changes in political context post-Brexit; and the enduring problem of structural imbalances privileging UK Government influence in mechanisms for shared rule, including the Common Frameworks. Whilst the Common Frameworks involve all four governments, the position of Northern Ireland is especially complex, given the shifting application of aspects of EU law under the Northern Ireland Protocol/Windsor Framework, and the absence of elected representatives at Stormont. Our focus in this contribution thus rests particularly on the narrower GB operation of the domestic internal market.

As a point of departure, the UK's experience of devolution is distinctive in that, pre-Brexit, it did not involve the creation of specific domestic instruments for positive or negative harmonisation.[12] In policy terms, the approach was essentially one of 'devolve and forget' rather than devolve and coordinate jointly. Devolution was also inherently asymmetrical, not extending to cover England as the largest

12 On devolution and its evolution generally, see eg D Torrance, '"A Process, not an Event": Devolution in Wales 1998–2020' (House of Commons Briefing Paper CBP 8318, 6 April 2020) and D Torrance, '"The Settled Will?" Devolution in Scotland 1998–2020' (House of Commons Briefing Paper CBP 8441, 6 April 2020).

and economically most powerful of the four UK nations.[13] The space to balance self- and shared rule was instead largely occupied by EU principles and structures, including in relation to the management of intra-UK trade.[14] Brexit decoupled the UK's territorial constitution from this architecture, requiring the UK and devolved governments to arrive at a fresh consensus regarding the principles and structures of a newly reconstituted domestic internal market. Our analysis of the Common Frameworks and UKIMA as instruments of, respectively, positive and negative harmonisation (and their interaction) evidences the struggle to do so effectively thus far.

The space that the Common Frameworks and UKIMA now occupy remains politically contested, with Brexit exacerbating rather than reducing political tensions between the UK and devolved governments. Viewed from Cardiff and Edinburgh, the repatriation of EU powers marks the point at which regulatory control in areas of devolved competence previously governed by EU law should increase to expand the scope for democratic self-rule. Contrastingly, the UK Government appears intent, post-Brexit, on coordinating intra-UK regulatory policy prospectively as an exercise in shared not self-rule. But without the principles and structures of the EU internal market in place as constitutional guardrails, its efforts to achieve this, including through the Common Frameworks, are collapsing under the weight of its attachment to a theory of the UK's territorial constitution that, by default, prioritises control from the centre. The UK Government's controlling impulses are evident not only through its enactment of the UKIMA without the consent of the devolved governments, but also in its emerging approach to policy coordination through the Common Frameworks as instruments of shared rule. As we conclude, internal market governance will remain contested for as long as the UK remains tied to a constitutional framework that requires mechanisms for positive (and negative) harmonisation to operate under the shadow of the present constitution.

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13 On asymmetry, see eg C M G Himsworth, 'Devolution and its jurisdictional asymmetries' (2007) 70(1) Modern Law Review 31 and C Jeffreys, 'Devolution in the United Kingdom: problems of a piecemeal approach to constitutional change' 39(2) Federalism and Constitutional Change 280.

14 See here eg *R (on the application of Petsafe Ltd) v Welsh Ministers* [2010] EWHC 2908 (Admin) [2010] 11 WLUK 379 and section 3 below.

1 POSITIVE HARMONISATION: THE EU, DEVOLUTION AND THE UK CONSTITUTION

1.1 Positive harmonisation and EU integration

Writing in the context of EU market integration and drawing on Tinbergen's earlier work on economic policy,[15] Scharpf, explains how:

> *negative* integration refers to the removal of tariffs, quantitative restrictions, and other barriers to trade or obstacles to free and undistorted competition. *Positive* integration, by contrast, refers to the reconstruction of a system of economic regulation at the level of the larger economic unit.[16]

Negative integration (or negative harmonisation)[17] is exclusively a mechanism for market-making and is inherently deregulatory. Positive harmonisation meanwhile can contribute both to the creation of a new, wider market through the harmonisation of divergent national norms, as well as to securing social protections, through market-correcting initiatives. Here, common policies may be adopted to set baseline standards for matters such as employee and environmental rights, for reasons other than the potential impact on freedom of movement created by any inter-state divergence of these rules.

The complexities in reaching intergovernmental agreement on positive harmonisation measures is the main factor explaining the relative success of negative harmonisation in the EU context, with its strong system of court-based enforcement operating at both a supranational and a national level.[18] This was especially the case in the first decades of the EU when decision-making in Council by the member states' government representatives required unanimity. Though those restrictions have lessened through successive treaty amendments,[19]

15 J Tinbergen, *International Economic Integration* 2nd edn (Elsevier 1965).

16 Scharpf (n 1 above) 45, original emphasis.

17 Positive and negative harmonisation are commonly used interchangeably with positive and negative integration, particularly in EU law and policy. In this contribution, we prefer the language of harmonisation over integration, given the absence, in the UK context, of a comparable teleological focus on integration to that outlined in the EU Treaties.

18 On judicial integration and the EU internal market, see eg T Horsley, *The Court of Justice of the European Union as an Institutional Actor: Judicial Lawmaking and its Limits* (Cambridge University Press 2018).

19 On the present framework, see arts 289 and 294 TFEU (ordinary legislative procedures) and art 289(2) TFEU (special legislative procedures). For analysis, see eg P Craig, *The Lisbon Treaty: Law, Politics and Treaty Reform* revd edn (Oxford University Press 2013) ch 2. On subsidiarity in EU integration, see eg J Öberg, 'Subsidiarity as a limit to the exercise of EU competences' (2017) 36 Yearbook of European Law 391 and S Pazos-Vidal, *Subsidiarity and EU Multilevel Governance: Actors, Networks and Agendas* (Routledge 2019).

the successful adoption of harmonising legislation meanwhile still requires the measure, proposed by the European Commission, to navigate the demands of a multi-actor process with significant checks and balances. These include rules on competence, human rights considerations, proportionality and, significantly, subsidiarity – the requirement that measures should be taken at the lowest effective level within the system of multilevel governance.[20] To secure respect for this principle, national parliaments have formally been co-opted into the EU legislative institutional matrix, and they are directed to consult subnational representative institutions with legislative powers when taking their positions.[21] Legislation will ultimately rest on support from the European Parliament and a sufficient number of member state governments in the Council of the European Union – and here too the UK Government engaged with devolved governments in developing the UK's line on EU matters in devolved areas.[22]

The EU's regulatory outputs include measures that are both market-making and market-correcting, including a competition law regime, subsidy regulation, market organisation rules and support for agricultural products, and measures for worker, consumer and environmental protection. When legislative devolution was introduced into the UK, these EU regulations became to a greater or lesser extent prescriptive frameworks that maintained commonality in the approach of the different legislatures in the UK. Such commonality did not, however, necessarily mean uniformity.[23]

In an EU context, the Treaties recognise that in some policy areas (generally those where competence between the EU and its member states is shared, rather than resting exclusively with the EU; for example, social policy and environmental policy),[24] the EU can set minimum standards, leaving to the member states the decision whether

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20 See eg art 2 Treaty on European Union (TEU) (Union values); art 5 TEU (competence, subsidiarity and proportionality); art 6 TEU (fundamental rights). See also Protocol (No 2), on the application of the principles of subsidiarity and proportionality [2008] OJ C115, 206, and EU Charter of Fundamental Rights of the European Union [2012] OJJ C 326, 391.

21 Art 6(2), Protocol (No 2) on the application of the principles of subsidiarity and proportionality [2008] OJ C115, 206.

22 See eg Concordat on the Coordination of European Union Policy Issues, included in the Memorandum of Understanding concluded between the UK and Devolved Governments, October 2013.

23 See J Hunt, 'Devolution and differentiation: regional variation in EU law' (2010) 30 Legal Studies 421–441, and see further section 4.2 below.

24 Art 4(2) TFEU enumerates policy areas in which competence is shared between the Union and the member states.

to offer additional regulatory protections above this level.[25] In others, full harmonisation is the norm. Even in these situations, however, EU legislative instruments might explicitly build in local implementation and, with it, possible variation, as seen in agricultural policy.[26] There is a greater tendency for maximum harmonisation and uniformity to operate in relation to product standards, and more tolerance for variation in relation to process standards – the surrounding circumstances in which economic activity takes place. Along with other regulatory activity by a member state or its constituent parts within the scope of EU law, any advance on minimum harmonisation standards is subject to the overriding negative harmonisation requirement that it does not present an unlawful restriction in free movement – however, the availability of public policy justifications assists in maintaining possible divergence.[27] That obligation, imposed on the UK as a matter of EU law, was reinforced domestically. The Devolution Acts mandated that devolved legislation comply with EU law as a condition of legality.[28]

1.2 Positive harmonisation and the UK constitution

On the UK's departure from the EU, the issue of how to manage the exercise of legislative power across the UK in the absence of a common EU regulator took on a significant political resonance – and urgency. In this contribution, we explore how this is being achieved, focusing on the Common Frameworks and UKIMA as new instruments for internal market governance post-Brexit. Before considering these new mechanisms (and their interaction), however, this section examines the scope for positive harmonisation under pre-existing devolution arrangements, drawing attention, in particular, to the facilitative qualities (and limits) of the Sewel Convention as a potential replacement tool for UK-wide market management post-Brexit.

By the time of Brexit, both Scotland and Wales were operating under a reserved powers model, which enumerates those powers that

25 For discussion, see S Weatherill, 'The fundamental question of minimum or maximum harmonisation' in S Garben and I Govaere (eds), *The Internal Market 2.0* (Hart 2020).

26 See eg art 5, annex IV of Regulation (EC) No 1782/ 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers [2009] OJ L30, 16. For judicial confirmation, see the decision of the EU Court (Grand Chamber) in Case C-428/07 *Mark Horvath v Secretary of State for Environment, Food and Rural Affairs* ECLI:EU:C:2009:458, para 50, and M Cardwell and J Hunt, 'Public rights of way and level playing fields: Horvath v Secretary of State for Environment, Food and Rural Affairs' (2010) 12(4) Environmental Law Review 291–300.

27 See further section 3.2 below.

28 See eg s 29(2)(d) Scotland Act 1998 and s 108(2) Government of Wales Act 2006.

lie with Westminster, beyond devolved competence.[29] However, whilst reserved powers are legally protected from incursion by devolved legislatures, there is no such legal prohibition against Westminster acting in devolved areas. Instead, a constitutional convention developed that Westminster, whilst retaining sovereignty, would not normally legislate on devolved matters without the consent of the relevant devolved legislature – the Sewel Convention.[30] This commitment was later included in the Memorandum of Understanding reached between the Governments on IGR,[31] before being included in statutory (though non-legally enforceable) form in the Scotland Act 1998 and Government of Wales Act 2006.[32]

Very clearly then, Westminster could in theory replace the EU legislator post-Brexit as a possible source of positive harmonisation; in other words, as an institution positioned to adopt UK-wide legislative measures in areas of devolved competence.[33] As the EU regulator had done previously, such measures could leave more or less space for local variation. The Agriculture Act 2020 – a UK statute – provides a recent example of this. That Act established a regulatory framework on agricultural subsidies which Welsh ministers may modify so far as it operates in relation to Wales.[34] Significantly, in this example, the Welsh Government and Senedd were clear that this arrangement was temporary, whilst work was undertaken to develop Wales' own primary legislative Agriculture Bill.[35] Constitutionally, the Westminster legislation will not otherwise pre-empt the later exercise of autonomous devolved legislative activity on policy issues that are not reserved.

Of course, whilst the possibility for the adoption of UK-wide legislation across devolved areas of competence exists in the above

29 Though there are now significant commonalities in approach across the three settlements, differences remain. In Northern Ireland, there is a three-fold categorisation, of transferred measures within devolved competence, and a category of 'excepted' matters remaining at Westminster (analogous to reserved measures under the other settlements). There is a further set of 'reserved' matters which may be removed from central control at some later point.

30 On the origins and development of the Convention, see eg G Cowie and D Torrance, 'Devolution: The Sewel Convention' (House of Commons Briefing Paper CBP-8883) 13 May 2020.

31 Memorandum of Understanding (n 22 above) para 14.

32 See now s 27(8) Scotland Act 1998 and s 107(6) Government of Wales Act 2006, respectively.

33 See here also pre-Brexit, Page and Batey (n 9 above) 511. Page and Batey's early analysis points to the extensive, consensual use of Westminster powers to legislate in areas of and/or affecting devolved competences, including in relation to EU measures.

34 Agriculture Act 2020, sch 5.

35 See s 47 detailing the expiration of particular provisions in relation to Wales at the end of 2024.

terms, its actual use will encounter a range of constitutional and political considerations that should give pause to viewing it as an effective shared governance instrument of positive harmonisation. Winetrobe suggests that the original purpose of Sewel was as 'a safeguard against sudden, unilateral use of Westminster's sovereign legislative power'.[36] Taken on these terms, recent practice certainly throws into question the effectiveness of Sewel in achieving its original purpose.[37] That purpose, according to Winetrobe, was also far removed from any idea of the Convention as a positive instrument to trigger UK-wide legislative activity by the Westminster Parliament. It was still less a mechanism to facilitate policy co-operation and shared governance between the UK and devolved governments. Nonetheless, in practice, this *facilitative* function of Sewel has become one of its twin purposes and has been variously described in terms such as enabling policy co-operation,[38] and providing for shared governance.[39] That said, whilst examples of positive co-operation may exist (including the Agriculture Act 2020) and be seen in UK-wide legislative outputs,[40] the process might also involve no more than the extension of English-centric proposals to devolved territories.[41] In short, the Westminster Parliament and the Sewel Convention are inherently limited as institutional forums for genuine shared governance.

The Devolution Acts reflect a democratically endorsed recognition that primary policy responsibility lies with the devolved governments for non-reserved matters, with lines of accountability to their own parliaments. These lines of democratic accountability are inevitably undermined by Westminster legislation that incorporates devolved matters in the absence of full and effective involvement by these devolved institutions. Institutionally, Westminster does not include a strong second chamber to enable the input of regional concerns – as

36 B K Winetrobe, 'A partnership of parliaments' in R Hazell and R Rawlings (eds), Devolution, *Law Making and the Constitution* (Imprint 2005) 44.

37 A McHarg, 'The contested boundaries of devolved legislative competence: towards better devolution settlements' (Institute for Government/Bennett Institute for Public Policy Review of the UK Constitution Guest Paper 2023).

38 A McHarg, 'Constitutional change and territorial consent: the *Miller* Case and the Sewel Convention' in M Elliot, J Williams and A L Young, *The UK Constitution after Brexit* (Hart 2018).

39 C McCorkindale, *How is Devolution Changing Post EU?*, Adviser's Briefing to Scottish Parliament (Constitution, Europe, External Affairs and Culture Committee 17 February 2023).

40 See also eg the Coronavirus Act 2020.

41 See eg Page and Batey (n 9 above) on the discussion around the use of Westminster legislation by the first Scottish Parliament and, more recently, criticism from the Senedd's Legislation, Justice and Constitution Committee of the reliance on Westminster legislation by the Welsh Government, Legislation, Justice and Constitution Committee Annual Report 2020/2021.

seen, for example, in Germany. Further, the Sewel Convention itself makes no effective provision for devolved *legislative* collaboration.[42] Though the devolved legislatures have clear processes for their side of the process, there are in Westminster no formalised mechanisms for interparliamentary engagement associated with the Convention, and nothing in the Standing Orders of the two Houses that make it a requirement for any Parliamentary Committee, or the floor of the House, to consider the motions from devolved parliaments granting, or withholding legislative consent.

The operation of Sewel relies instead on the existence of a system of IGR. The suggested contours of these processes are foreseen in the separate Devolution Guidance Notes (DGN)[43] which supplement the Memorandum of Understanding. For example, the DGN covering Westminster parliamentary legislation affecting matters devolved to Scotland recognises that 'although the [Sewel] convention refers to the Scottish Parliament, UK departments will in practice deal with the Scottish Executive'.[44] The DGN generally presuppose early, ongoing, effective engagement at the level of officials and ministers in the development of Westminster legislation incorporating matters that are otherwise devolved.

The UK has generally failed to establish such a system of effective IGR that has the confidence of all parties.[45] This is an obvious matter of concern given the reliance on effective IGR for the Sewel process to reach its potential as a defensive and facilitative tool. Under the Memorandum of Understanding, a suite of Joint Ministerial Committees (JMCs) was established and foreseen as the key forum for IGR. These included a plenary format that was to meet annually and involve the highest-level political representation, along with an EU-focused configuration, and a domestic JMC. However, only JMC (Europe), with a mandate to determine the UK line ahead of upcoming Council meetings, met regularly and consistently. As the former Director General for Devolution in the UK Cabinet Office, Jim Gallagher reported, 'most intergovernmental relations happen below the political

42 See also eg Page and Batey (n 9 above). Scottish and Welsh MPs, of course, are able to play a role in representing the interests of their constituencies in Westminster legislative procedures.

43 Cabinet Office, Devolution Guidance Notes.

44 Cabinet Office, Devolution Guidance Notes: Post-Devolution Primary Legislation Affecting Scotland (November 2005) DGN 10.

45 For recent criticism, see eg N McEwan, M Kenny, J Sheldon and C Brown Swan, 'Intergovernmental relations in the UK: time for a radical overhaul? (2020) 93(1) Political Quarterly 632.

radar, as officials deal with day-to-day matters'.[46] Below the level of the JMC, networks of inter-official interactions have operated, necessitated, for example, by the cross-border provision of public services, by the overlap of responsibilities for matters such as tax and welfare, and for the coordination of activity required under particular EU measures, especially in relation to agriculture and environment. As Keating observes, '[i]ntergovernmental relations in devolved and federal systems serve two purposes: to make policy jointly where that is desired; to manage conflicts between governments'.[47] The domestic UK IGR system was not constructed to facilitate joint policymaking, and the JMCs were not decision-making bodies, but were instead, at most, forums 'for communication and shared learning',[48] and offering a dispute resolution mechanism wholly skewed in the UK Government's favour.

These limitations in the UK's system of IGR present barriers to effective policy cooperation across areas of devolved competence. This applies both where Westminster legislates for the whole UK, or, alternatively, through the possible coordination of the separate regulatory activities of the different governments and parliaments. The removal of the rules, governance structures and principles from the EU, which previously operated to connect the centre and the devolved governments, has brought the weaknesses in shared rule into extremely sharp relief.[49] This has triggered reviews of, and adjustments to, key aspects of IGR functioning, most significantly, as a result of the four government joint Review of Intergovernmental Relations, which reported in January 2022.[50] The Review has led to the establishment of a new, three-level hierarchy of intergovernmental machinery, from the Prime Minister and Heads of Governments Council to mid-tier Interministerial Groups, to portfolio-level engagement, as well as a new orientation, with an apparent greater emphasis on shared governance.

The new system breaks from its predecessor in that the previous dominance of central government is challenged, through measures including the rotation of the location and chairs for Interministerial Groups' meetings, and significantly, in the creation of a standing IGR Secretariat. This is staffed from across the different governments,

46 J Gallagher, 'International relations in the UK: co-operation, competition and constitutional change' (2012) 14 British Journal of Politics and International Relations 198, 200.

47 SPICE and M Keating, Joint Briefing for the Constitutional Affairs, Europe, External Affairs and Culture Committee (Intergovernmental Relations Panel 9 June 2022).

48 McEwen and Petersohn (n 10 above).

49 See also eg McEwen (n 10 above).

50 Conclusions of the Joint Review of Intergovernmental Relations (13 January 2022).

and it demonstrates a degree of independence previously absent from the IGR system. This independence is also apparent in a new dispute resolution procedure, which was previously fully under the control of the UK Government. As the House of Lords Constitution Committee observes, however, success depends on whether the governments are 'committed to using the new structures to cooperate on achieving shared objectives, rather than simply managing—or taking opportunities to accentuate—their differences'.[51]

2 THE COMMON FRAMEWORKS, POSITIVE HARMONISATION AND SHARED RULE

The conclusions of the UK and devolved governments' joint Review of Intergovernmental Relations reflect a commitment – on paper at least – to more effective structures and institutions of shared governance.[52] Reflecting this orientation towards more effective shared rule, this section introduces discussion of the Common Frameworks as consensus-based instruments for the coordination of policy between the UK and devolved governments. We explore the potential contribution and emerging limits of the Frameworks as tools for positive harmonisation in relation to the management of devolved competences previously falling within the scope of the EU Treaties.

2.1 Origins, rationale and development

The underpinning principles of the Frameworks approach to cooperation on policy were first set out in a JMC (EU Negotiations (EN)) Communiqué from October 2017.[53] The Communiqué recognises a commitment on the part of all governments 'to work together to establish common approaches in some areas that are currently governed by EU law' within areas of devolved competence. First amongst the reasons for establishing Frameworks is 'the need to enable the functioning of the UK internal market, while acknowledging policy divergence'. Additionally, Frameworks are to be established where necessary to:

> ensure compliance with international obligations; to ensure the UK can negotiate, enter into and implement new trade agreements and international treaties; to enable the management of common resources;

51 House of Lords, Select Committee on the Constitution, 'Respect and Co-Operation: Building A Stronger Union for the 21st Century' 10th Report of Session 2021–22, HL 140, para 182.

52 See n 50 above.

53 Joint Ministerial Committee (EN) Communiqué, 10 October 2019, intergovernmental agreement between UK, Scottish and Welsh Governments, subsequently endorsed by Northern Ireland Executive in June 2020.

> to administer and provide access to justice in cases with a cross border element; and to safeguard the security of the UK.[54]

Commitment to proceed through the Frameworks approach was part of a compromise deal reached through intergovernmental negotiations around the passage of what would become the EU (Withdrawal) Act 2018. As introduced, the Bill had originally proposed a blanket restriction on the exercise of devolved competences falling within the scope of returning EU powers. That restriction would bind the devolved governments unless and until specific powers were released under Orders in Council from Whitehall.[55] In its place, an agreement was reached that the default position would be the 'return' of powers to the devolved legislatures, with the potential for temporary freezes to be placed on regulatory activity in areas where divergence might be problematic, and where common frameworks would be needed. The power for UK ministers to introduce these freezes over devolved legislation was included in the EU (Withdrawal) Act, and made subject to a devolved consent request requirement – though the absence of consent was not an absolute block to action. For England, a political restriction was accepted as applying on Westminster and Whitehall. This was all contained in an Intergovernmental Agreement (IGA) between the Welsh and UK Governments,[56] which committed the parties to 'continue to work together to create future common frameworks where they are necessary'.[57] Whilst the agreement was sufficient for the Welsh Government to give consent to the Bill, the Scottish Government refused both to sign up to the IGA, or to give its consent. Nonetheless, it has participated in the development of Common Frameworks alongside the other governments.

The Common Frameworks establish a new and potentially far-reaching intergovernmental platform for policy coordination and introduce a layer of *political* obligation on law makers when exercising their *legislative* powers – sometimes to act jointly, sometimes to cooperate and collaborate, and at the very least, to have regard to the possible consequences of proposed regulatory choices on others. Legally, these processes are non-binding, with each of the four governments retaining its right to exercise its respective competences in particular policy areas in accordance with the devolution legislation.[58]

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54 Joint Ministerial Committee (EN) Communiqué (n 11 above).

55 EU (Withdrawal) Bill, cl 11.

56 Intergovernmental Agreement on the European Union (Withdrawal) Bill and the Establishment of Common Frameworks (24 April 2018).

57 Ibid para 1.

58 See eg Department of Environment, Food and Rural Affairs, Resources and Waste Provisional Common Framework: Framework Outline Agreement and Concordat (CP 770 December 2022) 10.

The success (or failure) of the Common Frameworks thus turns, to a great extent, on the strength of political relationships between the four governments. In that regard, the Frameworks extend the reach of the evolving IGR structures into an underdeveloped aspect of the UK's territorial constitution, its internal market.

Input from the different Whitehall ministries produced an initial list of over 150 areas of EU and devolved competence overlap, where Frameworks might be required.[59] This original list of measures was subsequently revised and refined – to there now being a total of 32 Common Frameworks – 26 bringing together the four governments of the UK, the remaining six involving only the governments in Belfast and London.[60] As of June 2023, only one of the Frameworks had passed all stages of legislative scrutiny from the four parliaments demanded of it,[61] long after the target date of January 2021 for the completion of the process.[62] In the meantime, the remaining frameworks have been operating on a provisional basis. Frameworks exist in particular in the areas of agricultural and environmental regulation, as well as food standards and safety, procurement, and professional qualifications. Where there is limited potential for divergence, or where the significance of any divergence is minimal for internal or international trade, it has been decided that no framework is required.[63] For a very small number of Framework areas, for example, fisheries management, there is agreement that cooperation will in part be managed through new, primary Westminster legislation. For the most part however, frameworks are mechanisms to coordinate the regulatory activity of the different legislatures within the UK.

A broad understanding of policy coordination is employed under the Common Frameworks which, depending on the policy area, can include common minimum (or maximum) regulatory standards, along with setting common goals, placing limits on policy divergence or requiring mutual recognition.[64] Whilst frameworks differ from issue to issue, there are some commonalities. Each consists of a general overview of the issue and the principles which necessitate the framework – whether

59 Frameworks Analysis: Breakdown of Areas of EU Law that Intersect with Devolved Competences in Scotland, Wales and Northern Ireland (9 March 2018). This document has subsequently been regularly updated and amended.

60 Frameworks Analysis 2021, Updated Analysis (9 November 2021).

61 Department for Levelling Up, Housing and Communities, Hazardous Substances: Planning Framework (CP 508 August 2021).

62 The original timeframe may appear ambitious given the complexities involved. In any case, the continued suspension (at the time of writing) of the Northern Ireland Assembly continues to block final approval for the remaining provisional Frameworks.

63 See Frameworks Analysis 2021 (n 60 above).

64 Joint Ministerial Committee (EN) Communiqué (n 11 above).

the demands of the internal market, or some other reason. They detail any relevant underpinning legislation and include a concordat or memorandum of understanding signed by the parties which sets out how the governments are to cooperate in policy development, and how they are to manage any proposed divergence in regulation. The Resources and Waste Common Framework, for example, envisages UK-wide discussion of policy decisions, including new policy creation, regulatory change and operational issues.[65] These might lead to UK-wide measures, or a coordinated multinational approach. The Food and Feed Safety and Hygiene Common Framework meanwhile includes *inter alia* a commitment to identify where concurrent powers could be available so one statutory instrument could be used to implement consistent decisions (with consent) across the UK;[66] whilst the Nutrition Related Labelling, Composition and Standards Common Framework establishes a commitment to share policy proposals in primary, secondary and non-statutory measures in good time to allow for full consideration and the agreement of a common approach wherever possible.[67]

2.2 Coordinating policy, managing divergence

A fundamental and, as yet, unanswered question is whether the Frameworks will actually reach full maturity as instruments of positive harmonisation, especially given the nascent state of improved UK IGR.[68] A defining feature of their functioning thus far has been their rather 'thin' approach to policy coordination. Presently, policy coordination appears to have proceeded only to the extent of the UK and devolved governments reaching agreement that specific regulatory objectives – including, for example, the regulation of single-use plastics (SUPs); the introduction of deposit return schemes and the regulation of food and drink that is high in fat, sugar and salt – fall within the scope of specific Frameworks.[69] Beyond this, there is as yet little evidence of policy coordination in 'thicker' substantive terms; for example, through

65 Department of Environment, Food and Rural Affairs, Resources and Waste Provisional Common Framework: Framework Outline Agreement and Concordat (CP 770 December 2022).

66 Cabinet Office, Food and Feed Safety and Hygiene Common Framework: Provisional Framework Outline Agreement and Concordat (CP 321 November 2020).

67 Department of Health and Social Care, Nutrition Related Labelling, Composition and Standards Provisional Common Framework (CP 306 October 2020).

68 For concerns here, see also House of Lords, Common Frameworks Scrutiny Committee, 'Common Frameworks: An Unfulfilled Opportunity?' (HL 2022–23) 41. See also section 1.2, above.

69 For a summary of regulatory initiatives, see Office for the Internal Market, Annual Report on the Operation of the UK Internal Market 2022–2023 (21 March 2023) 28–41.

joint agreement on minimum standards or rules on mutual recognition. This is despite strong demand-side interest from stakeholders in the use of the Common Frameworks more substantively to prevent the emergence of future barriers to trade within the UK internal market.[70] A review of formative practice gives the distinct impression of (as yet) 'unfulfilled' regulatory potential in that regard. Indeed, initial practice points to development of the Common Frameworks primarily as mechanisms that impose largely procedural obligations (eg to share details on parallel regulatory initiatives), rather than as forums to negotiate more substantive policy coordination.[71]

The Frameworks effectively cast the UK internal market as being a shared regulatory space. In theory, there is scope for cooperative, consensual joint policymaking in this space, in line with the JMC (EN) principles, and their declared respect for the devolution settlements and the democratic accountability of the devolved legislatures. However, the Common Frameworks speak not just to policy coordination, but also to the management of regulatory divergence, and to the defence of legislative autonomy. It should be recalled that the first of the grounds for Common Frameworks – enabling the functioning of the UK internal market – explicitly includes acknowledging the potential for policy divergence. How much divergence can be accommodated is less clear. The 2017 principles give very little guidance. They foresee frameworks 'maintaining, at a minimum, the same degree of flexibility for differentiated policy solutions as was provided under the relevant EU law instruments'.[72] This is effectively backward looking and gives little guidance on how to manage new policy developments, or to determine how much of, for example, an interference in trade will be deemed too much, and how much can be accommodated. It also makes no attempt to build in a commitment to subsidiarity, such as the one that applies to EU governance, and acknowledges and protects the position of subnational regions.

The newly defined UK internal market reads in new limits to devolved competence, tied to the realisation of the shared functional objective of regulating intra-UK trade. For the devolved governments, this challenges the traditional view of devolution as an expression of political self-rule. Despite its agreement to participate in the frameworks process, the Scottish Government, in particular, has voiced dissatisfaction at the prospect of additional interference with its devolved competences imposed by the political commitment to work together under the Frameworks. This can be seen explicitly in the text of the Feed and Food Safety Framework, for example, which acknowledges

70 See ibid 44–46.

71 House of Lords (n 68 above).

72 Joint Ministerial Committee (EN) Communiqué (n 11 above).

the refusal by the Scottish Government to define common approaches here as *necessary* as this could mean that a harmonised approach was required.[73] Instead, there is agreement that a common approach is 'at least desirable', and permitting 'evidence-based divergence where this is considered appropriate'.[74]

The texts of the Frameworks thus incorporate commitments both to pursue harmonisation, as well as to accommodate divergence. Just as the frameworks differ in the emphasis they place on the need for harmonisation, they also differ in the space recognised for divergence. Whilst the Food, Feed Safety and Hygiene Framework foresees the possibility of divergence 'where risk analysis shows divergence to be both necessary and proportionate to the risk to provide appropriate consumer protection',[75] the Resources and Waste Framework reads as being particularly positive and open to divergence.[76] Divergence under this Framework is acknowledged as potentially providing 'key benefits, such as driving higher standards, [and] generating innovation'. 'Divergence on policy' is 'an acceptable outcome' that can be referred on for 'review and approval'.[77] Consistency is not a feature across the Frameworks. Whilst the variety of models may be criticised for complexity, it is not inconsistent with the breadth of practices that fall under the banner of harmonisation under EU law and also differs from (and within) policy sector to policy sector.

Individual Frameworks establish procedures for resolving disputes where the UK and devolved governments are unable to reach agreement on regulatory divergence. These procedures are of particular significance where policy divergence would impact negatively on JMC (EN) principles; for example, where policy divergence is considered liable to create new barriers to intra-UK trade.[78] The dispute resolution process, which starts at the level of officials but can escalate to ministerial level, operates solely through political channels. Whilst this may not be out of alignment with the approach to UK IGR generally, it represents an obvious conceptual gap in relation to the regulation of policy divergence within the UK internal market. Alongside the positive harmonisation framework to coordinate policies, we might expect the Common Frameworks –

73 Cabinet Office, Food and Feed Safety and Hygiene Common Framework: Provisional Framework Outline Agreement and Concordat (CP 321 November 2020) 7.
74 Ibid.
75 Ibid 13.
76 Department of Environment, Food and Rural Affairs (n 65 above).
77 Ibid 27.
78 Ibid 30.

and, in particular, their dispute resolution structures – to prescribe a set of thicker substantive principles against which the effects of disputed policy initiatives may be assessed. Multilevel structures governing cross-border trade typically engage the principles of non-discrimination, mutual recognition and market access to that end as instruments of negative harmonisation. Their inclusion within a system of shared rule complements mechanisms for joint or coordinated policymaking. UKIMA was to bring a set of negative harmonisation principles into the same space as the positive harmonisation – though in a highly confrontational and disruptive way.

3 THE UKIMA: ENTER NEGATIVE HARMONISATION

The previous section explored the operation of the Common Frameworks as potential instruments of positive harmonisation. This section turns to consider intervening changes to managing intra-UK policy divergence as a result of the UK Government's introduction of a second instrument: the UKIMA. We examine the UKIMA as a tool of negative harmonisation and then turn to consider its interaction with the pre-existing Common Frameworks.

3.1 Objectives and principles

The UKIMA has four main objectives: first, to make provision for an internal market for goods and services within the UK, including in relation to the recognition of qualifications; secondly, to address the specific position of Northern Ireland post-Brexit; thirdly, to authorise the provision of financial assistance by the UK Government to support, among other things, economic development and infrastructure projects throughout the UK; and, finally, to reserve to the UK Government exclusive competence to regulate the provision of state aid within the UK post-Brexit.[79] The UK Government maintained that legislation was necessary to address each of these objectives as a means to secure frictionless trade across the four nations of the UK following the UK's exit from the EU internal market.[80] In relation to Northern Ireland, the UKIMA served an additional important function in the implementation

79 UKIMA, Preamble. For discussion, see eg M Dougan, J Hunt, N McEwen and A McHarg, 'Sleeping with an elephant: devolution and the United Kingdom Internal Market Act 2020' (2022) 138 Law Quarterly Review 650; T Horsley, 'Constitutional reform by legal transplantation: the United Kingdom Internal Market Act 2020' (2022) 42(4) Oxford Journal of Legal Studies 1143 and K Armstrong, 'The governance of economic unionism after the United Kingdom Internal Market Act' (2022) 85(3) Modern Law Review 635.

80 Department for Business, Energy and Industrial Strategy, UK Internal Market (White Paper CP 278 July 2020).

of the Protocol on Northern Ireland annexed to the EU/UK Withdrawal Agreement.[81]

With respect to the internal market, parts 1 and 2 of the UKIMA guarantee the free movement of in-scope goods and services between the four nations of the UK. This is achieved by mandating the prospective application of two fundamental principles – mutual recognition and non-discrimination – to all commercial transactions that fall within its scope. Accordingly, section 2 UKIMA provides that goods lawfully produced in, or imported into, one part of the UK where they may also be lawfully sold should, in principle, be able to be lawfully sold in all other nations of the UK. Statutory provisions that impose 'relevant requirements' that speak, among other things, to the particular characteristics of those goods or, likewise, to their production, presentation or packaging are prohibited. Parallel frameworks govern the application of the principle of non-discrimination in relation to goods and, by analogy, the application of mutual recognition and non-discrimination to the provisions of in-scope services.[82]

Mutual recognition and non-discrimination (the 'market access principles' under the UKIMA) may be considered to replace the EU Treaty provisions guaranteeing the free movement of goods and services within the EU internal market (eg article 34 of the Treaty on the Functioning of the EU (TFEU) on goods and article 56 TFEU on services).[83] These provisions applied, pre-Brexit, as enforceable limits on the exercise of competences by both the UK and devolved governments, including in relation to intra-UK trade. For example, in *Petsafe Ltd*, article 34 TFEU was invoked to challenge, as a restriction on the free movement of goods, a ban on the use of electric collars on cats and dogs in Wales under the Animal Welfare (Electronic Collars (Wales)) Regulations 2010.[84] As replacements for the EU Treaty rules on intra-EU movement, the market access principles speak conceptually to the dynamics of negative harmonisation. Whereas the Common Frameworks exist to coordinate policy divergence politically by consensus, the UKIMA establishes a legal framework to scrutinise the regulatory preferences of individual governments for compliance

81 Protocol on Ireland/Northern Ireland [2020] OJ L27/102, implemented by the European Union (Withdrawal Agreement) Act 2020. On 24 March 2023, the EU–UK Joint Committee reached agreement on the Windsor Framework amending the Protocol. For analysis, see eg C R G Murray and N Robb, 'From the Protocol to the Windsor Framework' (2022) 74 (AD1) Northern Ireland Legal Quarterly 1–21.

82 See ss 5–9 and ss 19–21 UKIMA, respectively.

83 The EU free movement also regulates capital and payments (art 63 TFEU) and persons (arts 45 and 49 TEFU).

84 *R (on the application of Petsafe Ltd)* (n 14 above). See also eg *Sinclair Collins v Lord Advocate* [2012] CSIH 12.

with a set of directly enforceable norms: non-discrimination and mutual recognition.

Domesticating EU legal principles, the UKIMA is a paradigmatic example of what comparative scholars would recognise as a legal transplant.[85] The UK Government's enacting of the UKIMA represents an attempt to transpose legal principles and structures from one legal system to another; in this case, from the EU as a quasi-federal supranational 'new legal order' to the UK as a nation state combining a cornerstone principle of parliamentary sovereignty with a territorial constitution incorporating an advanced framework for the devolution of government power internally.[86] The transplantation analogy extends beyond the domestication of the market access principles. Notably, the UKIMA also takes inspiration from the EU internal market's procedures for the *ex ante* review of member state legislation introducing new technical standards. Under EU law, member states are obliged to notify the EU Commission of draft measures, facilitating, where necessary, prior scrutiny for compliance with the Treaty provisions on intra-EU movement.[87] Under the UKIMA, the notification requirement is modified. Rather than impose notification requirements on the devolved governments, the UKIMA tasks a newly established Office for the Internal Market (OIM) to provide independent guidance on the potential economic impact of proposed legislation at the request of the UK or one of the devolved governments.[88]

3.2 The UKIMA and the Common Frameworks

As negative harmonisation instruments, the UKIMA's market access principles occupy the same space as the Common Frameworks. Whereas the Frameworks seek to manage diversity by reaching agreement on the coordination of regulatory policies in specific substantive areas, the UKIMA addresses regulatory diversity by scrutinising measures that interfere with the free movement of goods and services within the UK internal market. The distinction here

85 For discussion, see Horsley (n 79 above). For comparative law perspectives, contrast eg Alan Watson, *Legal Transplants: An Approach to Comparative Law* 2nd edn (University of Georgia Press 1993); P Legrand, 'The impossibility of "legal transplants"' (1997) 4 Maastricht Journal of European and Comparative Law 114.

86 The UK Government has proved reluctant to acknowledge this process of legal transplantation. Indeed, its White Paper reads as a conscious attempt to downplay EU influence.

87 Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on information society services [2015] OJ L 241-1.

88 Ss 34–36 UKIMA.

between regulatory approaches connects with the dynamics of self- and shared rule. The Common Frameworks reflect the dynamics of shared rule as instruments that provide a potential structure for the UK and (in particular) devolved governments to enhance self-rule through cooperation on policy.[89] Contrastingly, the market access principles present as potential threats to self-rule. For the Scottish, Welsh and Northern Ireland Governments, in particular, their operation targets the exercise of devolved competences as tools to regulate, without external interference, economic (and non-economic) activity within their respective territories – the primary expression of democratic self-rule.

Concerns about the practical effects of the market access principles on the ability of devolved governments to regulate independently underscored the Welsh Government's (as yet unsuccessful) efforts to seek judicial review of the UKIMA.[90] Counsel for the Welsh Government argued that section 54(2) of the Act (adding the UKIMA to the list of instruments protected from modification by the Welsh Senedd) had 'the effect of extinguishing the practical effect of devolved competence in areas which include food standards and environmental protection'.[91] Future Senedd legislation in key areas of devolved competence, it was argued, would be subject to compliance with the market access principles and, accordingly, potentially unenforceable against goods and services entering Wales from elsewhere within the UK where they may be lawfully sold and provided. In a judgment upheld on appeal, the Divisional Court (Lewis LJ and Steyn J) rejected the judicial review application on the grounds that, in the absence of specific legislation, it was premature.[92] But the substance of the Welsh Government's abstract argument, namely that the UKIMA imposes new restrictions on the exercise of devolved legislative competences, is intellectually sound.

Despite the fact that they occupy the same space (the regulation of the UK internal market), there was never any serious political intention on the part of the UK Government to align the UKIMA with the pre-existing Common Frameworks programme. Indeed, in its original form,

89 See here also eg McEwen (n 6 above).

90 *R (On the Application of the Counsel General for Wales) v The Secretary of State for Business Energy and Industrial Strategy* [2021] EWHC 950 (Admin).

91 *R (On the Application of the Counsel General for Wales) v The Secretary of State for Business Energy and Industrial Strategy* [2022] EWCA Civ 118, [15].

92 *R (On the Application of the Counsel General for Wales)* (n 90 above) [38], confirmed on appeal in *R (On the Application of the Counsel General for Wales) v The Secretary of State for Business Energy and Industrial Strategy* (n 91 above) [36]. The UK Supreme Court refused permission to appeal in August 2022. For analysis, see G P Evans, 'Devolution and declaratory judgments: the Counsel General's Reference on the UK Internal Market Act 2020' NILQ (forthcoming).

the UKIM Bill made no reference at all to the Frameworks. The two mechanisms were enacted by different (Conservative) governments with very different visions of internal regulatory governance post-Brexit. The UK Government's rationale for introducing the UKIMA was based on its contention that the Common Frameworks did not sufficiently address the potential economic 'spill over' effects for business and consumers of future regulatory divergence between the four nations.[93] The Lords Constitution Committee contested that claim, arguing that, with sufficient political buy-in from all four governments, the Frameworks were perfectly capable, as a matter of principle, of managing regulatory divergence within the UK.[94] The Scottish Government also disputed the UK Government's diagnosis that the market access principles were necessary to prevent the emergence of future obstacles to intra-UK trade. Together with the Welsh Senedd, it refused to grant its legislative consent to the UKIMA's enactment.

In substantive terms, the domestication of the EU principles of non-discrimination and mutual recognition under the UKIMA injects what might be considered a missing element into the newly reconstituted UK internal market – an instrument of negative harmonisation. In contrast to the Common Frameworks, the market access principles actually prescribe substantive limits on the space for policy divergence in relation to intra-UK trade. Their effect is to impose a set of directly enforceable limits on the exercise of devolved competences. This represents a partial replication, in a new domesticated form, of the limits that EU law previously placed on the power of the devolved governments to exercise full control over the regulation of economic activity within their respective territories, including in relation to the management of intra-UK trade. They do this in a more absolute, unconditional way than operated under EU law.

In particular, the UKIMA defines exceptions to the principles of non-discrimination and mutual recognition considerably more narrowly than under the EU Treaties. For example, with respect to goods, section 8(6) UKIMA permits only the justification of indirectly discriminatory regulatory measures that are considered necessary to protect public safety or security and/or the protection of the life or health of humans, animals or plants. Previously, under EU law, it was open to the devolved governments to justify policies that interfered with the Treaty provisions on intra-EU movement, including in relation to intra-UK trade, using a more expansive framework of express derogations

93 Department for Business, Energy and Industrial Strategy (n 80 above).

94 House of Lords, Select Committee on the Constitution, United Kingdom Internal Market Bill (HL Paper 151). See also E Lydgate and C Anthony, 'Brexit, food law and the UK's search for a post-EU identity' (2022) 85(5) Modern Law Review 1168, 1182.

(article 36 TFEU) or an open-ended list of overriding public interest requirements recognised by the EU Court of Justice.[95] It was on that basis that the Welsh Government in *Petsafe Ltd* successfully argued that the Welsh ban on the use of electric collars on cats and dogs was justified on social policy grounds as a proportionate restriction on the free movement of goods under article 34 TFEU.[96] The effect of the UKIMA's narrowing of justification grounds is to prioritise economic efficiency over competing public interest concerns, accentuating the deregulatory qualities of the UK internal market post-Brexit.

3.3 Alignment under UKIMA principles

During its passage through the UK Parliament, the UKIM Bill was amended to take express account of the Common Frameworks, which remain the devolved governments' preferred instruments for the management of intra-UK regulatory diversity post-Brexit. As a result of this, the Act now makes it possible to exempt so-called 'Common Framework Agreements'[97] from the application of the market access principles. Under the UKIMA, the power to grant exemptions is reserved to UK government ministers.[98] However, in a concession to a consensus-based approach to IGR (and meaningful shared rule), the UK and devolved governments reached agreement on a process for considering exemptions pursuant to section 10 (for goods) and section 18 (for services) UKIMA.[99] That agreement, however, remains political and, as such, has no effect on the Secretary of State's legal powers under that Act.[100]

The intergovernmental agreement on process outlines that it is the responsibility of the nation (or nations) seeking an exemption from the market access principles to set out the scope and rationale for the proposed exemption with supporting evidence. The proposal[101] is to be considered within the relevant Common Framework in accordance with the prescribed decision-making processes set out therein. Where agreement is reached, this is to be notified and recorded within the

95 See eg Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* (Cassis de Dijon) ECLI:EU:C:1979:42, para 8. In all cases, justifications are subject to a strict proportionality test.

96 *R (on the application of Petsafe Ltd)* (n 14 above).

97 Defined as 'a consensus between a Minister of the Crown and one or more devolved administrations as to how devolved or transferred matters previously governed by EU law are to be regulated after IP completion day'. See UKIMA, s 10(4).

98 Ss 10 and 18 UKIMA.

99 Process for Considering UK Internal Market Act Exclusions in Common Framework Areas (10 December 2021).

100 See also eg Armstrong (n 79 above) 658.

101 The Agreement references 'proposals' for exemptions rather than 'requests'.

Common Framework; for example, through an exchange of letters. It is then the responsibility of the relevant Secretary of State to introduce a statutory instrument into Parliament giving effect to the agreement for approval under the affirmative resolution procedure. Substantively, exemptions to the market access principles are not tied to the specifics of the proposing government's particular policy framework, but instead directed towards the removal of defined categories of products (or services) from the scope of the UKIMA generally.[102]

The process for exempting agreements reached through the Common Frameworks from the UKIMA's market access principles was first activated in relation to legislation on SUPs. In 2021, the Scottish Parliament enacted a ban on the supply and, in certain instances, manufacture of SUPs which entered into force on 1 June 2022.[103] The Scottish Government succeed in securing agreement on an exemption through the Resources and Waste Common Framework – resulting in the UK Government's enactment of the UKIMA 2020 (Exclusions from Market Access Principles: Single-Use Plastics) Regulations 2022, amending schedule 1 of the UKIMA. The Scottish Government is on record criticising both the narrowness of that amendment and the delay in securing it through the agreed intergovernmental process. Indeed, two months elapsed prior to the enactment of the 2022 Regulations during which the Scottish SUP regulations were in force and, as such, technically vulnerable to judicial review for compliance with the market access principles.

The Scottish Government has since sought a further section 10 UKIMA exemption to cover its deposit return scheme (DRS). The proposed scheme introduces a refundable deposit charge for in-scope single-use drinks containers and supplier-based obligations to fulfil certain collection obligations directly or indirectly. Similar schemes are being developed for England and Wales.

Having initially anticipated securing a single exemption to cover both its SUP and DRS regulations, the Scottish Government found itself required to propose a further, separate exemption for the latter. The Scottish Government maintains that it duly made such a proposal in compliance with the terms of the intergovernmental agreement on the exemption process and has publicly expressed its frustration at the UK Government's apparent lack of engagement in dealing with this. Procedurally, it is notable that the agreed intergovernmental process does not require the relevant (here: Scottish) minister to submit a separate formal 'request' to the Secretary of State once agreement has

102 UKIMA 2020 (Exclusions from Market Access Principles: Single-Use Plastics) Regulations 2022, s 2.

103 Environmental Protection (Single-Use Plastic Products) (Scotland) Regulations 2021.

been reached on its proposal through the relevant Common Framework. Under the agreed process, it is the responsibility of the Secretary of State (here: the Department for Environment, Food and Rural Affairs (DEFRA)) to take forward the exemption proposal as agreed between the four governments through the Common Framework.

In 2023, the Scottish Government announced its decision to postpone the operation of the scheme until 1 March 2024 as a result of delays in its efforts to secure an exemption from the market access principles.[104] In an indication of escalating tensions, one Member of the Scottish Parliament (MSP) (Ross Greer, Scottish Green Party) wrote to the Speaker of the House of Commons accusing the Secretary of State for Scotland (Alistair Jack, Conservative) of misrepresenting the Scottish Government's engagement with DEFRA through the Common Frameworks programme to secure an exemption for its DRS legislation pursuant to section 10 UKIMA.[105] The Secretary of State is recorded as having reported to the House that the UK Government had not yet received an official ministerial 'request' from the Scottish Government for such an exemption. As Mr Greer sought to remind the Secretary of State – echoing the (then) First Minister's correspondence to the Prime Minister[106] – the agreed intergovernmental process imposes no such procedural requirement. Subsequently, in a move that the Scottish First Minister, Humza Yousaf (Scottish National Party), condemned as a 'democratic outrage',[107] the UK Government announced that it would only partially exempt the DRS from the application of the market access principles, citing a need to align the Scottish scheme with its own proposals for England and Wales.[108] Without an exemption, the DRS would be confined to in-scope drinks containers produced within the Scottish market, resulting in additional costs for Scottish producers and consumers should a less onerous scheme be introduced to cover the rest of the UK market.

The Scottish Government's efforts to secure an exemption for the DRS captures the emerging dynamics of intra-UK trade relations post-Brexit. Rather than evidence of an emerging culture of cooperative intergovernmental decision-making through agreed Frameworks and exemption processes, the DRS experience points to a model of IGR that remains principally characterised by bilateral confrontations between the UK Government and the government of one of the devolved nations.

104 Minister for Green Skills, 'Circular economy and biodiversity', letter dated 18 April 23.

105 Ross Greer MSP, letter dated 22 April 2023.

106 First Minister of Scotland to UK Prime Minister, letter dated 28 February 2023.

107 A Learmouth, 'UK Government unveil conditions for "consistent" DRS exemption' *The Herald* (Glasgow 27 May 2023).

108 'Policy statement: Scottish Deposit Return Scheme – UK internal market exclusion' (27 May 2023).

Political tension between the UK Government and devolved governments is also visible in other areas, notably in relation to the UK Government's introduction of the Genetic Technology (Precision Breeding) Bill.[109] That Bill (now enacted)[110] introduces legislative changes for England only, removing restrictions on the development of certain types of precision-breeding technologies. The Scottish and Welsh Governments alleged that the UK Government had only informed them of the Bill's content immediately prior to its introduction in an alleged breach of a political obligation to manage potential divergence through the Common Frameworks. An amendment was tabled (but subsequently withdrawn) at committee stage to prevent the operative parts of the Bill coming into force until a Common Framework agreement on precision breeding has been agreed between the UK Government and the Scottish and Welsh Governments.[111] Responding at committee stage, the Minister for Farming, Fisheries and Food (Victoria Prentis, Conservative) maintained that the Bill was out of scope given that the four administrations had jointly resolved not to adopt a Common Framework on genetically modified organism technologies.[112]

4 THE COMMON FRAMEWORKS: UNTAPPED POTENTIAL?

The Common Frameworks exhibit clear potential as instruments of positive harmonisation. As outlined, they establish, by consensus, possible mechanisms for the UK and devolved governments to coordinate policymaking across the four nations of the UK. However, a review of initial practice indicates that the Common Frameworks remain some way off reaching maturity as positive harmonisation tools in relation to domestic market regulation (see section 2, above).[113] The criticism here is not that the Frameworks are yet to emerge as forums for joint agreement on uniform UK-wide regulatory standards with respect, for example, to SUPs or the introduction of deposit return schemes. Uniformity is rarely, if ever, the prescribed end goal of positive harmonisation within any system of multilevel governance.[114] Rather, with the Common Frameworks, the concern

109 See eg Scottish Government, 'Genetic Technologies (Precision Breeding) Bill': letter to UK Government', letter dated 10 June 2022.

110 Genetic Technology (Precision Breeding) Act 2023.

111 Public Bill Committee (Bill 11) 2022–2023, 252.

112 Ibid 254.

113 See also House of Lords (n 68 above).

114 For comparative analysis of regulatory dynamics across different internal markets, see Anderson (n 5 above).

is that these instruments may fall far short of their potential as tools simply to coordinate (as opposed to unify) divergent policy preferences throughout the UK post-Brexit. As section 2 outlined, the experience thus far points to their functioning as little more than mechanisms for the devolved governments simply to report (and defend) specific decisions on policy, rather than as forums for meaningful agreement on intra-UK policy coordination. Should that approach endure, shared rule would end up being more procedural than substantive.

The question that arises is: what factors are conditioning the operation of the Common Frameworks as positive harmonisation tools? In particular, what may be restricting their potential flourishing as instruments for effective substantive policy coordination between the UK and devolved governments?

In this section, we draw attention to three issues. First, there is the underlying question of political 'buy-in'. Exiting the EU legal order requires the UK and devolved governments to reach a new agreement on the UK internal market as an object of regulation. Secondly, there is the issue of political context. Changes to the framework within which competences are exercised post-Brexit are generating new tensions between the UK and devolved governments with respect to the conceptualisation of devolved competences under the UK's territorial constitution. Thirdly, there is the enduring structural problem of disaggregating 'English' and 'UK-wide' regulatory interests and establishing effective structures to balance the former alongside the interests of the three other (much smaller) nations.

4.1 In search of new consensus

First, on political 'buy-in', there is little evidence thus far to indicate that the UK and devolved governments have reached workable agreement on the UK internal market as an *object* of regulation. Consensus on the nature of a functional problem (and the principles designed to resolve it) is an essential prerequisite for effective coordination within any system recognising distinct layers of government.[115] With respect to the UK internal market, agreement presently appears, at best, only partial. The initial approach under the Frameworks remains the highwater mark in terms of joint agreement on the existence of a functional problem. Signing off the Frameworks programme, the UK and devolved governments recognised a common regulatory challenge arising as a result of the repatriation of competences post-Brexit. The subsequent enactment of the UKIMA disturbed that consensus, with the devolved governments expressly refuting the UK Government's

115 On the importance of generating common interests as a basis for shared rule alongside self-rule, see eg R L Watts, *Comparing Federal Systems* 3rd edn (McGill-Queen's University Press 2008) 182.

diagnosis that further intervention was required in the form of the market access principles to prevent the emergence of future obstacles to intra-UK trade.

The gap between the UK and devolved governments in relation to the UK internal market as an object of regulation reflects the pull of competing conceptions of self- and shared rule in relation to devolution.[116] For the devolved governments, acknowledging the UK internal market as a shared regulatory space that cuts across the devolved competences challenges the view of devolution as a 'voluntary union of nations', according to which devolved competences exist as a direct expression of democratic self-rule.[117] This is apparent, post-Brexit, from the devolved governments' concerns about the practical effects of the market access principles on their regulatory autonomy (section 3.2, above). Resistance to the application of these principles follows from their capacity to reduce the power of the devolved governments to exercise full control over the regulation of economic activity within their respective territories.[118] The concern here is amplified when one considers the dominance of England as the largest of the four UK markets.[119]

The UK Government, on the other hand, appears more open, conceptually, to the idea of the UK internal market as a shared regulatory space requiring the introduction of additional directly enforceable legal principles to manage future policy divergence. However, its diagnosis of the regulatory problem (prospective regulatory divergence as an obstacle to intra-UK trade) is not matched by a developed understanding of *how* shared rule should operate in practice. Its initial attempt through the Common Frameworks represents the clearest attempt to bring together the UK and devolved governments to agree on future policy coordination. But that insight was short-lived. The subsequent approach of the Johnson Government through the UKIMA repudiated

116 On competing conceptions of the UK constitution order generally, see eg D Wincott, C R G Murray and G Davies, 'The Anglo-British imaginary and the rebuilding of the UK's territorial constitution after Brexit: unitary or union state?' (2022) 10(5) Territory, Politics, Governance 696.

117 See eg Scottish Government, 'After Brexit: the UK Internal Market Act and devolution' (8 March 2021) 3. On self-rule as a defining characteristic of Scottish devolution, see eg A Page, 'Scotland in the United Kingdom: an enduring settlement?' in A Lopez-Basaguren and L Escajedo San-Epifanio (eds), *Claims for Secession and Federalism: A Comparative Study with a Special Focus on Spain* (Springer 2019).

118 The UKIMA was also added to the list of 'protected' instruments under the Devolution Acts, meaning that it may not be modified by the devolved legislatures. See s 54 UKIMA.

119 England accounts for around 85% of the UK's gross domestic product. See here also eg Dougan et al (n 79 above) 671.

the very idea of shared rule by monopolising political authority from the centre.

Disagreement over the UK internal market as a regulatory object extends to normative principles. Under the Common Frameworks, the UK and devolved governments effectively sidestepped the crucial matter of determining *what* replacement substantive principles ought to inform the regulation of the UK internal market post-Brexit. Nothing was agreed beyond an abstract commitment to 'maintain, as a minimum, equivalent flexibility for tailoring policies to the specific needs of each territory as is afforded by current EU rules'.[120] Following the enactment of the UKIMA, the market access principles now occupy that space, imposing thicker substantive limits on domestic policymaking. In their new, modified form, these principles are strongly deregulatory, articulating a vision of the UK internal market that prioritises considerations of economic efficiency over the protection of other non-economic values.[121] The shift to efficiency represents a significant adjustment to pre-existing EU legal frameworks, which aspire to balance the economic benefits of liberalising intra-EU with the achievement of a broad range of social and political objectives.[122] It is an ideological choice in favour of 'economic unionism'[123] that was imposed on the devolved governments and one that remains strikingly out of alignment with their respective regulatory traditions, at least to the present point.[124]

The UK experience thus far contrasts with that of the EU's internal market. True, member states periodically take aim at particular EU instruments or EU judicial decisions that they consider to interfere

120 Joint Ministerial Committee (EN) Communiqué (n 11 above).

121 For criticism, see eg Scottish Government (n 117 above) 17.

122 See here eg art 3(2) TEU: 'The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.'

123 Armstrong (n 79 above).

124 Among other things, devolution has enabled the Scottish and Welsh Governments to diverge on issues such as land reform; the regulation of smoking and alcohol; personal care provision; access to higher education; and, in Scotland, direct taxation. Signalling further departure from UK government policy, the Scottish Parliament enacted the European Union (Continuity) (Scotland) Act 2021 empowering Scottish Ministers to align with future developments in EU law where appropriate (and permissible under the Scotland Act 1998). For an early survey of policy differences post-devolution, see A Trench and H Jarman, 'The practical outcomes of devolution: policy-making across the UK' in A Trench (ed), *Devolution and Power in the United Kingdom* (Manchester University Press 2007).

unjustifiably with their often jealously guarded regulatory autonomy. But, at the macro level, there is no fundamental disagreement between the member states with the objective of establishing a functioning internal market in accordance with the provisions of the EU Treaties. Nor is there any dispute with regard to the specific regulatory instruments designed to achieve that objective. The EU internal market rests on consensus between the member states on the co-existence of instruments of positive and negative harmonisation as tools to realise the economic, social and political benefits of market integration. Agreement between the member states further extends to normative principles, with the EU Treaties (under the supervision of the EU Court of Justice) providing for the establishment of a functioning internal market that aspires to balance economic benefits of liberalising intra-EU trade with the achievement of a wide range of social policy objectives and respect for fundamental principles, notably subsidiarity and proportionality.

4.2 Political context

Secondly, turning to consider changes in political context, Brexit has transformed the framework within which devolved competences are exercised under the UK's territorial constitution, generating new sites of political tension between the UK and devolved governments. Membership of the EU internal market had a significant impact on devolved competences. In a break with the 'devolve and forget' (or 'hyper-dualist') logic of devolution, it carved out a distinctive space for the exercise of devolved competences as *concurrent* rather than *de facto* exclusive competences.[125] This was visible both vertically in interactions with EU institutions as well as horizontally *vis-à-vis* the UK Government.

Vertically, from their inception, the devolved governments were locked into the EU's internal market project as an area of shared member state and EU responsibility under the EU Treaties.[126] This required compliance with the EU Treaty provisions guaranteeing the free movement of goods, persons, services and capital. The exercise of devolved competences therefore had to be 'other regarding' at all

125 J Hunt, 'Subsidiarity, competence, and the UK territorial constitution' in O Doyle, A McHarg and J Murkens (eds), *The Brexit Challenge for Ireland and the United Kingdom: Constitutions under Pressure* (Cambridge University Press 2021).

126 The Devolution Acts reinforced this as a matter of domestic law. See s 27(3) Scotland Act 1998 and s 94(6)(c) Government of Wales Act 2006. See also eg M Keating, 'Brexit and devolution in the United Kingdom' (2017) 5(2) Politics and Governance 1.

times with respect to the demands of the EU internal market.[127] The EU Treaty provisions on intra-EU movement functioned to ensure the representation of external interests in domestic political processes within the devolved territories.[128] Accordingly, the Scottish Government could only legislate to introduce minimum alcohol pricing within Scotland provided that this was compatible with the demands of article 34 TFEU on the free movement of goods.[129] In that respect, as a matter of EU law, the position of the devolved governments was no different from that of the UK Government legislating in areas of reserved (or non-devolved) competence within the scope of Union law.

Horizontally, EU membership also facilitated the exercise of devolved competences concurrently with the UK Government in areas of Union policymaking. This was most visible in relation to the implementation of EU policy, where the UK and devolved governments coordinated the exercise of their respective competences to adapt EU frameworks to local conditions within the four markets of the UK. The Concordat on the Coordination of European Policy Issues, agreed between the UK and devolved governments, outlined the freedom (within the constraints of Union law) for the devolved governments to adapt EU rules to local conditions, or, alternatively, to coordinate UK or GB-wide approaches with the UK and other devolved governments.[130] When challenged, the EU Court of Justice confirmed that intra-UK differentiation with respect to the implementation of EU policies was permitted as a matter of Union law.[131]

Cooperation between the UK and devolved governments in areas of devolved competence extended further to capture political input into EU policymaking.[132] A Memorandum of Understanding concluded between the UK and devolved governments explicitly recognised the intersection of EU and devolved competences in several areas of EU policymaking, together with the particular interest and role of the devolved governments in these areas.[133] Further (or accordingly), the

127 The position for Wales differed prior to the transfer of legislative competences under the Government of Wales Act 2006.

128 Regan (n 8 above). See also, with respect to art 34 TFEU, Maduro (n 8 above). For criticism on limits, see eg Jaakkola (n 8 above).

129 See *Scotch Whisky Association v Lord Advocate and Advocate General* [2017] SC 465.

130 Concordat on the Coordination of European Union Policy Issues (n 22 above), B4 Common Annex, B4.17.

131 *R (Horvath) v Secretary of State for Environment, Food and Rural Affairs* [2006] EWHC Admin 1833.

132 See eg A-L Högenauer, 'The Scottish Parliament – active player in multilevel European Union' in G Abels and A Appler (eds), *Subnational Parliaments* (Routledge 2016).

133 Memorandum of Understanding (n 22 above) para 18.

Concordat on the Coordination of European Policy Issues empowered the devolved governments, where appropriate, to represent the UK interest at Union level through the Council of the European Union.[134] This was despite the formal designation of EU relations as a reserved competence under the Devolution Acts.[135]

Aligning devolution with the structures of the EU as a quasi-federal system of multilevel governance in the above manner, membership of the EU internal market exercised powerful effects on the conceptualisation of devolved competence. For the devolved governments, alignment challenged the perception of devolved competences as *de facto* exclusive; in other words, as powers enabling them to exercise near total control over the regulation of economic and non-economic activity within their respective territories. For the UK Government, EU membership exercised a powerful check on opposing political impulses to control devolution from the centre in line with the orthodox, legalistic view of devolution as a framework that remains firmly embedded within a unitary domestic constitution. EU principles and structures, including an active commitment to subsidiarity, mandated that the UK Government should coordinate the exercise of its competences in relation to EU membership with those of the devolved governments in areas of Union policymaking. Taken together, the overall effect on devolved competences was largely unifying, with both the UK and devolved governments recognising a collective interest in coordination and shared rule both vertically and horizontally within EU frameworks.

Brexit appears to have largely extinguished the disciplinary (and unifying) effects of EU principles and structures on the exercise of devolved competences.[136] Without these guardrails in place, domestic regulatory interactions are transitioning to a new operational understanding of devolved competences that points to increasing polarisation. For the UK Government, the repatriation of EU competences in devolved policy areas appears tied to its understanding of the UK internal market as the continuation, domestically, of a previously EU-managed shared regulatory space. On that view, the exercise of devolved competences post-Brexit remains, by default, necessarily 'other regarding'. Membership of the UK internal market

134 Concordat on the Coordination of European Union Policy Issues (n 22 above), B4 Common Annex, B4.13.

135 Northern Ireland Act 1998, sch 2, s 3; Scotland Act 1998, sch 5, s 7(1); Government of Wales Act 2006, sch 7A, s 10(1) and (2).

136 Concurrent competence continues to define other aspects of domestic policymaking, notably in relation to aspects of social security under the Scotland Acts 2012 and 2016. See here eg A Page, 'Scotland in the United Kingdom' (2019) and A Evans, 'Inter-parliamentary relations in the United Kingdom: devolution's undiscovered country?' (2019) 39(1) Parliament, Estates and Representation 98.

requires the devolved governments to exercise their competences in a manner that takes direct account of any effects on intra-UK trade. Contrastingly, for the devolved governments, the repatriation of EU powers in areas of devolved competence is internalised as an expansion of *de facto* exclusive competences. Brexit marks a point at which devolved powers in areas previously governed by EU law should increase in line with their understanding of devolution as a constitutional framework that exists, first and foremost, to protect democratic self-rule.

The Common Frameworks stand out against that backdrop as a (non-legislative) attempt to preserve the logic of concurrency and coordination under the UK constitution despite far-reaching changes in political context post-Brexit. The Frameworks carry over into a new domestic context the EU-facing conceptualisation of UK and devolved competences as *de facto* concurrent, rather than *de facto* exclusive. Stripped to their core, they commit the UK and devolved legislatures to cooperate on policy coordination in areas of devolved competence that were previously within the scope of EU law. But that is about all they carry over. As our analysis has set out (sections 2 and 3, above), the Frameworks are light on substantive principles and, further, notably fail to transplant into domestic law many of the EU's important tools that are designed to enhance the scope for divergent policymaking within the EU's internal market as a shared regulatory space. These tools include, among other things, the open-ended set of overriding public interests justifying restrictions on cross-border movement as well as the EU's active commitment to subsidiarity. As our analysis reveals (section 3.3, above), the effective functioning of the Common Frameworks as instruments of positive harmonisation is also undermined by operational tensions. Recall here, for instance, the Scottish Government's difficulties, through an agreed intergovernmental process, to exempt regulations from the UKIMA's market access principles.

4.3 Structural legacies

A further powerful drag on the potential development of the Common Frameworks as positive harmonisation instruments is structural.[137] Effective domestic mechanisms for shared rule – including the Common Frameworks – are premised on a clearer division between the UK Government's role as the representative of UK and English interests, respectively. In its current form, the UK's asymmetric constitution does not meaningfully disaggregate English and UK-wide representative interests in that regard. Under both the Common Frameworks and the

137 See also eg McEwan et al (n 45 above) 638. See also Arden LJ in *R (Horvath)* (n 131 above) [51]–[59].

UKIMA, the UK Government occupies a dual representative position by default. It coordinates at the centre in proxy for UK interests whilst at the same time representing the political and economic interests of the English nation.

As mechanisms for shared rule, the Frameworks would offer greater potential for substantive policy coordination if they brought together representatives from the four nations of the UK as opposed to, as is currently the case, simply the UK and devolved governments. Presently, for example, when considering proposals to exempt Common Framework Agreements from the application of the market access principles, the UK Government acts in a dual representative capacity as both a regulator for England and as the institution tasked with protecting the joint UK-wide interest in ensuring the free movement of goods and services. This fusion of self-rule interests (English regulatory preferences) with shared rule concerns (joint UK and devolved agreement on policy coordination) inevitably conditions decision-making. Recall here, for instance, the UK Government's decision only partially to exempt the Scottish deposit return scheme from the application of the market access principles. In reviewing that scheme's effects on intra-EU trade, the UK Government makes no secret of its desire for substantive regulatory alignment with its own proposals for England (and Wales and Northern Ireland).[138]

Post-Brexit there has been some movement towards disaggregation through recent reforms to aspects of IGR. This includes, for instance, the introduction of changes to the management of dispute resolution processes, which the UK Government has traditionally dominated through the exercise of administrative gatekeeping functions.[139] Attributing such functions to the UK Government in areas of shared responsibility effectively leaves it to 'mark its own homework' as one stakeholder put it.[140] The Review of Intergovernmental Relations improves on this, by providing for the establishment of a Secretariat that is independent of the UK Government.[141] Composed of representatives from all four UK governments, its existence and functioning appeal to the logic of shared rule, albeit with regard only to dispute resolution and general administration. Independence from the UK Government is

138 Policy Statement: Scottish Deposit Return Scheme – UK Internal Market Exclusion (27 May 2023). The Welsh Government is cooperating with the UK Government with a view to establishing a common scheme, which will also extend to Northern Ireland. For an overview of proposals, see 'Introducing a Deposit Return Scheme for drinks containers in England, Wales and Northern Ireland'.

139 See also section 1.2 above.

140 C Jones, 'Brexit and devolution: stresses, strains and solutions' speech at the Institute for Government, 10 September 2018, cited in eg McEwan et al (n 45 above) 638.

141 Review of Intergovernmental Relations.

also visible in the attribution of advisory and reporting powers to the new OIM (section 3.1, above). The UKIMA establishes the OIM (within the Competition and Markets Authority) as a reporting, advisory and monitoring body that is directed to act 'even-handedly' with respect to the four UK administrations.[142] The OIM published its first annual report on the operation of the UK internal market in March 2023.[143]

The above changes, however, do very little to address to the core issue of tackling longstanding asymmetries in the UK's territorial constitution. Devolution has never extended to include representation for England as a distinct nation, with English representation left to the UK Government and the UK Parliament. The fusion of UK with English interests is particularly deeply embedded in legal accounts of the UK's territorial constitution.[144] Ideas of the UK as a unitary state under the Diceyan doctrine of (UK) parliamentary supremacy reflect distinctly English accounts of the UK constitution. EU membership directly challenged that account in relation to devolution,[145] but the pull of the old view has resurfaced to define UK Government approaches to the task of de-Europeanising the domestic constitution post-Brexit. Periodic proposals have been issued to address constitutional asymmetries (which present a serious challenge given the relative size of England), including Welsh Government suggestions to establish a UK Council of Ministers, with representation from each of the four governments, or earlier proposals for the introduction of a Minister for England within the UK Government. Lasting stability with respect to both the management of the UK internal market, specifically, and devolution, more broadly, requires ambitious constitutional reform.[146]

142 S 31(4) UKIMA.

143 OIM (n 69 above).

144 See here see eg Wincott et al (n 116 above).

145 See eg Case 213/89 *R v Secretary of State for Transport, ex p Factortame Ltd* ECLI:EU:C:1990:257. For the classic account on revolutionary change, see H W R Wade, 'Sovereignty – revolution or evolution?' (1996) 112 Law Quarterly Review 568.

146 See eg Labour Party, A New Britain: Renewing our Democracy and Rebuilding our Economy – Report of the Commission on the UK's Future (Labour Party 2022) and Alliance for Radical Democratic Change 'Stronger Scotland, better Britain' (Press release 1 June 2023). See also eg V Bogdanor, *The New British Constitution* (Hart 2009) and V Bogdanor, *Beyond Brexit: Towards a New British Constitution* (Tauris 2019).

5 CONCLUSION

With regard to matters of internal market governance, Brexit represents the continuation of a functional problem in a new political context. Functionally, the problem remains one of managing policy coordination (or the limits of policy divergence) within a political system that recognises distinct sites of political authority – in our example, arising as a consequence of devolution. Brexit requires the UK and devolved governments to reach a new consensus around how to address that problem in a newly reconstructed domestic context.[147]

In this contribution, we have drawn on distinctions between positive and negative harmonisation and related perspectives on self- and shared rule to reflect on progress towards achieving a new consensus. The results of our enquiry demonstrate the disruptive impact of removing EU principles and structures on the establishment and effective functioning of new domestic mechanisms for positive and negative harmonisation post-Brexit. Without the disciplinary effects of EU frameworks, efforts to establish replacement mechanisms to manage domestic internal market governance are struggling to gain traction. Detached from the EU as a system of multilevel governance, the UK constitution appears fundamentally unable to manage strengthening claims to self-rule from Cardiff and Edinburgh through new instruments of positive and negative harmonisation. The problem is not simply one of differing political parties governing the UK and devolved nations, respectively. Even if political alignment across the four nations should increase in the future (eg as a result of a change in UK Government), fair-weather governance is an impoverished basis for effective constitutional functioning. What is missing are robust institutional structures for shared rule to manage intra-UK policy divergence. This is not a new problem, but one that has emerged, post-Brexit, as a (if not, *the*) defining challenge for the UK constitution.[148]

The Common Frameworks stand out as the clearest attempt thus far to balance self- and shared rule within the constraints of the present constitutional settlement. Initially introduced with little enthusiasm in response to the UK Government's proposals to repatriate EU competences, the Frameworks appear now to be emerging as the devolved governments' preferred instruments for managing regulatory divergence post-Brexit, not least following the introduction of the UKIMA with its distinctly deregulatory rules on market access. Conceptually, the Frameworks represent a continuation of pre-

147 On the need for a renewal of political consensus more broadly, see the Welsh First Minister's call for a 'solidarity union' built around rights to public services and financial solidarity. See S Carrell, 'UK could break up unless it is rebuilt as "solidarity union", says Mark Drakeford' *The Guardian* (London 29 May 2023).

148 For earlier recognition, see eg Arden LJ in *R (Horvath)* (n 131 above) [51]–[59].

existing mechanisms for intergovernmental cooperation. However, in contrast to earlier instruments that were often largely technical in nature, the Common Frameworks are now required to discharge highly politicised functions across wide-ranging spheres of devolved policymaking. Structural biases and attitudinal distortions inherent in the UK's present constitutional settlement inherently undermine their capacity to do so effectively as potential positive harmonisation instruments by privileging UK Government control by default. The Scottish Government's efforts to diverge in relation to managing the circular economy exemplifies the practical effects of these biases and distortions. Future efforts to pursue intra-UK regulatory divergence in other areas of devolved policymaking will only further increase tensions to the point where the old constitution may finally snap, threatening the integrity of the Union.

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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.

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The market access principles and the subordination of devolved competence

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ABSTRACT

The United Kingdom (UK) Internal Market Act 2020's 'market access principles' are capable of disapplying devolved legislation. Because that process qualifies the effectiveness but not the validity of that legislation, the UK Government contends that it leaves devolved competences intact and, therefore, respects the devolution settlement. However, this article argues that the use of disapplication to mechanise the market access principles has a deeper subordinating effect on devolved competence. This is because it suggests that devolved legislation is second-class, even within competence, and it implies that the settlement offers no protection for the effectiveness of devolved legislation, in stark contrast to the position accorded to Westminster. Further, disapplication also points to a less autonomous model of devolution, undermines legal certainty, and conceals significant constitutional changes from view. As such, far from neutralising the Act's centralising tendencies, disapplication only exacerbates them.

Keywords: devolution; Brexit; parliamentary sovereignty; unqualified legislative power; disapplication; supremacy; competence.

INTRODUCTION

The *UK Internal Market* White Paper, introduced in July 2020, claimed that the United Kingdom (UK) Government 'values the principle of devolution and believes that the UK's exit from the EU [European Union] offers the chance to support the devolution

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settlements'.[1] It sought to provide reassurance that the UK Government's proposed approach was one 'that respects the devolution settlement',[2] a sentiment expressed elsewhere, too: Michael Gove, then Chancellor of the Duchy of Lancaster, spoke in similar terms following publication of the UK Internal Market Bill, saying that the devolved institutions would 'enjoy a power surge when the transition period ends in December'.[3] Accordingly, the White Paper included a list of '[e]xample areas' of 'new powers transferring to the devolved administrations'.[4]

However, this characterisation of the internal market proposals was not universally accepted. In contrast, the devolved institutions made their views known 'in the strongest of terms'[5] with the Scottish Government's Constitution Secretary calling that list 'one of the most shocking pieces of dishonesty [he had] seen from a Government'.[6] The Welsh Government, in its legal challenge to the UK Internal Market Act 2020 (UKIMA), maintained that its provisions 'ostensibly – albeit implicitly – limit the scope of the devolved powers of the Senedd'.[7]

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1 Department for Business, Energy and Industrial Strategy, *UK Internal Market* (White Paper CP 278 2020) 21.

2 Ibid 10.

3 Scotland Office, 'UK Internal Market Bill introduced today' (9 September 2020); Library Specialists, 'The United Kingdom Internal Market Bill, 2019–21' (CBP 9003 House of Commons Library 2020) 20.

4 Library Specialists (n 3 above) 20; Department for Business, Energy and Industrial Strategy (n 1 above) 17. See also Philip Sim, 'Fresh row over devolved powers after Brexit' (*BBC News Online* 16 July 2020); Cabinet Office, 'Revised frameworks analysis: breakdown of areas of EU law that intersect with devolved competence in Scotland, Wales and Northern Ireland' (UK Government 2019).

5 Thomas Horsley, 'Constitutional reform by legal transplantation: the United Kingdom Internal Market Act 2020' (2022) 42 Oxford Journal of Legal Studies 1143, 1156. See eg Constitution and Cabinet Directorate, 'UK Internal Market: initial assessment of UK Government proposals' (Scottish Government 2020); External Affairs and Additional Legislation Committee, 'UK Internal Market Bill: legislative consent' (Welsh Parliament 2020).

6 Library Specialists (n 3 above) 20; Sim (n 4 above). He continued: 'It's a mishmash of things the Scottish Parliament already has, things they've already decided we won't have because of the frameworks, and things that could be automatically overridden by a decision by the UK government to take a power away. There aren't new powers for the Scottish Parliament, that is a lie. Nobody should be fooled by this – what is actually happening here is taking away very significant powers that will have an effect on our daily lives.'

7 Counsel General for Wales, Grounds for Judicial Review: R (Counsel General for Wales) v Secretary of State for Business, Energy and Industrial Strategy (2021) para 1; *R (Counsel General for Wales) v Secretary of State for Business, Energy and Industrial Strategy* [2021] EWHC 950 (Admin); *R (Counsel General for Wales) v Secretary of State for Business, Energy and Industrial Strategy* [2022] EWCA Civ 118.

Similarly, Plaid Cymru described the White Paper as 'nakedly taking back competencies already held in Wales' and further claimed that 'the Westminster Government is chipping away at two decades of devolution'.[8] Such a feeling was not confined to the devolved parts of the UK, though. William Wragg, Chair of the House of Commons' Public Administration and Constitutional Affairs Committee, said that 'the Bill involves areas of devolved competence and potentially reserves new powers'. In his view, 'the effects of the Bill as outlined in the White Paper will engage with and alter the UK's devolved governance arrangements. This is a significant constitutional effect.'[9]

What explains such a marked difference of opinion? The fulcrum of disagreement appears to be the interpretation of the market access principles' impact on devolved law-making power. Illustratively, Alok Sharma, Secretary of State for Business, Energy and Industrial Strategy, wrote in his foreword to the White Paper that the proposed market access principles 'will not undermine devolution, they will simply prevent any part of the UK from blocking products or services from another part while protecting devolved powers to innovate'.[10] By contrast, William Wragg was of the view that these same principles 'will effectively create new reservations in areas of devolved competence'.[11]

The market access principles at the core of the UKIMA invite the language of evasion: they only impact on devolved competence 'effectively' (according to Wragg), or 'impliedly' (according to the Counsel General for Wales). This may well be by design: the operation of the market access principles conceals any change in competence from a purely legal analysis, allowing the UK Government to contend that '[all] powers that have been devolved will remain devolved'.[12] The key is that the market access principles, rather than repealing devolved legislation, or providing any other 'hard' limitation on its validity, merely qualify its 'effect' in certain circumstances: a process captured by the term 'disapplication'.[13]

Because devolved legislation affected in this way remains 'valid' in all, and enforceable in some, circumstances, it may appear that the

8 Plaid Cymru, 'Plaid responds to consultation on Westminster "power grab" proposals' (10 August 2020); Library Specialists (n 3 above) 21.

9 William Wragg MP to Michael Gove MP and Alok Sharma MP, 'The White Paper on the UK Internal Market' (10 August 2020); Library Specialists (n 3 above) 21.

10 Department for Business, Energy & Industrial Strategy (n 1 above) 8.

11 Wragg to Gove and Sharma (n 9 above).

12 Jenni Davidson, 'UK Government proposals for post-Brexit powers "one of the most significant threats to devolution yet"' [2020] *Holyrood*; David Torrance, 'EU powers after Brexit: "power grab" or "power surge"?' (House of Commons Library: Insight 29 July 2020).

13 This term serves as a useful shorthand for this process, given its nuances are explored in detail in the following section.

UK Government's analysis, on which competences *technically* remain unchanged, is persuasive. However, reliance on disapplication as the means for mechanising the market access principles provides a kind of camouflage, or what has previously been described as a 'smoke screen',[14] concealing *de facto* changes to devolution from a *de jure* analysis, facilitated by a lack of any clear definition of 'competence' itself.

It is this smoke screen which allows the UK Government to maintain that its approach 'respects the devolution settlement'.[15] However, this article argues that it does the opposite. The very mechanism used by the market access principles to give the appearance of protecting devolution – disapplication – has, in reality, the effect of constitutionally subordinating the devolved legislatures. This subordinative effect is more significant than the more conventional approach of reserving a particular policy area because, rather than merely cutting the outer limits of devolved legislative capability, it reduces the devolved legislatures to 'second-class' institutions *within* their competences, undermining the dynamism upon which much of the devolution system is predicated. Rather than protecting or empowering the devolved legislatures, the disapplication process is a core mechanism through which they are undermined.

The subordination of devolved legislation by disapplication therefore has a distinctly normative colour to it, but it is also a very practical tool. It provides the means by which the UK's central institutions can exercise a more assertive influence over, and involvement in, affairs *which they accept* remain devolved. Further, the UKIMA is an example of centralisation by stealth, allowing the UK Government to maintain that its approach is in keeping with at least the letter of devolution, while it is undermined in practice: a notably narrow interpretation of what it means to respect the settlement.

This article proceeds in three steps. First, it considers how the market access principles interact with legislation: 'the disapplication framework'. Second, it considers whether – and how – competences might be preserved under such a model, considering two approaches. One approach considers that a 'competence' does not necessarily mean the power to make *effective* legislation, and a second takes the opposite view. Third, this article will situate the subordination of devolved law-making power under the disapplication framework alongside the UKIMA's wider centralising project as, arguably, one of its core components.

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14 Anurag Deb and Nicholas Kilford, 'The UK Internal Market Act: devolution minimalism and the competence smoke screen' (*UK Constitutional Law Association* 4 July 2022).

15 Department for Business, Energy & Industrial Strategy (n 1 above) 10.

THE DISAPPLICATION FRAMEWORK

How does the UKIMA interact with devolved law-making power? Perhaps its most obvious effect on devolution is found in section 54, in which the UKIMA adds itself to the list of enactments protected from modification by the devolved legislatures. Two further parts of the Act also cut across devolved law-making power: part 6 makes provision for the UK Government to fund projects throughout the UK, 'regardless of devolved powers'[16] (although the UK Government can already spend in devolved areas)[17] and part 7 'amends the devolution statutes to reserve subsidy controls, equivalent to state aid provision under EU law'.[18] This 'resolves a dispute regarding competence over subsidy control by expressly reserving it to the central UK authorities'.[19]

Most important for present purposes, however, are the 'market access principles': mutual recognition and non-discrimination. The Explanatory Notes set these principles out in the following helpful terms:

> Mutual recognition means that any good that meets relevant regulatory requirements relating to sale in the part of the UK it is produced in or imported into, can be sold in any other part of the UK without having to adhere to additional relevant regulatory requirements in that other part. For example, a bag of flour made in one part of the UK that met the relevant requirements in that part (for example on the composition of the flour) can be sold in any other part of the UK without having to meet any other relevant requirements that apply there.[20]

> The non-discrimination principle means direct or indirect discrimination based on differential treatment of local and incoming goods is prohibited.[21]

16 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 650–676, 651. See also House of Lords Select Committee on the Constitution, *United Kingdom Internal Market Bill* (HL 2019-21, 151) paras 37–44.

17 Library Specialists (n 3 above) 22: 'The Explanatory Notes state that Part 6 of the Bill grants the power to a UK Minister of the Crown to provide funding for economic development, infrastructure, culture, sporting activities, and international educational and training activities and exchanges. The Explanatory Notes acknowledge that these purposes "fall within wholly or partly devolved areas". But the new powers are intended to "sit alongside the existing powers by which the UK Government can fund in relation to devolved matters across the devolved nations, in particular the Industrial Development Act 1982".' See also ibid s 6.6; Explanatory Notes to the UKIMA, para 80.

18 House of Lords Select Committee on the Constitution (n 16 above) para 45.

19 Dougan et al (n 16 above) 651; House of Lords Select Committee on the Constitution (n 16 above) para 46.

20 Explanatory Notes to the UKIMA, para 11.

21 Ibid para 18.

> Direct discrimination is where an incoming good is disadvantaged compared to a local good because it originates from another part of the UK. For example, a requirement that incoming produce must be chilled but local produce does not.[22]
>
> Indirect discrimination is where incoming goods are not directly discriminated against, but where regulation disadvantages incoming goods and has an adverse market effect.[23]

The relevant provisions are these: section 2(3) provides for the operation of the mutual recognition principle for goods. It says that '[w]here the principle applies in relation to a sale of goods in a part of the United Kingdom … *any relevant requirements there do not apply in relation to the sale*'.[24] Section 5(3) makes provision for the non-discrimination principle for goods.[25] It says that '[a] relevant requirement … *is of no effect in the destination part if, and to the extent that*, it directly or indirectly discriminates against the incoming goods …'.[26]

The role of these provisions is, therefore, to *disapply* 'relevant requirements' where the market access principles are engaged.[27] Devolved legislation can clearly provide, contain or consist almost entirely of provisions which are 'relevant requirements' for the purposes of the UKIMA. Such provisions would, so far as they engage the market access principles, be disapplied and produce no legal effect in the relevant circumstance. The fact that the UKIMA interacts with devolved legislation is no accident: the UKIMA expressly confines the application of the market access principles to legislation,[28] and expressly includes *devolved* legislation.[29] The market access principles apply to future Westminster legislation, too,[30] but are of course vulnerable to amendment or repeal by that Parliament in a way not available to the devolved legislatures.[31]

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22 Ibid para 19.

23 Ibid para 21.

24 Emphasis added.

25 S 19(1) makes provision for the non-discrimination principle for services. It says that '[a]n authorisation requirement in relation to the provision of services in one part of the United Kingdom does not apply to a person who is authorised to provide those services in another part of the United Kingdom'.

26 Emphasis added.

27 It is not clear whether there is any significance in the distinction between legislation that does 'not apply' and that which 'is of no effect'.

28 See eg UKIMA, ss 3(8), 6(10) and 16(14).

29 See ibid ss 3 and 58; Dougan et al (n 16 above) 662.

30 See *inter alia* UKIMA, s 58.

31 An issue discussed further below.

Although there are only very limited exceptions to the market access principles and no wider, more general system of derogations,[32] their operation is tempered in other ways. They are *primarily* prospective,[33] and there are contexts in which relevant legislation will remain operable, namely so far as purely *internal* regulation is concerned. For example, in a general discussion of the mutual recognition principle, Dougan et al explain that:

> mutual recognition will place significant limits on the ability of any legislative or governing body to set and enforce its own distinctive policy choices across its territory: rules might apply to local producers and suppliers, but cannot be enforced in the case of importation. For example, whilst one territory might ban the production of GMOs within its borders, it cannot stop the importation of GMOs which have been lawfully produced in another participating territory within the internal market.[34]

The key issue is this: devolved legislation that contains relevant requirements would have those provisions, so far as relevant, 'disapplied' by the market access principles in the UKIMA. The consequence is, therefore, that 'the policy objective motivating the devolved regulations would be undermined',[35] with certain rules being 'rendered inapplicable' in relevant cases.[36] The question at the core of the disagreement discussed above seems to be whether this process, which the UKIMA itself describes as 'affect[ing] the operation of … legislation',[37] amounts to a limitation of 'competence', something which, in turn, relies on implied definitions of that concept. Different positions on this are considered next.

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32 Mutual recognition can, conditionally, be denied only in response to some 'highly specific problems', with the consequence that it 'offers only very limited opportunities for a host territory to insist upon applying its own standards to imports from elsewhere in the UK': Dougan et al (n 16 above) 662. See also UKIMA, s 10(1) and sch 1, especially paras 1, 2 and 6–10.

33 UKIMA s 4, especially s 4(2)(b) and s 9. The market access principles apply primarily to new regulatory requirements, as well as existing requirements that are amended in a substantive way, although '[w]hat amounts to a "substantive" amendment is not expressly defined': Dougan et al (n 16 above) 662.

34 Dougan et al (n 16 above) 655.

35 Ibid 663.

36 Ibid 663–664.

37 For example, UKIMA, sch 1, para 2(1).

COMPETENCE AND THE PROBLEM OF DISAPPLICATION

There are, broadly, two different views on whether disapplication goes to – or offends – a relevant competence. These different views hang on different notions of 'competence' as a concept: whether it is a 'thin' concept that does not provide protection against disapplication, or a 'thick' concept which does. Put another way, is a qualification of the practical effect of legislation, even where its validity is unaffected, sufficient to affect a competence?

The first view: a thin conception

One answer to the question of whether disapplication goes to competence is 'no, disapplication leaves competences intact'. This view, apparently adopted by the UK Government, might be characterised as a 'thin', 'narrow' or 'flexible' conception of competence. Either because, on this view, a competence is a power to enact valid legislation, rather than legislation which has full legal effect – a broader notion – or because competence is flexible and accommodating enough to survive the deprivation of practical effect in many, though perhaps not all, circumstances.

This view is eminent in the EU's own doctrine of primacy and its remedy of disapplication,[38] from which the UKIMA appears to draw.[39] In that context, Schütze notes this cognate question: '[i]n what way would Community law prevail over conflicting national law: would it "break" or "disapply" it?'[40] He explains that '[t]ransporting the doctrine of supremacy from German federalism would have put national courts under a duty to declare conflicting national laws void'.[41] This approach might be characterised as 'the non-existence' theory, or the 'competence reading of the doctrine of supremacy' which Schütze argues 'goes too far'.[42] He notes that a different approach has prevailed in practice: 'The Court[of Justice]'s preferred supremacy doctrine would not render existing national measures void, but only "inapplicable" to the extent to which they conflicted with Community

38 See, in particular, Robert Schütze, 'Supremacy without pre-emption? The very slowly emergent doctrine of community pre-emption' (2006) 43 Common Market Law Review 1023; Michael Dougan, 'Primacy and the remedy of disapplication' (2019) 56 Common Market Law Review 1459.

39 Horsley notes that even the language of the UKIMA (such as 'relevant requirements'), and its definitions, appear to have been transplanted: Horsley (n 5 above) 1150.

40 Schütze (n 38 above) 1026.

41 Ibid 1029.

42 Ibid 1030.

law.'[43] Under that view, 'the incompatibility of subsequently adopted rules of national law with Community law did not have the effect of rendering these rules non-existent. National courts were only under an obligation to disapply a conflicting provision of national legislation.'[44] The effect is that '[t]he adoption of Community legislation, however, does not negate the underlying legislative competence of the Member States … It suspends national legislation in conflict with Community law.'[45]

In that context, this idea of 'suspension' has certain advantages which transpose well into the UKIMA regime. First, the disapplied legislation continues to operate in contexts in which it is not disapplied: 'A national rule, which is set aside for being inconsistent with Community law, is inoperative only to the extent of this inconsistency; the rule may continue to be applied to cases where it is not inconsistent, or to cases which are not covered by the Community norm.'[46] Accordingly, disapplied measures 'are not rendered null or void; they are merely to be treated as inapplicable in practice, and only to the extent of their verified incompatibility' and 'remain entirely valid and indeed fully applicable in all other situations/for all other purposes'.[47]

For the UKIMA, this is especially important given that relevant requirements – for example, devolved legislation providing for (simplistically) some higher regulatory standards – will remain applicable to producers based within the territory itself, in which context the market access principles do not bite.[48]

A second advantage, captured by the 'suspension' analogy, is that all disapplied legislation merely sits in a state of stasis, to become effective again once the disapplying legislation is repealed or amended.[49] In the context of the UKIMA this would mean that any amendment or repeal of the market access principles, or the addition of further justified derogations or exceptions might be able to reactivate any disapplied devolved legislation. A further, perhaps more subtle advantage, is that the remedy of disapplication evades

43 Ibid 1029; *Simmenthal II* (Case C-106/77) [17].

44 Schütze (n 38 above) 1030; *Simmenthal II* (n 43) [20]–[21].

45 Schütze (n 38 above) 1031.

46 Bruno de Witte, 'Direct effect, supremacy and the nature of the legal order' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 1999) 190.

47 It is also unclear who will be able to seek judicial enforcement of the market access principles or how far the courts will attempt, be able, or feel obliged to temper their application by reference to other doctrines or principles: Dougan et al (n 16 above) 668.

48 Ibid 671.

49 Schütze (n 38 above) 1032; de Witte (n 46 above).

the need to provide, explain, or justify gifting a power to the courts to *invalidate* relevant legislation.[50]

On these bases, the UK Government's submission that 'competences' are not affected by the market access principles[51] seems persuasive. After all, legislative provisions will be fully effective in *some* contexts, and are at worst dealt with in a way that is limited in potency and time. It appears, on this account, not right to contend that the devolved legislatures' 'power to make laws' are meaningfully affected by the market access principles.

However, this view relies on an interpretation of 'competence' which merely describes the power to make laws on paper which could have no effect in practice. As such, it implies a narrow reading of the autonomy provided by the devolution settlement, under which the possession of a legislative competence describes little more than a power which in practice may be impossible to exercise:[52] 'in practice, [the UKIMA] constrains the ability of the devolved institutions to make effective regulatory choices for their territories in ways that do not apply to the choices made by the UK government and parliament for the English market'.[53]

At the very least, the practical difficulty of regulating their import markets[54] means that 'it is difficult to see what other reading might be given to the Act that would leave devolved regulatory autonomy intact'.[55] To claim that disapplication, in leaving the *validity* of relevant legislation intact, leaves devolved competences intact too is to render competence a relatively illusory concept.

The House of Lords Select Committee on the Constitution, adopting a more practical lens, touched on this issue in its report on the Internal Market Bill:

> Limits to the competence of the devolved legislatures are set out in the devolution statutes. The Bill does not amend those Acts to include this restriction in competence. The Government should explain why the Bill does not amend the devolution statutes explicitly to limit

50 Schütze (n 38 above) 1031.

51 'Senedd Cymru has competence to legislate in all areas which are not reserved … The boundaries of Senedd Cymru's devolved competence set by the reservations in Schedule 7A to GOWA are … unamended': *Counsel General for Wales* (n 7 above) para 50.

52 See Dougan et al (n 16 above) 672.

53 Ibid 671.

54 See ibid: 'The assumption is no longer that devolved regulation applies to all of the relevant activity within the relevant devolved territory. Instead, it applies to producers or suppliers based in the devolved territory.'

55 Ibid 672.

> the competence of the devolved legislatures in respect of the non-discrimination principle.[56]

The reason why the UK Government has neither accepted that the market access principles amount to a competence restriction, nor sought to amend the devolution statutes accordingly, is perhaps clear given the preceding discussion: the market access principles do not, on the UK Government's preferred, thin conception of competence, affect devolved *competences* because they leave the legal validity of impugned legislation intact.

However, this account leads to some potentially incongruous results: the UK Government's thin conception of competence appears to potentially imply that a statute depriving *any* future devolved legislation of all (or much) of its practical effect would be compatible with the competences of the devolved legislatures and would not offend the devolution statutes which set them out. This would clearly be an absurd result, yet it is not clear what limits there are to protect against it, where they might be found, or on what principles they might be based.[57]

Recourse to the devolution statutes themselves does not resolve matters, either. 'Competence' is used primarily as a heading, and certain other provisions, for example section 29 of the Scotland Act 1998, merely take the concept as read or explain it in negative terms. The fundamental core of the Scottish Parliament's law-making power, section 28(1) of that Act, provides that '[s]ubject to section 29, the Parliament may make laws, to be known as Acts of the Scottish Parliament'. It is not clear whether 'make laws' necessarily implies that those laws are 'effective', but it is not absurd to think that it might, something which would be difficult to square with the UK Government's position.

It should at this point be noted that the market access principles also bite on Westminster as much as devolved legislation, but here important distinctions between these institutions themselves yield quite different results:

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56 House of Lords Select Committee on the Constitution (n 16 above) para 86.

57 One relevant principle might be that of 'devolved autonomy'; see eg Mark Elliott, 'The principle of parliamentary sovereignty in legal, constitutional and political perspective' in Jeffrey Jowell, Dawn Oliver and Colm O'Cinneide (eds), *The Changing Constitution* 8th edn (Oxford University Press 2015); Mark Elliott, 'Parliamentary sovereignty in a changing constitutional landscape' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* 9th edn (Oxford University Press 2019). However, it is not clear what level of protection that principle can provide, given that the UK Government either considers that that principle is not engaged, or can be justifiably overridden, by the UKIMA.

> In the first place, the fact that UKIMA was made a protected statute that the devolved institutions are unable to modify means that they are unable to set aside or override the market access principles where these are considered to have a harmful effect on devolved regulation. By contrast, the operation of Westminster parliamentary sovereignty means that this is an option which remains open to the UK parliament when legislating for England.[58]

A similar point was again noted by the House of Lords Select Committee on the Constitution in its report on the Bill:

> These provisions apply unequally across the UK. While clause 6 [as it was] defines a 'relevant requirement' as a statutory provision, the sovereignty of the UK Parliament means that it could be over-ridden implicitly or explicitly by later statute. The Government should explain whether clause 6 seeks to constrain Parliament's law-making power. If clause 6 is not intended to constrain Parliament, the Government should explain why it is not framed more accurately as a limitation only on the devolved legislatures. The Government should explain why clause 6 treats legislation intended for England differently from that passed by the devolved legislatures.[59]

This extract recognises one of the higher order impacts of the disapplication framework: it conceals the fact that the effects of the UKIMA's market access principles are quite different for Westminster and the devolved institutions. First, it notes that the Westminster Parliament could expressly repeal the market access principles; indeed, it could also simply enact legislation 'notwithstanding' them.[60] Second, it also notes that it arguably remains open for Westminster to *impliedly* repeal the market access principles, potentially by enactment of legislation with which they are merely incompatible, and even upon which they appear designed to bite. The courts categorising the UKIMA as a 'constitutional statute' might guard against such a course, but that categorisation is not inevitable.[61] Alternative routes, which might circumvent the question of implied repeal, do not (yet) appear capable

58 Dougan et al (n 16 above) 671.

59 House of Lords Select Committee on the Constitution (n 16 above) paras 87–88.

60 Horsley (n 5 above) 1162 and 1167.

61 See *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] QB 151 [68]–[70] (Laws LJ); *R (HS2 Action Alliance Limited) v The Secretary of State for Transport* [2014] UKSC 3, [2014] 1 WLR 324; Mark Elliott, 'Reflections on the HS2 case: a hierarchy of domestic constitutional norms and the qualified primacy of EU law' (*Public Law for Everyone* 23 January 2014); Mark Elliott and Nicholas Kilford, 'Nothing to see here? Allister in the Supreme Court' (2024) 28 Edinburgh Law Review 95.

of facilitating the market access principles' intended disapplication of *future* legislation.[62]

That the market access principles would not go to the *validity* of future legislation does not appear to resolve matters, given, as is considered next, recent authority suggests that disapplication *would* go to Westminster's power to make laws (Westminster ostensibly benefiting from a richer account of competence than is purportedly accorded to the devolved legislatures). This view, if it has purchase, might limit the capacity of the market access principles to qualify the operation of future Westminster legislation which could impliedly repeal them.

Questions therefore remain as to whether – and how – the market access principles bite on Westminster legislation, and the extent to which that process is consistent with orthodox constitutional principle. Consequently, it is at its lowest uncertain whether the market access principles will have their desired effect on Westminster legislation and, even were they to do so, regard to the wider constitutional picture illuminates the differences in the positions of the devolved and Westminster legislatures. The latter is far freer to disregard the market access principles than the former. Thanks to the camouflage provided by disapplication, however, these differences are hidden from view, with the UKIMA purportedly treating these legislatures the same.

Ultimately, the use of disapplication under the UKIMA, especially given the differences in its interaction with the UK's different legislatures, implies that the devolution scheme provides no constitutional protection for the effectiveness of law enacted within competence. The thin conception of competence reflects a thin conception of devolution itself. To suggest that devolution is not meaningfully undermined by depriving devolved legislation of much of its practical effect is to view devolution in extremely narrow terms: as a scheme which merely provides competences that, in practice, may be little more than illusory.

62 Eg *In the Matter of an Application by James Hugh Allister and Others for Judicial Review* [2023] UKSC 5. Here the Court said that the constitutional statutes doctrine could be rendered 'academic' where the statutory language is sufficiently express to 'modify' an earlier statute, distinguished from implied repeal by way of its incompleteness and temporariness: [66]–[68] (Lord Stephens). However, it is not clear that this same logic can be applied *prospectively* such that future legislation (containing relevant requirements) would be 'modified' by earlier legislation (the UKIMA). Indeed, under that logic, future legislation might simply modify the market access principles into 'subjugation'.

The second view: a richer account

The House of Lords Constitution Committee appears to have taken a different view of disapplication's effect on competence:

> If devolved legislation is to be set aside automatically by the Bill, this in effect curtails devolved competence. Such a change should be made only after consultation with the devolved institutions … such engagement has been limited and unsatisfactory.[63]

This explains the Committee's concern over the failure to amend the devolution statutes themselves, which might otherwise be thought to contain all the statutory limitations on devolved legislative power. The Committee's concern is rooted in a different understanding of competence, one that appeals not to a power which exists merely on paper, but also in practice. Clearly, on this view, which – as has been seen – is shared elsewhere, the UKIMA looks very much like a competence limitation.

This is a 'richer' account of competence as the power to make 'effective' law and, because it qualifies the effectiveness of legislation, on this account disapplication does affect competence. An advantage of such an approach is that its focus on practice is better able to do justice to the *real* (as opposed to hypothetical) extent of legislative power. Indeed, such a view might be motivated by a desire to render competence useful as an analytical tool, prioritising legal certainty.

There is authority for this approach more widely, particularly in the devolution context. For example, if a Bill is outwith devolved competence by virtue of the limitations provided in the relevant devolution statute, it is not simply 'disapplied'. Instead, such provisions cannot reach, or are excised from, the statute book itself.[64] Some parts of the devolution framework appear incapable of tolerating beyond-competence legislation remaining on the statute-book, even if in such a case they would not be given effect by the courts.[65] Others, however, do appear on their face capable of tolerating that alternative outcome: that

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63 House of Lords Select Committee on the Constitution (n 16 above) paras 83–85.

64 See Nicholas Kilford, 'Limitation, empowerment and the value of legal certainty in the Treaty Incorporation References Case' (2021) 26 Judicial Review 321. Indeed, legislation beyond the competence limits in s 29 of the Scotland Act (for instance) is by definition 'a nullity': Aileen McHarg and Christopher McCorkindale, 'The Supreme Court and devolution: the Scottish Continuity Bill Reference' (2019) 2 Juridical Review 190, 196; *In re the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64, [2019] 2 WLR 1 [56]; Mark Elliott, 'The Supreme Court's judgment in the Scottish Continuity Bill case' (*Public Law for Everyone* 14 December 2018).

65 *In re United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill and European Charter of Local Self-Government (Incorporation) (Scotland) Bill* [2021] UKSC 42, [2021] 1 WLR 5106 [12]–[18].

'[a]n Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament'[66] seems to foresee provisions contained within legislation being legally ineffective (rather than being excised from that legislation). Further, the courts have interpretive obligations to, so far as possible, read devolved legislation 'down' so that it is within competence.[67] In this way, the plain terms of devolved legislation may not reflect its actual, more limited legal effect, which is provided by interpretive work on the part of the courts.

Despite this, and in pursuit of rendering devolution 'workable', the courts have been keen to ensure that devolved legislation does accurately mirror the extent of the legislatures' competences. They have, accordingly, adopted quite a narrow approach to this interpretive obligation. In *Treaty Incorporation*, a Bill was passed which made use of broad terms, 'admittedly beyond competence', and which relied on the courts, using their interpretive obligation, to give the Bill effect only to the extent that it was within competence. Such an approach, in other words, relied overtly on the courts using the competence limits to interpretively 'cookie-cut' the Bill, rather than the provisions *themselves* reflecting the limits on competence found in the devolution statutes. The Supreme Court held that such an approach was impermissible in particular on the grounds that it was incompatible with the demands – pursuant to the rule of law and European Convention on Human Rights – of legal certainty and clarity, and that it was antithetical to the coherence and workability of devolution embodied elsewhere in the legislation and case law.[68]

The approach in this context, reinforced by the devolution statutes' 'pre-enactment safeguards',[69] prioritises legal certainty: rather than merely giving in-competence *effect* to relevant provisions, they must on their face *be* within competence. In this sense, the legal effect of devolved legislation and its validity are entwined. 'Competence' is thus an analytical device to accurately explain the real legal picture rather than some hypothetical one. The existence of valid but ineffective legislation would, therefore, be in tension with the courts' wider approach in this context.

There are clearly some good reasons for desiring this degree of certainty in the devolution context. It ensures, simply, that the legal effects of laws enacted by the devolved legislatures are apparent on their face, with provisions already sculpted by competence boundaries,

66 Scotland Act 1998, s 29(1).

67 For example, ibid s 101.

68 *Treaty Incorporation* (n 65 above) [75]–[79].

69 See Kilford (n 64 above); *Treaty Incorporation* (n 65 above) [73]–[74]. The Court here put considerable, and somewhat surprising, weight on these safeguards.

rather than needing to have these applied subsequently. The courts have not been attracted to the idea that effectiveness can be easily – or usefully – severed from validity[70] and, consonant with this view, have also provided authority that the deprivation of the practical effect of legislation *does* engage the relevant competence. In the Supreme Court's unanimous judgment in *Continuity Bill*, the Court said this:

> An enactment of the Scottish Parliament which prevented such subordinate legislation from having legal effect, unless the Scottish Ministers gave their consent, would render the effect of laws made by the UK Parliament conditional on the consent of the Scottish Ministers. *It would therefore limit the power of the UK Parliament to make laws for Scotland, since Parliament cannot meaningfully be said to 'make laws' if the laws which it makes are of no effect*. The imposition of such a condition on the UK Parliament's law-making power would be inconsistent with the continued recognition, by section 28(7) of the Scotland Act, of its unqualified legislative power.[71]

This is an important passage. It is concerned not with legal validity, but with effectiveness, the same point on which disapplication pivots. Indeed, the relevant provision 'would not affect the formal validity of any subordinate legislation made in the exercise of such powers, but is directed merely at the legal effect of such legislation'.[72] This distinction was not able to save the provision, however, because the Court's unambiguous view was that Parliament's power to make laws is undermined by a condition on the effectiveness of its legislation in a certain context.

This 'rich' approach to Westminster's legislation contrasts with the approach taken by the UKIMA. Rather than being incoherent, however, it is arguable that *Continuity Bill* provides a rich account of competence which the UKIMA, along with the UK Government's accompanying discourse, implies simply does not extend to the devolved legislatures. But what might justify an approach that vests *only* Westminster with a rich account of competence?

One answer might be that the richness of the account of competence in *Continuity Bill* is simply attributable to parliamentary sovereignty. This principle, of course not shared by the devolved legislatures, might seem to require stauncher protection by the Court than devolved competence can be afforded. However, the Court itself accepted that

70 *Continuity Bill* (n 64 above) [49]–[53].
71 Ibid [52] (emphasis added).
72 Ibid [49].

the relevant provision did *not* affect Westminster's sovereignty.[73] This is a persuasive contention: that '*Parliament cannot meaningfully be said to "make laws" if the laws which it makes are of no effect*' is simply a legal analysis of what it means to 'make laws', independent of parliamentary sovereignty. Any relationship with sovereignty must be borne by the secondary question: whether the Scottish Parliament is competent to qualify Westminster's power to make laws in this way. In the Court's judgment, it is not because to do so would modify a protected enactment (section 28(7)).

Even in this second stage of the analysis, however, sovereignty is not the relevant concept. Instead, it is the distinct (and quite different) notion of unqualified legislative power, more fully explored in the Supreme Court's subsequent *Treaty Incorporation* judgment, which is engaged.[74] That concept might be connected to parliamentary sovereignty, but its distinctness is evidenced (among other things) by its incapacity to tolerate qualifications which the Court, on its own analysis in both *Continuity Bill* and *Treaty Incorporation*, suggests *can* be borne by parliamentary sovereignty.[75] Sovereignty is painted in more flexible, accommodating terms than unqualified legislative power, which is more rigid and fragile. As such, it is right that an interference with section 28(7) does not necessarily meet the threshold to interfere with parliamentary sovereignty.

This point does not need to be laboured but suffice it to say that the Supreme Court's recent jurisprudence is not evidence that parliamentary sovereignty requires a 'rich' account of competence. Instead, it suggests that parliamentary sovereignty *can accept precisely* the kinds of limitations under discussion. The account of parliamentary sovereignty adopted by the Court in these cases is one that, if anything, is more closely aligned with the 'thin' account of competence, being flexible enough to tolerate conditions on effectiveness.

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73 'Nor are we persuaded that section 17 impinges upon the sovereignty of Parliament. Section 17 does not purport to alter the fundamental constitutional principle that the Crown in Parliament is the ultimate source of legal authority; nor would it have that effect. Parliament would remain sovereign even if section 17 became law. It could amend, disapply or repeal section 17 whenever it chose, acting in accordance with its ordinary procedures.': ibid [63]; McHarg and McCorkindale (n 64 above) 194. See also Anurag Deb's contribution to this special edition.

74 *Treaty Incorporation* (n 65 above). Mark Elliott and Nicholas Kilford, 'Devolution in the Supreme Court: legislative supremacy, Parliament's "unqualified" power, and "modifying" the Scotland Act' (*UK Constitutional Law Association* 15 October 2021); Mark Elliott and Nicholas Kilford, 'The Supreme Court's defence of unqualified lawmaking power: parliamentary sovereignty, Devolution and the Scotland Act 1998' (2022) 81 Cambridge Law Journal 4.

75 Continuity Bill (n 64 above) [63]; McHarg and McCorkindale (n 64 above) 194.

The answer might then be that whatever the relevant principle – whether parliamentary sovereignty or unqualified legislative power – protection is provided to Westminster's legislation through a mechanism that the devolved institutions cannot draw upon, and so the distinction between their conceptions of competence is justified. Yet, this still does not provide a complete answer. That 'Parliament cannot meaningfully be said to "make laws" if the laws which it makes are of no effect' does not appear to be the product of section 28(7), and neither is it clear that it is confined to the context of *unlimited* legislative power. Instead, this statement suggests that a qualification of the legal effect of legislation goes to the power to make laws, *whatever its scope*, whether infinite or infinitesimal. It does not appear that the presence of a limit on the scope of legislative competences would deprive that reasoning of its resonance. Indeed, other legislatures in the UK are empowered to 'make laws'[76] and, even though they have limited competence, they might, therefore, be justified in seeking to rely on this reasoning, and its normative foundations, as much as a legislature with legally unlimited competence. That the attribution of the richer account to the devolved legislatures is endorsed by the Constitution Committee (among others) demonstrates that this view *does* have purchase in contexts where the relevant legislature *does* have limited law-making power.

Continuity Bill and *Treaty Incorporation*, far from explaining why different rules might – or should – apply to Westminster, simply highlight that the rich account of competence has purchase, and that attempts to limit that account to Westminster require solid, yet absent, reasoning.

A MOMENT OF DEPARTURE: COMPETENCE AS A COMPONENT OF CENTRALISATION UNDER THE UKIMA

The use of disapplication by the UKIMA's market access principles is a double-edged sword. Because it leaves the legal validity – if not the effect – of devolved legislation intact, it facilitates what Plaid Cymru has described as 'Westminster double-speak'.[77] Competences undermined in practice, appear untouched on paper. Disapplication therefore provides the strongest case, endorsed by the UK Government through its preferred account of competence, that the UKIMA is not in fact an entirely centralising project. However, it is argued that rather than disguising or deflating the centralising tendencies of the UKIMA,

76 Eg Scotland Act, s 28(1).
77 Plaid Cymru (n 8 above).

the adoption of this mechanism enhances them. This is for two reasons, one normative and one practical.

The first reason is perhaps clear already. Under the UKIMA's market access principles, devolved legislation is only effective so far as compatible with a scheme that is explicitly (supposedly) *not* a competence limitation. Rejecting that this *is* a competence limitation implies that the devolution scheme offers protection only to the validity and not the effectiveness of devolved legislation. Further, where the devolved legislatures must rely only on a 'thin' conception of competence which is little more than illusory, Westminster benefits from the richer account adopted by the Supreme Court.[78] As such, especially when Westminster's capacity to circumvent or alter the market access principles is recalled, the devolved legislatures are subordinated at a foundational, normative level.

This is important because the UK's devolution framework is – or at least, has been – predicated on a normative equivalence between Westminster and *intra vires* devolved legislation.[79] This is why, so far as within their competence, the devolved legislatures can amend – or even repeal – Acts of the Westminster Parliament.[80] Westminster can, of course, return the favour (a process described as 'legislative ping-pong');[81] although its capacity to do so is qualified to some extent by the constitutional need (if not always the political desire) for devolved consent.[82] In a passage mirrored by implication in the other two devolution schemes, the Northern Ireland Act 1998 expressly provides that 'an Act of the [Northern Ireland] Assembly may modify

78 This has been described elsewhere as 'bifurcation': Nicholas Kilford, 'The UK Internal Market Act and the power to make effective laws' (*Institute of Welsh Affairs* 27 September 2022).

79 See *AXA General Insurance Limited v The Lord Advocate* [2011] UKSC 46, [2012] 1 868 [45]–[46] and [146]; Aileen McHarg, 'What is delegated legislation?' [2006] Public Law 539.

80 Elliott, 'Parliamentary Sovereignty in a Changing Constitutional Landscape' (n 57 above) 36. See also Mohamed Moussa, 'The "absent word" canon and asymmetrical sovereignty' (*UK Constitutional Law Association* 20 December 2022).

81 'In short, Parliament can always assert its will against a devolved legislature such as the Assembly even in relation to a devolved matter; but, in order to avoid the prospect of legislative "ping-pong" over a contested provision, with successive amendments made by the Assembly and undone by Westminster, an intrusion into the current devolved settlement would likely be required.': *Safe Electricity A&T Ltd & Another, Re Application for Judicial Review* [2021] NIQB 93 [45] (Scoffield J).

82 See, notably, Graeme Cowie, 'Brexit: devolution and legislative consent' (Briefing Paper CBP 08274, House of Commons Library 2018).

any provision made by or under an Act of [the UK] Parliament in so far as it is part of the law of Northern Ireland'.[83]

The devolution scheme is, therefore, built on an essential foundation of 'dynamism'.[84] At its core lies the premise that neither Westminster's parliamentary sovereignty, nor its possession of a number of exclusive competences, renders the devolved legislatures themselves constitutionally insignificant, nor emasculates the normative character of their in-competence legislation.[85] It is the boundaries of competence, historically at least, which are therefore axiomatic, determinative of the freedom those legislatures possess. Within those boundaries, autonomy is considerable, outside of them it is non-existent.[86]

The UKIMA, by contrast, presents a different view of devolution wherein devolved legislation – even within competence – is second-class. Rather than being the normative equivalent of Westminster's, devolved legislation *within* competence can be deprived of its practical effect by ordinary Westminster legislation, and even by lower regulatory standards in other parts of the UK.

The second reason disapplication enhances the centralising effects of the UKIMA is practical: the disapplication framework has two centralising implications which chime with the broader centralising project under the UKIMA. First, disapplication limits devolved freedom to diverge. Second, it is an essential mechanism through which Westminster's (and Whitehall's) engagement in devolved areas is emboldened. As such, it both *reduces* the outer limits of what the devolved institutions are capable of achieving, and *empowers* the central institutions even in areas where devolved institutions retain power.[87]

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83 Northern Ireland Act 1998, s 5(6).

84 See eg Deb and Kilford (n 14 above); Kilford (n 78 above).

85 'When acting within competence, the legislative autonomy granted to the Assembly under the Northern Ireland devolution settlement is considerable … within its sphere of competence, the Assembly is entitled to pass laws modifying any provision made by an Act of Parliament in so far as it is part of the law of Northern Ireland. By section 98(1), "modifying" is defined, in relation to an enactment, to include amendment or repeal. Thus, provided the Assembly is not acting beyond its competence as defined by sections 6–8 of the NIA, it may repeal any provision made by an Act of the Parliament of the United Kingdom as a matter of the law of Northern Ireland.': *Safe Electricity A&T Ltd & Another* (n 81 above) [43]–[44] (Scoffield J).

86 'There is no limitation on the Assembly's power to legislate for transferred matters, other than those relating to legislative competence more generally.': ibid [48] (Scoffield J). See also Anurag Deb's contribution to this special edition.

87 This second component might appear analogous to 'cooperative federalism' or 'shared rule', in which (at least) two regulatory bodies and spheres 'overlap' in the same areas. However, it is difficult to argue, given the general disregard for devolution throughout the enactment and content of the UKIMA, that it is meaningfully 'cooperative'.

The following section proceeds in two parts: first it sets out the general centralising components of the UKIMA itself. These have been explored elsewhere but are worth rehearsing here because they illuminate how disapplication fits within this broader scheme. Second, the way that disapplication both normatively and practically undermines devolution is considered.

The UKIMA as a centralising project

Because several parts of the legislation itself, and the process of enacting it 'do betray the centralizing motivations that underpin UKIMA',[88] it is worth devoting a little time to the broader centralising picture painted by the UKIMA to better understand how the subordination of devolved legislation fits within that context.

To take process first, the UKIMA's enactment was notably dismissive of devolved concerns and interests,[89] compounded by its explicit departure from the less unitary approach to market regulation under the common frameworks that preceded – and continue to interact with – it:[90]

> ... in place of a co-operative, co-owned process that embedded respect for devolution, as was the case with common frameworks, UKIMA was driven by the UK Government alone in the face of deep-seated opposition from all three devolved administrations. It was also introduced very late in the Brexit process. A White Paper was published in July 2020, allowing only four weeks for consultation[.][91]

Despite this opposition, the UKIMA proceeded without devolved consent, and the principles contained in the UKIMA, bereft of devolved input, contrast with the more consensual arrangements common

88 Dougan et al (n 16 above) 651.

89 House of Lords Select Committee on the Constitution (n 16 above) paras 7–14.

90 The 'market access principles are displaced only if the UK Government makes secondary legislation to give statutory effect to a common framework': Seán Patrick Griffin, 'The deposit return scheme and the UK Internal Market' (*The Constitution Society* 7 July 2023). UKIMA, s 10; Thomas Horsley and Jo Hunt, 'In praise of cooperation and consensus under the territorial constitution: the Second Report of the House of Lords Common Frameworks Scrutiny Committee' (*UK Constitutional Law Association* 26 July 2022). See also Legislation, Justice and Constitution Committee, 'Statement by the Committee: United Kingdom Internal Market Bill' (Welsh Parliament 2020).

91 Dougan et al (n 16 above) 661. These four weeks were during the Senedd's recess: David Rees MS to Alok Sharma MP and Simon Hart MP, 'UK Internal Market White Paper' (30 July 2020).

to other internal markets.[92] Indeed, the substance of the UKIMA appears to neglect, or undervalue, the contribution that the devolved institutions might be able to offer:

> Impressed throughout the UKIMA is the primacy of the UK government as UK-wide regulator … [T]he UK government retains a significant degree of control over the scope of the mutual recognition and non-discrimination tests. This is evident, for example, through its powers to amend the definition of 'relevant requirements' for goods, as well as to modify the frameworks governing the justification of measures that infringe either principle. Prior to exercising those powers, the Secretary of State is required to seek the consent of the devolved administrations, but may proceed regardless after one month provided she provides a reasoned statement.[93]

Horsley explains, for example, that the UKIMA's emphasis is on competition rather than cooperation,[94] and it is as part of this emphasis that the UKIMA limits the capacity for devolved legislative divergence.[95] However, it also provides for, and legitimates, central engagement within devolved areas. In this sense, it 'disrupts the basic approach to managing the co-existence of different sites of legislative power within the UK', standing in contrast to the '"devolve and forget" model, according to which the UK Parliament transferred legislative powers to the devolved administrations to exercise as they see fit and subject only to compliance with specific, predetermined limits'.[96]

Arguably, then, the UKIMA 'introduces something genuinely novel into the UK's pre-existing territorial constitution' by establishing a scheme which transcends the boundaries of devolution,[97] and which

92 'The co-option, by force of constitutional principle, of the devolved administrations into the UK internal market contrasts with the procedures governing the establishment of the EU internal market. In the latter case, the Member States freely consented to the adoption of the EU Treaties (and their subsequent amendment) as institutional partners.': Horsley (n 5 above) 1156.

93 Ibid 1157.

94 Ibid 1153.

95 Thomas Horsley, 'Reshaping devolution: the United Kingdom Internal Market Act 2020' (*UK in a Changing Europe* 10 October 2022).

96 Ibid. See also Alex Wickham, 'POLITICO London Playbook: Oxford down – New Rules – Market Day' (*POLITICO* 9 September 2020); Library Specialists (n 3 above) 22; Stephen Weatherill, 'Will the United Kingdom survive the United Kingdom Internal Market Act?' (*UK in a Changing Europe* 7 May 2021).

97 Horsley (n 5 above) 1152.

mirrors the 'muscular' or 'hyper-unionism' seen elsewhere.[98] Indeed, 'the Johnson administration's centralising and unilateral approach to the introduction of UKIMA [was] founded on an understanding of the United Kingdom more as a "unitary" than a multi-layered, territorially complex state'.[99] Accordingly, the curtailment of both devolved input to the legislative process and devolved legislative freedom under the scheme is accompanied by a growth of powers providing for central interference within devolved matters. Indeed, convergence was expressly the intention of the legislation from at least an international perspective,[100] despite federal experiences suggesting that divergence is compatible with international agreements.[101]

The UK Government's response is that, under the UKIMA 'the devolved administrations … retain the right to legislate in devolved policy areas that they currently enjoy'.[102] Even though that right is no longer as constitutionally exclusive, the UK Government's position, as has been seen, is that it is disapplication which *preserves* devolved competence and therefore qualifies these centralising implications. However, the opposite is true: the disapplication framework, in subordinating the devolved legislatures, is a core and potent part of centralisation under the UKIMA.

Disapplication as a component of centralisation

The broader centralising effects of the UKIMA may be well-known. They are not likely a surprise: the White Paper described the UK merely as 'a unitary state with powerful devolved legislatures, as well as increasing devolution across England'.[103] And yet, despite the lack of emphasis placed on the constitutional significance of devolution, the White Paper also said '[l]egislative innovation would remain a central feature – and strength – of our Union'.[104]

98 Ciaran Martin, 'Can the UK survive muscular Unionism?' [2021] Political Insight; Michael Kenny and Jack Sheldon, 'Unionism, Conservative thinking and Brexit' (*Centre on Constitutional Change* 27 July 2020); Michael Kenny and Jack Sheldon, 'When planets collide: the British Conservative Party and the discordant goals of delivering Brexit and preserving the domestic union, 2016–2019' (2020) 69 Political Studies 965; Henry Hill, 'Putting muscle behind the Union' (*The Critic* November 2021).

99 Dougan and others (n 16 above) 661.

100 Department for Business, Energy & Industrial Strategy (n 1 above) paras 123–123.

101 Library Specialists (n 3 above) 15–16; Confederation of British Industry, 'A roaring trade: capitalising on the opportunities of a UK–US free trade agreement' (2020) 34–5; Welsh Parliament Research Service, 'Internal market White Paper research briefing' (2020) 16.

102 Department for Business, Energy & Industrial Strategy (n 1 above) 22.

103 Ibid 12.

104 Ibid 22; Library Specialists (n 3 above) 13.

The cover for this claim is provided by disapplication and the implication that it, at least on one account, leaves competences intact. However, in adopting that model, the UKIMA is – perhaps inadvertently, perhaps not – normatively subordinating the devolved institutions in a way arguably far more fundamental than a simple alteration of competences. This subordination fits within, and forms part of, the wider centralising implications of the UKIMA in three ways. First, it undermines devolution's dynamism. This is because it establishes what might tentatively be described as a kind of 'supremacy clause' through which *in-competence* devolved legislation is unequal to, and disapplied by, purportedly non-competence limitations in ordinary but normatively superior Westminster legislation. Second, it undermines legal certainty by creating a complex scheme through which valid legislation is in some cases – and depending on a complex analysis – of no practical effect. This is particularly jarring given the courts' attempts – historic and recent – to ensure that devolved legislation does not need to be interpretively 'trimmed' by competence limitations but should be able to be read on its face as providing an accurate picture of the law. Third, the use of disapplication means that constitutional change is disguised, and that the discourse itself is obfuscated as the different institutions are encouraged to talk past one-another.

Undermining dynamism

Perhaps its most significant impact is the UKIMA's influence on the dynamism of devolution, which captures both (i) the normative equivalence between *intra vires* devolved and Westminster legislation, and (ii) the autonomy enjoyed within devolved competence.

As to the first, the UKIMA appears to operate as an *in-competence* restriction on the devolved legislatures. A protected enactment, like the UKIMA, cannot be 'modified' by the devolved legislatures. However, rather than merely being incapable of modifying the UKIMA, the devolved legislatures *must legislate compatibly with* the market access principles. Because this qualification does not take the form of a 'hard' competence limit it appears to act as a kind of supremacy clause: Westminster has provided, in ordinary legislation, a framework within which the devolved institutions must operate for their law to be effective *even within their competence limits*.[105] Put another way, devolved legislation may only make effective provision so far as compatible with the market access principles. The subordinating effect of this framework is amplified by the ease with which Westminster might be able to amend the UKIMA to tighten these restrictions further

105 See eg Australian Constitutions Act 1850, s 14.

or alter their effect, and by the power of the Secretary of State to alter the exemptions to the market access principles.[106]

Consequently, the UKIMA places Westminster and devolved legislation on different normative planes. It is true that the Westminster Parliament always has the legal power to amend the competences of the devolved institutions and to protect its enactments from modification but, in taking the form of 'hard' limitations, these changes are both exposed to high levels of accountability and form the boundaries of competence itself. The UKIMA presents a quite different picture wherein, even *within* those boundaries, devolved legislation is 'second-class'. Rather than the legislative 'ping-pong' implied by devolution, the UKIMA framework is far more hierarchical.

Another problem for the dynamism of the settlement is that the UKIMA imposes additional complex requirements with which the devolved institutions are themselves relatively powerless to engage. For example, sometimes the application of the market access principles will require a complex, perhaps unfamiliar, economic analysis. However, unlike competence limits, where there are a number of avenues open to the devolved legislatures to engage with, test and ultimately challenge their application, no similar mechanism exists for a devolved legislature to challenge the disapplication of its legislation by the UKIMA.[107] As such, an essential mechanism through which the devolved institutions can attempt to defend their legislation on competence grounds is absent in the context of the UKIMA. The consequence of this approach is that devolved freedom to diverge is deeply qualified, with limited opportunities for that qualification to be challenged (even if such a challenge *would* ultimately be successful).

The UKIMA therefore appears to present a new, albeit relatively nascent, approach to the management of devolution. Rather than an assumption that devolved power can be exercised freely within competence, this new approach is to permit autonomy only where central institutions are satisfied that that is appropriate in a particular case.

Evidence for this can be found in statutory instruments which qualify the operation of the market access principles. One of the earliest sources of the Welsh Government's concerns about the UKIMA was in the context of single-use plastics. Put simply, the Welsh Government

106 Explanatory Notes to the UKIMA, para 26.

107 Dougan et al (n 16 above) 671. The closest mechanism contained in the Act is that the Office for the Internal Market 'may also issue non-binding advice on the compatibility with the UKIMA of proposed regulations': Horsley (n 5 above) 1149; UKIMA, ss 34–35. Dougan et al (n 16 above) 667: 'UKIMA does not go as far (say) as mimicking the EU's long-established model of mandatory prior notification of draft standards.'

was seeking to regulate their use in legislation, the operation of which would be cut down by the market access principles in the UKIMA. To the extent that this legislation regulated imports into Wales, it would have no effect at all, seriously undermining its policy ambitions.

In July 2022, using the powers under section 10(2) UKIMA, the Secretary of State made regulations exempting single-use plastics from the market access principles.[108] These regulations came into force in August 2022 and follow an agreement reached under the common frameworks mechanism, through which the devolved institutions sought an exemption.[109] Not only does this instrument appear to imply that devolved concerns about the UKIMA were well-founded, it also points to a new relationship between the institutions wherein the devolved institutions seek permission to make effective law in a certain area, and Whitehall and Westminster – if inclined – acquiesce. Similarly, the Scottish Government has proposed a deposit return scheme pursuant to which it has sought an exemption from the UKIMA's market access principles. However, the UK Government has not agreed a *full* exemption (only agreeing an exemption to the extent that it would align the scheme with its own proposed UK-wide one). The Scottish Government announced, after failing to secure the UK Government's reconsideration, that the scheme would be delayed.[110] Recently, the Scottish Parliament has passed the Wildlife Management and Muirburn (Scotland) Bill, but no exemption to the market access principles pursuant to banning the sale of glue traps has been secured. Thus, under this model, the UK Government occupies a dominant position: it has the discretion to determine whether certain devolved policies otherwise within competence will be effective. This is a noticeable shift away from a position wherein the devolved institutions did not require consent for legislation within their competences to be effective.

In fact, this system represents a regression to one analogous to that abandoned in Wales in 2011. Under that system, set out in part 3 of the Government of Wales Act 2006, the Welsh National Assembly only received competence following legislative competence orders which needed to be negotiated with the UK Parliament. Not only was this system complex and often unworkable, but it also made it clear that, in practical and symbolic terms, the Welsh institutions were junior partners.

108 UKIMA (Exclusions from Market Access Principles: Single-Use Plastics) Regulations 2022.

109 Department for Levelling Up and Housing and Communities and Cabinet Office, 'Process for considering UKIM Act exclusions in Common Framework Areas'.

110 The Scottish Parliament has also subsequently voted in favour of repealing the UKIMA: Scottish Government, 'Protecting the powers of the Scottish Parliament' (*Scottish Government News* 3 October 2023).

Undermining legal certainty

The courts have, as explored above, sought to ensure that legal certainty is a core component of the devolution scheme, especially given that the UK's internal market has already provided some of the competence limitations under that scheme.[111] However, the UKIMA enables the devolved legislatures to enact provisions which may, in relevant circumstances, have no – or much more limited – legal effect. As noted, the UKIMA requires a complex analysis, part of which is overlaying the market access principles on top of legislation, and part of which may be a complex economic analysis (for example, in order to deduce if there is indirect discrimination).[112] Both of these qualities are antithetical to the Supreme Court's recent unanimous position that a legislature's enactments should accurately mirror the scope of its powers, rather than those limitations being implied into their operation by the courts *ex post*.[113]

Concealing constitutional change and obscuring the discourse

Inter-institutional discussions are important, as are agreed concepts. However, one of the reasons that the UK Government and the devolved institutions have been, effectively, talking past one another is because they appear to disagree about what competence actually means, and what it takes to change it. In this way disapplication – in contrast to invalidity – becomes a useful device to conceal or disguise significant constitutional changes:

> On paper, devolution might continue to look the same. Indeed, it might even look more extensive, given the repatriation of powers previously exercised at EU level to the devolved authorities under the EU (Withdrawal) Act 2018. But in practice, the operation of UKIMA has real potential to limit the capacity of the devolved institutions to pursue different economic or social choices from those made in London.[114]

Accordingly, disapplication allows the UK Government to contend – using a legalistic analysis – that devolved powers have grown, whereas the devolved legislatures' more practical analysis yields the opposite results.

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111 'As Lord Hope noted in *Imperial Tobacco*, a common theme of the reservations is that they "are designed to ensure that there is a single market within the United Kingdom for the free movement of goods and services".': Dougan et al (n 16 above) 657; *Imperial Tobacco Ltd v The Lord Advocate* [2012] UKSC 61, [2013] 1 AC 792 at [29] (Lord Hope).

112 Dougan and et al (n 16 above) 669.

113 *Treaty Incorporation* (n 65 above) [17], [59] and [62].

114 Dougan et al (n 16 above) 674.

It is not necessarily clear that the UKIMA impliedly repeals relevant provisions of the devolution statutes.[115] However, by characterising its effects in terms of disapplication, it simply does not need to. Yet this approach adds to the 'smoke screen', making significant adjustments to the territorial constitution via ordinary legislation without proper oversight, accountability and transparency; even more concerning when the limited engagement with the devolved institutions throughout its enactment is considered.

Put another way, the UKIMA 'de-constitutionalises' competences, suggesting that the practical effect of devolved legislation is not a major constitutional concern, certainly not in comparison to the d*e jure* competences set out in the devolution statutes themselves. This may be the product of a narrow legalistic analysis, or it may be an attempt to insulate significant constitutional changes from proper scrutiny and accountability. In either case, it is difficult to argue – even if *de jure* competences are unchanged – that the UKIMA is consistent with the terms and spirit of the devolution settlement, let alone any wider principle of devolved autonomy, a broader idea surely concerned with the effectiveness of devolved legislation, rather than being satisfied merely by the capacity of the devolved legislatures to enact valid but ineffective legislation. Further, they are features of the constitution which might be undermined by attempts to conceal real changes to the devolution settlement by devices like disapplication, through which a centralising project is disguised, dressed in the camouflage of further decentralisation.

CONCLUSION

The UKIMA's market access principles do not admittedly alter the competences of the devolved legislatures. Consonant with the UK Government's position, this is because disapplication – the process by which they affect the 'operation' but not the validity of devolved legislation – arguably does not go to 'competence' *per se*. However, this account is predicated on a narrow view of that concept, which does not appear to apply with the same force to Westminster. The result of this process is the creation of a new 'in competence' limit on devolved law-making power which undermines several core components of the devolution settlement, including its dynamism and emphasis on legal

115 See *R (Counsel General for Wales) v Secretary of State for Business, Energy and Industrial Strategy* EWHC (n 7 above); *R (Counsel General for Wales) v Secretary of State for Business, Energy and Industrial Strategy* (n 7) EWCA. Nicholas Kilford, 'The UK Internal Market Act's interaction with Senedd competences: the Welsh Government's challenge' (*UK Constitutional Law Association* 23 February 2021).

certainty. Rather than merely adding to the list of 'hard' limits on devolved power, the disapplication system employed by the UKIMA undermines the status of devolved legislation, rendering it subordinate – and vulnerable – to ordinary Westminster legislation, all while effectively concealing the reality of this change. However, rather than disguising the UKIMA's centralising implications, the disapplication process *is* itself their core component.

It may seem like this case is being overstated: the UKIMA is one piece of legislation operating within quite a limited context. However, not only is the UKIMA illustrative of a broader centralising trajectory, it is also a striking case of *déjà vu*. The UKIMA is a prime piece of post-Brexit regulation and, as Horsley and others have noted, bears an intriguing resemblance to the system it replaces, being modelled on – or at least borrowing from – the EU's own internal market architecture. This is perhaps ironic in itself. However, the UKIMA also reopens questions, all too familiar in the EU context, about 'competence creep' and the overriding of local policy ambitions by distant political institutions. As in that context, it is not clear that limiting the UKIMA to the practical effect of legislation rather than its validity will provide much consolation to those seeking to 'take back control'.

Indeed, the narrower view of competence is defined by the claim that the disapplication of devolved legislation is constitutionally tolerable and compatible with the devolution settlement. As such, narrow and rich views of devolved competence – especially so far as they contrast with accounts of Westminster's – are microcosms for narrow and rich accounts of devolution itself, and its place within the UK's contemporary constitution. Which path is taken on competence might be instructive as to exactly what position devolution itself is thought to occupy.

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Lessons from the age of empire: the UK Internal Market Act as a rupture in the understanding of competence

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ABSTRACT

The emergence of devolution in the United Kingdom (UK) has led to the emergence of a significant body of jurisprudence to understand its place in the UK constitution, including various conceptual frameworks to explain its operation. A problem with some of this jurisprudence is the characterisation of devolution as novel or exceptional, capable of being understood only on its own terms. An examination of the history of constitutional development within the British empire, however, reveals otherwise.

Imperial history shows that the issues faced by devolved administrations in the post-Brexit UK – uncertainties about competence and the extent of dynamism and plurality, for example – have emerged before. More than that, they were dealt with by a combination of statutory text, judicial approach and political pragmatism. Some of these solutions provide a rich source from which lessons can be drawn for present-day challenges.

This article explores how legislative competence was understood across the empire and the UK before the emergence of devolution in its most recent form. It looks at the political and judicial approaches to thorny questions of legislative supremacy, legislative subordination, political paramountcy and political pragmatism.

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This article aims not only to challenge the myth of devolution's *sui generis* nature but demonstrate why the UK Internal Market Act 2020 represents a rupture in how competence was constitutionally understood. In this way, we may be better equipped to understand and resolve the problems of devolution posed by Brexit.

Keywords: legislative competence; imperial history; devolution; legislative sovereignty; disallowance; repugnancy; respection.

INTRODUCTION

In *Martin v Most*, the Supreme Court turned away from the rich history of pre-devolution legislative autonomy within the British empire when interpreting the Scotland Act 1998, stating, 'the Scotland Act provides its own dictionary'.[1] The novelty of modern devolution within the United Kingdom (UK), and the need to understand it without reference to what came before or what has developed elsewhere, is reinforced in subsequent cases such as *Imperial Tobacco* in the Inner House of the Court of Session.[2] Although these are decisions related to the Scottish Parliament, there is in principle no reason why they cannot be applied to Senedd Cymru and the Northern Ireland Assembly. I therefore consider that, like with the Scotland Act, the Supreme Court would also consider that the Government of Wales Act 2006 and the Northern Ireland Act 1998 provide their own dictionaries.

However, what came before modern devolution was not only rich, it was also varied in both nature and experience. Between dominions with the most extensive legislative autonomy, to directly ruled colonies with no legislative autonomy to speak of, there lay India – a vast collection of autonomous provinces and protectorates with a highly controlled national government – and Northern Ireland, which in some ways resembled a dominion within the UK. The operationalisation of such diverse constitutional arrangements inevitably led to conflict, whether between sub-national and national governments of self-governing territories or between these national governments and the British metropole. The lessons learned from these conflicts would reverberate not only in the comprehensive devolution models proposed in the 1970s[3] but also in the models

1 *Martin v Most* [2010] UKSC 10, 2010 SC (UKSC) 40, [15].

2 *Imperial Tobacco v Lord Advocate* [2012] CSIH 9. See, particularly, [72]–[73] in the opinion of Lord Reed.

3 See Lord Kilbrandon, *The Royal Commission for the Constitution (1969–1973) Volume I Report* (Cmnd 5460 1973) 152–161, especially the discussions of Canada at paras 521–522. The Kilbrandon Commission report eventually led to the Scotland Act 1978 and the Wales Act 1978, neither of which was implemented due to the lack of the requisite threshold at referendums held in Scotland and Wales respectively.

which were realised in the 1990s.[4] As Donal Coffey observes, '[t]he egress of the British constitution was the constitution of the British Empire; which in turn became an ingress into British constitutional theory'.[5]

In 2020, the UK Internal Market Act (UKIMA) created a new source of conflict between central government in London and the UK's devolved administrations in Holyrood, Cardiff Bay and Stormont. Reversing the trend of increasing decentralisation which has in some ways become a hallmark of modern devolution in the UK, the UKIMA marked a major constitutional inflection point. Central to this inflection point is the concept of legislative competence – both at Westminster and its devolved counterparts – and the impact of the UKIMA on this concept. In what follows, I explore the central argument in this article: that legislative competence was historically understood as distinct from legislative sovereignty, with the former only describing the ability of a legislature to enact law regardless of that law's legal effect. I argue that the UKIMA is an unprincipled and ahistorical rupture in this understanding.

This article is divided into six main sections. The first section sets out some definitions around legislative competence relevant to this article; the second section explores legislative competence through a political lens; the third section explores the interaction between legislative competence and legislative sovereignty; the fourth section explores competence through a legal lens; the fifth section distils the main points around the historical understanding of competence; and the sixth section compares this understanding with the effect of the UKIMA and recent Supreme Court jurisprudence on legislative competence. The second, third and fourth sections explore the historical understanding, both political and legal, of legislative competence within the empire and within the British metropole. These sections are then contrasted with the way in which competence is affected by the UKIMA and the Supreme Court's recent jurisprudence. This contrast demonstrates what I argue to be a rupture in the understanding of competence from its historical (thin) conception to its more recent (increasingly thicker) conception. Both conceptions are detailed in the first section.

At this stage, I set out two necessary caveats. First, I do not claim to explore the diverse constitutional arrangements across the British

4 See eg the Explanatory Notes to s 29 of the Scotland Act 1998, which record Lord Sewel (who moved what would become the Scotland Act in the House of Lords) referring to a case arising out of Northern Ireland's pre-1998 devolution model as providing the basis for testing whether Acts of the Scottish Parliament were within its competence.

5 Donal Coffey, 'Constitutional law and empire in interwar Britain' (2020) 71(2) Northern Ireland Legal Quarterly 193, 209.

empire in their respective socio-political contexts. My aim is not to tell the stories of political and popular struggles within the empire, because such stories have been told by people with a relevant expertise and insight to which I make no claim. Rather, my concern is to foreground the concept of legislative competence in the constitutional arrangements enacted throughout the empire by the UK Parliament and the political and legal approaches which sustained them. Second, I do not explore all of the internal constitutional arrangements specific to each colony or dominion. My concern is how legislative autonomy was approached by UK authorities (political and judicial), rather than setting out a definitive account of imperial constitutional history. Instead, I recommend that those who are interested in the detail of such history might consult the works of scholars such as Peter Oliver,[6] Dean Knight,[7] Nicholas Aroney et al,[8] P N Masaldan[9] and Arthur Berriedale Keith.

A final introductory note is on the use of the words 'metropolitan' and 'imperial'. I use the former to mean the Crown's Government in the UK and the latter in relation to the empire as a whole.

THE PARAMETERS OF COMPETENCE

For the purposes of this article, I start with two concepts of legislative competence.[10] The first is grounded in legislative ability in a sense where, so long as the relevant legislature is able to enact law, irrespective of the legal effect of that law once enacted, the legislature retains its competence. This would be true, for example, of legislatures the statutes (or statutory provisions) of which were pre-empted[11] or even voided by statutes of a higher legal status.[12] This was part of the UK Government's position in the Welsh Government's challenge

6 Peter C Oliver, *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand* (Oxford University Press 2005).

7 Dean R Knight and Matthew Palmer, *The Constitution of New Zealand: A Contextual Analysis* (Hart 2022).

8 Nicholas Aroney, Peter Gerangelos, Sarah Murray and James Stellios, *The Constitution of the Commonwealth of Australia* (Cambridge University Press 2015).

9 P N Masaldan, 'The sphere of provincial government under the Government of India Act 1935' (1947) 8(3) Indian Journal of Political Science 761.

10 The antecedents of these two concepts can be found in Anurag Deb and Nicholas Kilford, 'The UK Internal Market Act: devolution minimalism and the competence smoke screen' (*UKCLA* 4 July 2022).

11 Eg the Government of Ireland Act 1920, s 6(2).

12 See the Colonial Laws Validity Act 1865, s 2 (explored further below).

to the UKIMA[13] and is exemplified by cases such as *Rediffusion v Attorney General of Hong Kong* (I explore the case in more detail further below).[14] In this article, this is treated as the 'thin' concept of legislative competence, in which a legislature is competent in a field so long as its laws relating to that field are able to get on to the statute book (whatever happens to those laws subsequently). This has the impact of severing legislative ability from legal effect.

The second concept predicates legislative ability on legal effect, so that a law which has no legal effect *ipso facto* implies a corresponding restriction on legislative competence. In other words, a legislature only has competence in a field where it has the ability to make law which is effective and not merely appearing in the statute book. This concept is exemplified by cases such as *The Treaty Incorporation Bills Reference* (also explored further below).[15] This is the 'thick' concept of legislative competence.

The difference between the two conceptions can perhaps be most clearly illustrated by taking a hypothetical Act of the UK Parliament (X), which concerns a subject (Y), transferred to a devolved administration. X governs Y by using a particular set of standards (Z1), which the devolved administration wishes to change to a different set of standards (Z2). However, the devolved administration does not directly modify the content of X by straightforwardly supplanting Z1 with Z2. Instead (for policy reasons adopted by the devolved administration), the administration amends the legal effect of X so that Z1 is to be understood as or supplanted by Z2 over time. On a thin conception of competence, the UK Parliament retains the competence to legislate in respect of Y because, despite the modification of the *legal effect* of X, X was able to get on to the statute book. Moreover, the transfer of Y to the devolved administration did not terminate the UK Parliament's competence to legislatively intervene in Y as and when it chooses. On a thick conception of competence, the devolved administration's modification of the legal effect of X *ipso facto* deprived the UK Parliament of its competence to make law in respect of X, because the devolved administration's modifications rendered X ineffective.

The emergence of legislative autonomy in the British empire was a centuries-long and asymmetric process. The earliest examples of

13 *R (Counsel General for Wales) v Business, Energy and Industrial Strategy Secretary* [2022] EWCA Civ 118 [24].

14 *Rediffusion v Attorney General of Hong Kong* [1970] AC 1136 (Privy Council).

15 *Reference by the Attorney General and the Advocate General for Scotland – United Nations Convention on the Rights of the Child (Incorporation) Scotland Bill; Reference by the Attorney General and the Advocate General for Scotland – European Charter of Local Self-Government (Incorporation) (Scotland) Bill* [2021] UKSC 42, 2021 SCLR 629.

legislative autonomy included the creation of colonial legislatures mandated to make laws for the peace, welfare and good government of the relevant colony.[16] There was, however, asymmetry in one significant aspect in these early examples of legislative autonomy – some colonial legislatures were expressly forbidden from legislating contrary to the entire body of English law,[17] whereas others were not.[18] The task of checking the legislative remits of colonial legislatures in this system fell to two main bodies: the Colonial Office and the Judicial Committee of the Privy Council.[19] The former advised the Sovereign in Council whether to use its disallowance powers, by which legislation enacted by the colonies would be struck out of the statute books by royal authority. The latter, as the court of final appeal for the empire, assessed the *vires* of colonial legislation against the statutes which conferred law-making powers on colonial legislatures. Both the political control of the Colonial Office and the legal control of the courts is crucial to understanding how legislative competence operated in the empire.

AUTONOMY AND POLITICS: DISALLOWANCE, ROYAL INSTRUCTIONS AND RESERVATION

This section explores the political controls over imperial legislation exercised by and on behalf of metropolitan authorities. Its purpose is to demonstrate that although these controls intervened in law-making, they were not regarded as constituting a competence restriction on the corresponding legislature (in other words, competence was understood in its thin conception).

16 See eg the Constitutional Act 1791 (Upper and Lower Canada), s 2, and the Australian Constitutions Act 1850 (Victoria, Van Diemen's Land, South Australia and Western Australia), s 14.

17 The Australian colonies: see the Australian Constitutions Act 1850, s 14.

18 The Canadian provinces: see the Constitutional Act 1791, s 2 of which simply forbade the provincial legislatures from enacting laws repugnant to the Act itself. This was changed significantly when, by the Union Act 1840, Upper and Lower Canada were reunified into the Province of Canada, where the Legislative Council and Assembly were barred from enacting laws in breach of the Union Act, any unrepealed part of the Constitutional Act, or any current or future Act of the UK Parliament extended to the Province of Canada 'by express Enactment or by necessary Intendment': see the Union Act 1840, s 3.

19 For the rest of the article, I refer simply to the Privy Council.

Disallowance

Although the Privy Council was seen in theory as a 'vital element of control over the colonies, as a part of the heritage of the Briton overseas … and as a prerogative link of empire',[20] the reality is more nuanced. For example, Australian legal academic Sir William Harrison Moore noted that, while a significant proportion of cases decided by the Supreme Court of New South Wales between 1825 and 1862 involved questions of the applicability of English law to New South Wales, these questions were answered in the colony itself.[21] It is evident that every dispute over legislative competence would not reach the Privy Council, the more so as it considerably restricted criminal appeals which it would hear to 'very rare' instances,[22] thus implicitly restricting competence appeals involving criminal statutes from the colonies.

A highly significant role was instead played by the Colonial Office.[23] This role was the review of colonial legislation to determine whether it should be permitted or disallowed. The involvement of the executive in reviewing colonial legislation stemmed from the fact that the Crown's representatives in the colonies were authorised to legislate solely on the terms of their respective commission and instructions, both of which were also approved by the executive in London.[24] Colonial legislation so reviewed by the executive met with one of three fates: disallowance by Order in Council, confirmation by Order in Council, or 'qualified assent': where the Crown's representative would assent on the Sovereign's behalf with the understanding that the latter could revoke assent at any time.[25]

This metropolitan review of colonial legislation was not a competence review in the legal sense as it would appear under the modern devolution settlements. Sir James Stephen, for instance, who as Colonial Office legal counsel officially reviewed colonial legislation 'in point of law', noted in 1841 that characterising his work as providing 'mere legal opinions' was 'a fiction', because such opinions 'embrace or advert to every topic which … demand[s] the notice of the Secretary of State in reference to the [colonial legislation]'.[26] That the

20 See eg Vincent C Macdonald, 'The Privy Council and the Canadian Constitution' (1951) 29(10) Canadian Bar Review 1021, 1025–1026.

21 William Harrison Moore, 'A century of Victorian law' (1934) 16(4) Journal of Comparative Legislation and International Law 175, 178.

22 See eg *Attorney General of New South Wales v Bertrand* (1865–67) LR 1 PC 520, 530 per Sir John T Coleridge.

23 D B Swinfen, *Imperial Control of Colonial Legislation 1813–1865* (Clarendon Press 1970) 11.

24 Ibid 12.

25 Ibid 13.

26 Ibid 15.

political interests of the metropole were of paramount importance in this review process is clear: decisions of the Sovereign in Council relating to the disposal of colonial legislation were based on minutes of the Secretary of State expressing his views on this issue (without reference to colonial officials or inhabitants who might be affected by the legislation).[27] But colonial legislation was not reviewed in a vacuum. Colonial Office counsel candidly admitted that the review of colonial legislation, and the relationship of the metropole with its colonies, had to be mutually beneficial 'while it lasts', demonstrating that even during this early phase, there was an acknowledgment that demands for greater autonomy in the colonies were inevitable.[28]

Here, it is important to explore the character of the disallowance power. It was not an intervention prior to the enactment of a law. Rather, it was a form of post-enactment (that is, post-assent) intervention, exercisable typically[29] within two years of the date of the relevant statute's enactment.[30] Disallowance was recommended where, as previously set out, colonial legislation conflicted with some metropolitan interest in an unacceptable manner. The sweep of this power, therefore, encompassed a field much wider than law. In fact, where the colonial legislation was arguably legally repugnant to its enabling statute or some Act of the UK Parliament which expressly or otherwise extended to the relevant colony, the focus of the Colonial Office was on the practicalities underlying the impugned legislation, rather than its *vires*. As David Berridge Swinfen summarises: '[w]here the justifiable needs of the colonists conflicted with the rule of law, the latter must bend, as far as practicable'.[31] It is also telling that advising on disallowance turned Colonial Office counsel from 'being a lawyer, into a practical administrator with expert legal knowledge'.[32]

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27 Ibid 16. Stephen, as quoted by Swinfen, notes how the Secretary of State would not even be present when the Council deliberated colonial legislation, preferring instead to send minutes.

28 Ibid 31, Swinfen quoting Sir Frederic Rogers, who succeeded Stephen in the Colonial Office.

29 But not absolutely – British India was, for example, subject to disallowance powers without any time-limits. See the Government of India Act 1915, s 69.

30 See eg the New Zealand Constitution Act 1852, s 58. A significantly restricted modern version of this power can be found in the Northern Ireland Act 1998, s 15(4), in cases of royal assent given to urgent Assembly Bills to which the Northern Ireland Secretary has consented (where such Bills require the Secretary's consent under s 8).

31 Swinfen (n 23 above), 63.

32 Ibid 57. The reference is specifically to Stephen, in Swinfen's analysis of the change of Stephen's doctrinaire approach to colonial legislation, to one which was more practically minded.

Instructions

Disallowance was a power exercised in London (in relation to dominion and colonial legislation, but not provincial legislation of federal dominions),[33] by the Sovereign in Council. In the colonies and dominions, however, there was also a form of metropolitan control through formal Instructions to representatives of the Crown (such as governors or lieutenant governors). Royal Instructions constituted the parameters within which Crown representatives could act in relation to colonial legislation – by assenting to or refusing to assent to such legislation on the Crown's behalf, or by reserving legislation for the signification of the Crown's pleasure.[34] Although in theory a form of far-reaching metropolitan control, in practice the Instructions contained clauses and articles which could fairly be described as *pro-forma* between successive Crown representatives of the same colony or province and *across* different colonies and provinces.[35] Moreover, although opinion varied (including judicially) on the issue, the Colonial Office uniformly insisted that Instructions had no force of law and thus colonial legislation assented to in breach thereof could not be considered repugnant in any sense, with Stephen caustically comparing the effect of Instructions to 'a page from Robinson Crusoe'.[36]

Nevertheless, Instructions were relied upon by authorities in London when the actions of the Crown representative in relation to colonial legislation affected a metropolitan interest – whether a practical interest or one of principle. Examples of the former category include a particular interest in controlling colonial legislation which modified the local electoral franchise and likewise on provision that imposed trading restrictions in relation to goods from across the

33 Disallowance and reservation were mostly dealt with in London only in relation to Bills passed by national legislatures such as the Parliament of Canada or the Commonwealth Parliament in Australia. Bills passed by sub-national legislatures, such as those of the Canadian provinces or Australian states, were dealt with (in terms of disallowance and reservation) mostly by their respective national governments rather than London. See, for example, Arthur Berriedale Keith's discussion of London's control over these aspects in relation to dominion (Canada, Australia, New Zealand, Newfoundland, South Africa and the Irish Free State) legislation in A B Keith, *The Dominions as Sovereign States* (Macmillan 1938) 65–66. Note, however, that there were exceptions to this, eg the Colonial Office directly instructing the Lieutenant Governor of New Brunswick (a Canadian province) to veto future attempts to legislate industrial incentives: see Earl Grey, *The Colonial Policy of Lord John Russell's Administration Volume I* (Richard Bentley 1853) 279–280.

34 See eg the British North America Act 1867, s 55 (regarding Bills passed by the Parliament of Canada) and s 90 (regarding Bills passed by Provincial Legislatures in Ontario, Quebec, Nova Scotia and New Brunswick).

35 Swinfen (n 23 above) 82.

36 Ibid 79, Swinfen quoting Stephen in a letter from 1842.

empire, but especially from the metropole.[37] Examples of the latter category include matters relating to slavery. A Dominican statute was enacted to appoint a Rector, but also authorised the same Rector to solemnise marriages between slaves only on the consent of their owners. Stephen pointed to the relevant Instructions for the Governor of Dominica which forbade legislative tacking – enacting laws dealing with multiple subjects (in this case, the appointment of a Rector and marriage between slaves) – as a way of recommending the statute's disallowance. Stephen's real point, however, was that it restricted the marital rights of slaves.[38]

India marked a departure from the aforementioned practice of *pro-forma* Instructions called in aid of the metropolitan interest from time to time, but otherwise unenforced. By the time Indian people were allowed into the legislature which made laws directly for them, under the Indian Councils Act 1861, the Governor General in Council was free to legislate on any subject whatsoever dealing with India. This ability, however, was subject to a bar on affecting the 1861 Act and certain other, older UK statutes dealing with the governance of India during its rule by the East India Company, UK Acts raising revenues in the UK for India, statutes relating to mutiny and desertion, UK Acts passed after the 1861 Act which extended to Indian territories and a specific bar on legislating contrary to the sovereignty of the UK Parliament and certain parts of the 'unwritten Laws or Constitution of the United Kingdom' (on which, I expand further below).[39] The Indian Governor General, as the Crown's representative, was *not* subject to any general Instructions relating to his office under the 1861 Act, and could also make laws affecting the Crown's prerogatives[40] – laws which might have earned a swift recommendation for disallowance in relation to other territories.[41] However, this is not to suggest that Indian Governors General were free to legislate as they wished. A practice had developed by the 1870s of seeking the prior sanction of (the metropolitan) Secretaries of State for India before introducing legislation in India – a practice which was deprecated in certain quarters and led to a 'strong feeling … against [these] constructive qualifications and limitations … upon the powers

37 Ibid 88–91.
38 Ibid 87.
39 The Indian Councils Act 1861, s 22.
40 Ibid s 24.
41 See Swinfen (n 23 above) 100–101, exploring certain legislation from Tobago and Jamaica which interfered with prerogative powers to summon and dissolve legislatures as well as with the effect of such summons and dissolution.

of the Legislative Council'.[42] Exacerbating the concerns of its critics, however, the practice of seeking the metropolitan India Secretary's prior sanction would, in the Government of India Act 1915, be turned into a statutory duty whereby the Governor General was required to 'pay due obeisance to all such orders as he may receive from [the India Secretary]'.[43] Even when modest measures towards (but short of complete) responsible government in India by Indians were enacted in 1919, a commensurate relaxation of the India Secretary's control over Indian affairs was partial.[44]

An illustration of the control retained over Indian law is in the matter of Indian attempts to develop and control an Indian maritime industry in the interwar period. Systemically starved of capital, with no government support and faced with openly hostile competition from British shipping, Indian shipping had faded into insignificance by the interwar period.[45] In the period 1924–1925, almost three-quarters of India's overseas trade was carried by British tonnage.[46] Attempts to enact legislation reserving India's trade to shipping companies controlled predominantly by Indian people were met with outright hostility by British interests in India.[47] This hostility was compounded by discussion in the UK Parliament and repeated appeals to the India Secretary by business associations in India and the UK,[48] general delay and finally, an outright and *constitutional* ban on non-reciprocal discriminatory treatment between British and Indian shipping.[49]

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42 C D Field, 'The limitation of the powers of the Legislative Council in India' (1895) 11 Law Quarterly Review 278. Field claimed this deprecation 'throughout all educated classes of the community in India, Native as well as European'. The reality of Indian *community participation* in legislative business was considerably different. The 1861 Act had, by the time Field was writing, been amended to include between five and eight non-official (that is, unaffiliated to the Crown or Government of India) Additional Members to the Legislative Council, who may be European or Indian, in a Council where the maximum strength was 24 members. See ibid 279. None of these non-official members, were, moreover, elected in any capacity, but nominated by the Governor General: see the Indian Councils Act 1861 s 10, as amended by the Indian Councils Act 1892, s 1(1).

43 The Government of India Act 1915, s 33.

44 The Government of India Act 1919, s 33.

45 Frank Broeze, 'Underdevelopment and dependency: maritime India during the Raj' (1984) 18(3) Modern Asian Studies 429, 445.

46 V Ramadas Pantulu, 'Indian Mercantile Marine and the Coastal Traffic Reservation Bill' (1929) Triveni: A Journal of the Indian Renaissance.

47 Broeze (n 45 above), 448–449.

48 HC Deb 6 May 1929, vol 227, cols 1932–1933.

49 The Government of India Act 1935, s 115(1).

Reservation

The reservation of a Bill for the signification of the Crown's pleasure was an altogether different power from disallowance. Whereas disallowance was exercised in respect of an already enacted statute, reservation preceded assent, which in that event came directly from the Crown and not its colonial representative. Arthur Berriedale Keith describes the purpose of reservation powers as 'secur[ing] full discussion between the Imperial and Dominion Governments of any issue affecting Imperial relations [rather] than to dictate policy'.[50] However, this characterisation of reservation as a trigger for intergovernmental discussion is somewhat more idyllic than the nuanced reality of its exercise, especially in one specific area: non-white affairs across the empire.

Endowed with a new autonomous bicameral General Assembly in 1852, self-governing New Zealand's Governors were initially instructed to reserve Bills relating to a range of matters, including those affecting the Crown's prerogative, and those which would be enacted only for a year.[51] Delegation of powers to New Zealand's provinces by the General Assembly warranted the exercise of reservation in 1854 and 1856,[52] but matters came to a head over legislating in respect of Māori affairs. Under the New Zealand Constitution Act 1852, Māori affairs were the special responsibility only of the Crown or those to whom it delegated such responsibility (the Governor or Provincial Superintendents).[53] The General Assembly, however, had passed a Bill to allow colonists to purchase land directly from the Māori. This ability to purchase land was subject to the 'Governor in Council', meaning the Governor was bound by advice from his Executive Council (of local politicians), rather than being required to follow his Royal Instructions (from London), as the Constitution Act 1852 had set out.[54] The Governor reserved the Bill and metropolitan authorities in London vehemently objected to its provisions. London believed that the Bill would cause distrust and 'revolution' and that British military strength would be required to enforce its provisions. As a result, not only was the Bill reserved, but assent was also refused.[55]

Just as with reservation for Māori affairs in New Zealand, the Crown had special responsibilities for 'native affairs and of matters specially

50 A B Keith, *The Governments of the British Empire* (Macmillan 1935) 50.
51 John E Martin, 'Refusal of assent – a hidden element of constitutional history in New Zealand' (2010) 41 Victoria University of Wellington Law Review 51, 53.
52 Ibid 57–58.
53 See eg the New Zealand Constitution Act 1852, s 73.
54 Martin (n 51 above) 58–59.
55 Ibid 60.

or differentially affecting Asiatics throughout' South Africa.[56] South African Governors General were required, upon their Instructions, to reserve Bills abolishing the right of Black people to vote.[57] Swinfen notes that, while the metropolitan authorities pushed back against colonial and dominion attempts to dilute the political position of non-white communities within these territories, this pushback was not always successful[58] or full-throated.[59] Indeed, within a few decades of granting South Africa and New Zealand self-government, London effectively gave up its special responsibilities towards the non-white communities in both.[60]

Understanding competence through disallowance and reservation

The political powers of disallowance and reservation, as well as control over assent to legislation through Instructions and general metropolitan orders to the Crown's representatives throughout the empire, illustrate an important point for legislative competence in the empire. Although legislatures were legally permitted to make laws in wide-ranging subjects, their ability to do so was significantly controlled through the politics of metropolitan paramountcy. The operation of this paramountcy was often unpredictable and overlaid by a complex web of different priorities. In some cases, Colonial Office concerns about the interests of the politically disadvantaged inhabitants of the empire – whether slaves or former slaves, Māori, or Black communities in South Africa, appear to have motivated metropolitan control over colonial and dominion legislation. In some ways, this might be characterised as the metropole being concerned with ensuring effective 'peace, order and good government' – the stock statutory phrase which conferred law-making powers on many colonial and dominion legislatures.[61] But

56 The South Africa Act 1909, s 147.

57 Keith (n 50 above) 49.

58 See eg Australian colonies seeking to end the practice of transporting convicts to their shores by stringent laws which would increase their punishments, against which the Colonial Office, initially fervently opposed, eventually gave way: Swinfen (n 23 above) 141–143.

59 See eg ibid 144–145, Swinfen's exploration of the Australian colonies' antipathy towards Chinese immigration and consequent legislation seeking to drastically reduce and disincentivise this immigration.

60 For South Africa, see Keith (n 50 above) 49, and, more generally, Hermann Giliomee, 'The non-racial franchise and Afrikaner and Coloured identities, 1910–1994' (1995) 94 African Affairs 199, 219; for New Zealand, see Martin (n 51 above) 64.

61 See eg the Government of Ireland Act 1920, s 4(1) (legislative powers of Irish Parliaments), and the Government of India Act 1935, s 288(2) (Aden).

these concerns of welfare obscured deeper concerns of *metropolitan* government – whether the powerful shipping interests in relation to India or the unwillingness to put the Crown's armed forces at the disposal of newly self-governing New Zealanders to deal with the Māori as they saw fit.

Indeed, an exploration of the political control of colonial and dominion legislation throughout the empire reveals its polylithic quality: there was no coherent approach to the use of disallowance, reservation, Instruction, or order, or even an attempt to rationalise the circumstances in which such elements would be used.[62] If there was any convention as to when or how these elements would be used by metropolitan authorities in London, it lay in the political priorities of the UK Government and the ability of Crown servants to convince the relevant minister to exercise a power or advise the sovereign to do so.

Here lies a powerful reason for the decline of political controls in the interwar period: they were used by the UK *in the UK's interests*. In recounting the history of the Imperial Conferences – periodic gatherings of the most important dominions and colonies in the empire – historian and international affairs scholar F H Soward points to disunity being the Conferences' key feature, with Canada, South Africa and the Irish Free State able to exert pressure on the UK in their own (and collective) interests.[63] Thus for example, Canada was able to make the persuasive case for patriating the powers to advise the reservation of Bills (though by convention rather than legislative change)[64] and the UK Government in turn had to recognise the dominion governments as its equals and not its subordinates.[65] The need for the dominions to gain equality with the metropole in powers and status makes sense if the metropole acts like an overbearing parent towards dominion interests. Indeed, there was a growing weariness in Canada at the UK 'harping

62 Though note that, within federal dominions such as Canada, there were attempts to rationalise these circumstances for legislation enacted by sub-national legislatures: see eg Eugene Forsey, 'Disallowance of provincial Acts, reservation of provincial Bills, and refusal of assent by Lieutenant-Governors since 1867' (1938) 4(1) Canadian Journal of Economics and Political Science/Revue canadienne d'Economique et de Science politique 47, 48–49. But as the focus of this article is competence and autonomy as understood by the UK, I do not explore this issue in any detail.

63 F H Soward, 'The Imperial Conference of 1937' (1937) 10(4) Pacific Affairs 441, 443.

64 W P M Kennedy, 'Imperial Conferences, 1926–1930' (1932) 48(2) Law Quarterly Review 191, 196. Legally, the power of reservation was subject to no limitations or restrictions, see *Reference Concerning the Power of the Governor General in Council to Disallow Provincial Legislation and the Power of Reservation of the Lieutenant-Governor of a Province* [1938] SCR 71, 79, per Duff CJ (Supreme Court of Canada).

65 Ibid 198–199.

on' about its status relative to that dominion.[66] The most significant development in this regard lay in the Statute of Westminster 1931, by the terms of which the UK Parliament gave up its right to make laws for the dominions without their request and consent,[67] conferring on dominion legislatures the right to make laws with full extraterritorial effect[68] and the unqualified right to regulate their own shipping and coastal trade.[69]

But the exercise of political control also indicates that legislative competence was understood in its thin conception. Disallowance of a law, for example, did not preclude the relevant legislature from attempting to enact or enacting the same or similar law again because such laws would invariably reach the statute book before being disallowed (if they were disallowed). Certain colonies, for example, St Kitts (the present-day Federation of Saint Christopher and Nevis) and British Honduras (present-day Belize) were particularly noted for attempting to enact disallowed laws in different guises or revive previously disallowed laws.[70] Similarly, the reservation of an imperial Bill would not necessarily preclude it from reaching the statute book, because the Colonial Office might have recommended assent (even qualified assent) instead of disallowance (as set out at the start of this section). The nature of these political controls turned on the priority that the metropole accorded to ensuring policy coherence between itself and a relevant territory in a given field at a given time. Thus, disallowance and reservation could not by nature operate as hard constraints on legislative competence because a somewhat amended version of a previously disallowed law could reach the statute book, depending on metropolitan attitudes.[71]

Modern equivalents to disallowance and reservation

It is important to appreciate that disallowance and reservation have no exact equivalents in modern devolution. The closest powers to disallowance are those conditionally authorising UK ministers to revoke subordinate legislation made by devolved authorities.[72] Meanwhile, although reservation may seem similar to pre-assent intervention

66 Ibid 193.
67 The Statute of Westminster 1931, s 4.
68 Ibid s 3.
69 Ibid s 5, disapplying the Merchant Shipping Act 1894, ss 735–736, which restricted colonial legislatures' abilities to amend or repeal any part of that Act and regulate coastal trade.
70 Swinfen (n 23 above) 88.
71 Martin (n 51 above) 81–82.
72 See eg the Scotland Act 1998, s 58(4), the Government of Wales Act 2006, s 82(3), and the Northern Ireland Act 1998, ss 25(1) and 26(4).

powers, such as that most recently exercised in relation to the Scottish Parliament,[73] I would argue that reservation is a categorically different power for two main reasons. First, reservation was unconditional – *any* imperial Bill could be reserved for the signification of the Crown's pleasure, for *any* reason. The existence of any specific Instructions to reserve Bills dealing with certain matters did not preclude reservation of other Bills dealing with other matters. This is unlike the power under the Scotland Act, which is conditional. Second, the absolute discretion contained in the reservation power allowed it to be used as a powerful tool for policy coherence, in accordance with the policy priorities of the metropole. By contrast, the Scotland Act introduces elements of legal coherence in the exercise of the power under section 35 – incompatibility with international obligations[74] and adverse effects on the operation of the law as it applies to reserved matters.[75] This is not to say that legal coherence has no connection with policy – after all, legal coherence may itself be a policy decision – but that the reservation power contained no element of legal coherence as a *condition* of its exercise. It is difficult, given that this is the first exercise of the section 35 power, to say more by comparison to reservation, but it is clear that the two powers are different.

AUTONOMY AND PARLIAMENTARY SOVEREIGNTY

The levers of political control over colonial legislation were undergirded by the unbreachable sovereignty of the Crown in Parliament to legislate in respect of any part of the empire. This sovereignty was explicitly laid down in many statutes conferring legislative autonomy[76] and inferred in others.[77] This was categorically different from the general provisions laying down the supremacy of specific UK statutes extended to colonies by express or implied terms. The sovereignty of the Crown in Parliament simply meant that it had the right to legislate in respect of the empire and this right could not be legally curtailed at all.

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73 The Scotland Act 1998, s 35(1)(b), in relation to the Gender Recognition Reform (Scotland) Bill. See also, 'Policy statement of reasons on the decision to use section 35 powers with respect to the Gender Recognition Reform (Scotland) Bill'.

74 The Scotland Act 1998, s 35(1)(a).

75 Ibid s 35(1)(b).

76 See eg the Government of India Act 1915, s 65(2), and the Government of Ireland Act 1920, s 75.

77 See eg in the discussion of the right of the UK Parliament to legislate for Canada by W H P Clement, *The Law of the Canadian Constitution* (Carswell Co 1892) 56. This is despite there being no specific part of the British North America Act 1867 declaring or otherwise reserving this right.

Sovereignty as the character of legislative ability

Two characteristics of parliamentary sovereignty as judicially understood historically deserve mention here. The first characteristic is that the doctrine co-existed with legislatures which were plenary in their powers. The case of *Burah* is instructive here.[78] The issue in that case involved the Indian Governor General, by legislation enacted under the Indian Councils Act 1861, removing the Garo Hills territory from the jurisdiction of the Calcutta High Court, and instead vesting it in the office of the Chief Commissioner of Assam, subject to the direction and control of the Lieutenant Governor of the Bengal Presidency. The Lieutenant Governor in turn, using powers conferred by this legislation, extended the exclusion to the Khasi and Jaintia Hills.[79] The respondent (Burah) was tried and convicted of murder by the Deputy Commissioner of the Khasi and Jaintia Hills and sentenced to death, with this sentence later commuted to transportation for life by the Assam Chief Commissioner.[80] The issue was whether the Indian Legislature (the Governor General in Council) had the competence to enact this legislation, given that it stripped the High Court of jurisdiction conferred by an Act of the UK Parliament. Alternatively, it was contended that, if the Indian Legislature was competent to enact such a law, it was still incompetent to delegate jurisdiction-stripping to the Lieutenant Governor.[81] The Calcutta High Court, sitting *en banc* and by a bare majority, declared the law *ultra vires* on the alternative ground.[82] The Privy Council allowed the appeal and dismissed both grounds, with its reasoning shining a light on the interaction between the UK Parliament and the Indian Legislature.

On the first ground, the Indian Councils Act 1861 placed several restrictions on the competence of the Indian Legislature, as set out above. Of these, the Privy Council considered that only one could apply – the injunction against making laws contrary to certain Acts of the UK Parliament. In this case, the relevant UK statute was the Indian High Courts Act 1862, which set out, *inter alia*, the jurisdiction of the High Courts (including the Calcutta High Court).[83] That Act expressly subjected its jurisdictional clauses to laws made by the Indian Legislature, so the respondent's argument failed in this regard.[84] On the alternative ground, it was contended that, as the Indian Legislature

78 *The Queen v Burah* (1878) 3 App Cas 889 (Privy Council), judgment of Lord Selborne.
79 Ibid 890–892.
80 Ibid 889.
81 Ibid 896–897.
82 Ibid 892–893.
83 The Indian High Courts Act 1862, ss 9, 10 and 11.
84 *Burah* (n 78 above) 903.

was a delegate of the UK Parliament, it was caught by the rule against sub-delegation and could not itself delegate legislative powers (to the Lieutenant Governor to extend the exclusion of jurisdiction). The Privy Council considered that the Indian Legislature, far from being a delegate, was, when acting within the limits of its parent statute, 'intended to have, plenary powers of legislation, as large, and of the same nature, as those of [the UK] Parliament itself'.[85] Moreover, the Privy Council did not consider that the Indian law had delegated anything to the Lieutenant Governor, but merely made its application to the Khasi and Jaintia Hills (to exclude the jurisdiction of the Calcutta High Court) conditional on the Lieutenant Governor's discretion. This was permissible, the Privy Council declared, because:

> Where plenary powers of legislation exist as to particular subjects, whether in an imperial or in a provincial Legislature, they may ... be well exercised, either absolutely or conditionally. Legislation, conditional on the use of particular powers, or on the exercise of a limited discretion, entrusted by the Legislature to persons in whom it places confidence, is no uncommon thing; and, in many circumstances, it may be highly convenient.[86]

The analogy with the UK Parliament is highly instructive, the more so because, among the competence restrictions under the 1861 Act which the Privy Council held did not apply in *Burah*, the final such restriction is worth setting out:

> ... the said Governor General in Council shall not have the Power of making any Laws or Regulations which ... may affect the Authority of Parliament, or the Constitution and Rights of the East India Company, or any Part of the unwritten Laws or Constitution of the United Kingdom of Great Britain and Ireland, whereon may depend in any Degree the Allegiance of any Person to the Crown of the United Kingdom, or the Sovereignty or Dominion of the Crown over any Part of the said Territories.[87]

The respondent in *Burah* argued that the power to legislate in respect of the Calcutta High Court was retained by the UK Parliament to the exclusion of the Indian Legislature. This was because the 1861 Act conferred no power on the Indian Legislature to make laws in respect of courts specifically, whereas a previous UK Act did so. By implication of the UK Parliament enacting the High Courts Act, it was argued that it had reserved the power to legislate for courts.[88] If correct, the Indian law in question would constitute an attack on the authority of the UK Parliament to legislate for India, in a breach of the 1861 Act. But the

85 Ibid 904.
86 Ibid 906.
87 The Indian Councils Act 1861, s 22.
88 *Burah* (n 78 above) 896–897.

Privy Council drew a key analogy between the *legislative abilities* of the Indian Legislature and the UK Parliament.[89] The only difference between the two bodies was that the former could only legislate within defined boundaries and the latter had no such boundaries – the *character* of their legislative abilities, however, was the same. Thus, the sovereignty of the UK Parliament did not act as a further, implied limitation on the law-making abilities of legislatures with plenary powers. This was despite the existence of provisions in some UK Acts preserving the power of the UK Parliament to legislate for imperial possessions with autonomous legislatures.[90] *Burah* was subsequently applied in relation to other legislatures such as in Queensland.[91]

Sovereignty as a subsisting attribute

The second characteristic of parliamentary sovereignty was that, as the dominions became sovereign entities themselves, the doctrine came to characterise multiple legislatures across the new Commonwealth. In thus evolving, the doctrine of legislative sovereignty came to be legally understood as capable of withstanding manner and form restrictions, as in *Ranasinghe*.[92] The impugned legislation in that case had been a statute of the Parliament of Ceylon authorising executive appointment of members to Bribery Tribunals.[93] There were two issues with this statute. First, the tribunal members were appointed by the Ceylon Governor General on executive advice, rather than via the independent Judicial Service Commission as mandated under the Ceylon (Constitution) Order in Council 1946 (the 1946 Order).[94] Second, although the Ceylonese Parliament was permitted to amend any aspect of the 1946 Order, a Bill to do so could only be validly assented to if it was passed by at least two-thirds of the total membership of the Parliament's lower House, and certified as such.[95] The impugned statute was instead passed by a simple majority.

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89 Ibid 904.

90 See eg the Government of India Act 1935, s 110(a). A B Keith described this provision as 'definitely connected with sovereignty' and characterised it as a reassertion of parliamentary sovereignty 'in accordance with precedent' rather than acting as an implied, substantive restriction on legislative competence: see A B Keith, *A Constitutional History of India 1600–1935* (Methuen & Co 1936) 376.

91 *Cobb v Kropp* [1967] 1 AC 141 (Privy Council) 154E, judgment of Lord Morris of Borth-y-Gest.

92 *Bribery Commissioner v Ranasinghe* [1965] AC 172 (Privy Council), judgment of Lord Pearce.

93 Ibid 191G–192C.

94 The Ceylon (Constitution) Order in Council 1946, s 55(1).

95 Ibid s 29(4).

The Privy Council decided that the statute was *ultra vires* on both grounds.[96] In response to the appellant's argument that the Ceylonese Parliament was sovereign, with this sovereignty precluding any restrictions on its legislative powers and any judicial scrutiny into whether any of its enactments complied with the manner and form restrictions contained in the 1946 Order, Lord Pearce's analysis of legislative sovereignty is worth setting out in full:

> No question of sovereignty arises. A Parliament does not cease to be sovereign whenever its component members fail to produce among themselves a requisite majority, e.g., when in the case of ordinary legislation the voting is evenly divided or when in the case of legislation to amend the Constitution there is only a bare majority if the Constitution requires something more. The minority are entitled under the Constitution of Ceylon to have no amendment of it which is not passed by a two-thirds majority. The limitation thus imposed on some lesser majority of members does not limit the sovereign powers of Parliament itself which can always, whenever it chooses, pass the amendment with the requisite majority.[97]

Lord Pearce did not arrive at this position by deeming the Ceylonese Parliament as legally inferior to the UK Parliament. Instead, the distinction he drew related to the foundational parameters of each legislature. In neither case was the legislature able to escape its respective foundational parameters – it was just that the UK Parliament did not have any such parameters which *prescribed* its powers.[98] A similar point was made by Centlivres CJ in the South African case of *Harris*,[99] though the manner and form restriction in that case required a joint sitting of both Houses of the South African Parliament and a

96 *Ranasinghe* (n 92 above) 193D and 194D–E.

97 Ibid 200B–C.

98 Ibid 195B. It is curious that the Board was not referred to *MacCormick v Lord Advocate* (1953) SC 396, a decision of the Inner House of the Court of Session which may have given Lord Pearce pause before arriving at this conclusion, as the Lord President in *MacCormick* had made *obiter* comments to the effect that the UK Parliament was at least arguably prescribed by the Treaty of Union 1707, see *MacCormick*, 411–412. This view was also relevant to the Acts of Union 1800, by which the modern UK Parliament was constituted, in relation to Northern Ireland: see Harry Calvert, *Constitutional Law in Northern Ireland: A Study in Regional Government* (Stevens & Sons 1968) 18–20. This view of the 1800 Acts resurfaced in *Allister and Peeples' Applications for Judicial Review* [2023] UKSC 5, [2023] 2 WLR 457, but the Supreme Court did not dispositively answer this matter, instead referring to this view as 'academic': see *Allister and Peeples* [66].

99 *Harris v Minister for the Interior* 1952 (2) SA 428, (Appellate Division) 464E.

two-thirds majority vote in such a sitting.[100] *Harris* was cited with approval in *Ranasinghe*.[101]

When applied to the legislatures of the empire, therefore, the doctrine of parliamentary sovereignty emerged from its cocoon of Diceyan absolutism and developed considerable nuance. It accommodated and co-existed with an increasing level of legislative autonomy throughout the empire, until the UK Parliament, in tandem with the political status of the UK, came to be seen as having relinquished its ability to superintend, far less control, the legislatures it had once enacted (or authorised) into existence, or having enabled these legislatures to significantly reduce or sever their relations with the UK.[102] Certainly, in his final years, Dicey himself would accept the limits of his purist vision of the doctrine – ironically, in trying to reconcile manner and form qualifications which the UK Parliament had enacted upon itself.[103] In many ways, this was inevitable: the Statute of Westminster marked one of the most consequential dominoes to fall in a cascade which ended with the UK Parliament enacting a complete severance of ties when granting independence.[104]

AUTONOMY AND LAW: REPUGNANCY AND RESPECTION

If metropolitan political controls over imperial legislation demonstrated the thinness of competence, so too did the legal limits of the law-making abilities of the empire's legislatures. As explored below, the evolutions of these abilities were not understood as legally *depriving* the UK Parliament of its competence to enact law regardless of such evolution. In fact, the development in the judicial understanding of these legal limits emphatically underscores the thinness of legislative competence of both the empire's legislatures and the UK Parliament.

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100 The South Africa Act 1909, s 152.

101 *Ranasinghe* (n 92 above), 199F.

102 See eg *Moore v Attorney General for the Irish Free State* [1935] AC 484 (Privy Council), which concerned the validity of the Oireachtas of the Irish Free State having amended its 1922 Constitution to remove appeals to the Privy Council: see the judgment of Viscount Sankey LC at 498–499. See also *Whittaker v Durban Corporation* [1921] 90 LJPC 119 (Privy Council) 120, per Lord Haldane, observing that the general intention of s 106 of the South Africa Act 1909 was to 'get rid of appeals to [the Privy Council]' through law enacted by the South African Parliament.

103 The Parliament Act 1911. See Coffey's discussion of Dicey's views in Coffey (n 5 above) 205–208.

104 See eg the Burma Independence Act 1947, s 1(1). See also the Federation of Malaya Independence Act 1957, s 1(2)(b).

Repugnancy

Repugnancy as a concept was derived from the language of the statutes which conferred law-making powers on colonial legislatures. As set out earlier, there were, by and large, two types of statutory language which reflected the concept. First, a colonial legislature was barred from enacting law repugnant to the 'law of England'. Second, a colonial legislature was barred from enacting law repugnant to Acts of the UK Parliament specifically or by necessary implication extended to the corresponding colony. While the sweep of repugnancy was reasonably clear in regard to the second category, so that a colonial legislature had only to be aware of specific UK statutes extended to the corresponding colony, the first category gave rise to difficulties.

A significant difficulty arose in defining the extent of the 'law of England' with reference to whether a colony had been 'settled' or 'ceded' (or conquered). The distinction here was consequential, as 'ceded' or conquered colonies in law retained all their pre-existing laws until or unless modified by prerogative or the UK Parliament.[105] By contrast, 'settled' colonies, seen by the law as being practically uninhabited (or without a 'settled law') at the time of colonisation, were subject to the entire body of English law which could then subsequently be modified by prerogative or statute, whether metropolitan or colonial.[106]

Theoretically, the enforceability of the repugnancy doctrine was not simply the domain of the courts. Nothing prevented the Sovereign in Council from disallowing legislation which was presumed to be repugnant, or the Colonial Office from recommending that disallowance be exercised. But in practice, the Colonial Office's views on repugnancy were generally favourable to the colonial legislatures. Stephen, for example, remarked on the twin 'absurdity' of attempting to distil a set of fundamental constitutional principles from written and unwritten English law, as well as the idea that the UK Parliament should have intended colonial legislatures to be bound rigidly by these principles.[107] Stephen's successor Rodgers also shared this view, believing that colonial legislatures should only be bound by the terms

105 See eg *Campbell v Hall* (1774) Lofft 655, 744, per Lord Mansfield CJ (King's Bench).

106 *Cooper v Stuart* (1889) 20 App Cas 286, 291, per Lord Watson. The terms 'settled' and 'ceded' are controversial in historical and present-day law in parts of the erstwhile empire and present-day Commonwealth such as Australia. It is not my intention to explore this controversy because I cannot do justice to it, either in this article or otherwise. But that does not mean the controversy should go unacknowledged, see eg Dani Larkin and Kate Galloway, 'Uluru statement from the heart: Australian public law pluralism' (2021) 29(2) Australian Law Librarian 151.

107 Swinfen (n 23 above) 57, quoting Stephen in a memo on Van Dieman's Land (modern day Tasmania).

of UK statutes which intended to bind them.[108] It should be noted that, where the Colonial Office may have recommended disallowance for repugnancy with the fundamental principles of English law, those principles were (at the relevant time) so entrenched that their abolition was generally unthinkable.[109]

However, the pragmatism of the Colonial Office over repugnancy did not extinguish a growing crisis in South Australia. The second puisne judge of the South Australian Supreme Court, Benjamin Boothby, had interpreted the repugnancy doctrine somewhat too aggressively for the liking of South Australia. The judge had invalidated legislation for having been assented to in breach of the relevant Royal Instructions and for fundamental breaches of English common law, going as far as suggesting in one case that the South Australian Parliament had 'no authority' to override the common law.[110] Boothby was pilloried in the South Australian press.[111] The metropolitan response was to entrench the Colonial Office's pragmatism into statute. The result – the Colonial Laws Validity Act 1865 – marked a major reform in the doctrine of repugnancy. Colonial legislatures[112] were now bound only by the terms of their enabling legislation and specific UK statutes which were extended to the corresponding colonies (including any subordinate legislation made thereunder),[113] in line with the Canadian position set out above. These statutes would operate in the relevant colony to the exclusion only of any inconsistent colonial legislation (which would be rendered void due to this inconsistency).[114] Moreover, colonial legislation assented to in breach of Instructions would no longer be void thereby (unless the Instructions were contained in Letters Patent or the Governor's Commission).[115] By the interwar period, however, this reform in repugnancy had outlived its initial emancipatory character,

108 Ibid 59.

109 Examples include the sovereignty of the Crown in Parliament, the prohibition of slavery, the dominance of Christianity and the prohibition of punishment without trial: see ibid 59, fn 17.

110 Ibid 170–171.

111 See *The South Australian Register* (Adelaide 19 June 1861) 2, and 'The Parliament and the Supreme Court' *The South Australian Register* (Adelaide 25 July 1861) 3.

112 As defined, 'colony' excluded the UK, the Channel Islands, the Isle of Man and Indian territories: see Colonial Laws Validity Act 1865, s 1.

113 The Colonial Laws Validity Act 1865, ss 2–3.

114 A version of these provisions was enacted in the Government of Ireland Act 1920, s 6(1).

115 The Colonial Laws Validity Act 1865, s 4.

and was viewed as too restrictive,[116] leading eventually to the Statute of Westminster 1931.

The operation of the Colonial Laws Validity Act entrenched the practice of the Colonial Office into law (despite its misgivings and opposition to such a move)[117] by implicitly distinguishing between local matters in which the metropole either did not wish to, or did not have the capacity to interfere, and those matters which the metropole determined were of empire-wide importance. This entrenchment not only rectified the errors of a rogue colonial judge, but it also addressed a bitter complaint from South Australia: that the metropole was happy to plod along without even acknowledging, far less addressing, the difficulties faced by the colonial Government.[118] The South Australian crisis served as a powerful reminder, already understood by the Colonial Office (as above), that metropolitan–colonial relations had to be *mutually* beneficial.

It is arguable, however, that repugnancy relating to fundamental aspects of the common law subsisted notwithstanding the Colonial Laws Validity Act, in some measure, to invalidate laws which were extreme in their breach of such fundamental aspects. For example, in *Sprigg v Sigcau*, the Privy Council ruled that the proclamation of a Governor of the Cape Colony authorising the arrest of a former tribal chief in Pondoland was unlawful under the corresponding statute of the Cape Colony Parliament,[119] while also noting that such a proclamation, effectively an act of attainder,[120] 'would be little calculated to enhance the repute of British justice'.[121]

Respection

Respection[122] is a doctrine which tests whether colonial or dominion legislation falls within the prescribed subject matters over which the corresponding legislature has competence. Variously expressed by the phrases 'pith and substance' and 'true nature and

116 K C Wheare, *The Statute of Westminster and Dominion Status* (Oxford University Press 1953) 127–131.

117 Swinfen (n 23 above) 180.

118 Ibid 180–181.

119 *Sprigg v Sigcau* [1897] AC 238 (Privy Council) 248.

120 Ibid 241, remarks of Lord Halsbury LC.

121 Ibid 247.

122 The word 'respection' appears in *Martin v Most* (n 1 above) [11], and in Calvert (n 98 above) 178–180.

character',[123] respection is distinct from repugnancy in an important respect: where repugnancy marks the binary threshold (an impugned law is either repugnant or it is not), respection is the method by which the court determines whether an impugned law is repugnant or not. At its core, respection asks the purpose of a given law, in order to determine whether it impermissibly breaches a competence restriction of its enacting legislature. However, querying statutory purpose does not make respection synonymous with purposive construction, especially when the latter canon of statutory construction is applied to Acts of the UK Parliament. This is because respection asks for statutory purpose *relating to* the prescribed parameters of legislative competence in the statute which establishes the relevant legislature. No such query is possible with Acts of the UK Parliament, given that the UK Parliament has no prescribed limits to its own competence. Thus, in determining whether a law was repugnant by respection, the courts had to ask not only the purpose of the law, but also the extent of the corresponding legislatures' competence in a given field. The latter question raised its own problems, given that subjects within a legislature's competence were merely listed in statutes which established these legislatures, with no statutory guidance as to how widely such subjects should be interpreted by the courts. It is beyond the scope of this article to exhaustively explore the relevant caselaw, but the following examples show a trend of widely construing sub-national competences and strictly construing national competences.

So, for example, the Privy Council decided that, as treaty implementation *per se* was unlisted under dominion and provincial competences in the British North America Act 1867, treaty implementation in the domestic Canadian legal order would have to be split between the dominion and provincial legislatures, according to the subject matter with which a given treaty dealt.[124] This had the impact of invalidating dominion legislation implementing, *inter alia*, international treaties concerning labour law and, moreover, emphasised provincial competences at the expense of dominion authority. For this and related judgments, the Privy Council's legitimacy was called into

123 See eg *Prafulla Kumar Mukherjee v Bank of Commerce Ltd, Khulna* (1947) 74 LR Ind App 23 (Privy Council) 42–43, in particular Lord Porter (for the Board) approving a passage from the Federal Court of India's judgment in *Subhramanyan Chettiar v Muttuswani Goundan* (1940) FCR 188, 201, per Sir Maurice Gwyer CJ: 'the impugned statute is examined to ascertain its pith and substance or its true nature and character'. *Prafulla Kumar Mukherjee* was cited as illustrative of respection in *Martin v Most* (n 1 above) [12].

124 See eg *Attorney General for Canada v Attorney General for Ontario and Others* [1937] AC 326 (Privy Council) 351, per Lord Atkin (for the Board).

question.[125] Half a world away, India's newly established Federal Court was busy 'emasculating' its central government by invalidating wartime detention regulations and setting thousands of detainees free.[126] This was a consequence of strictly construing the Government of India's rule-making powers under the Defence of India Act 1939, which authorised rules to detain those 'reasonably suspected' of being or acting hostile,[127] whereas the rules so made contained no reference to reasonable suspicion, only to the relevant government's satisfaction.[128] At the same time, the Federal Court gave the Indian provinces considerable latitude to dismantle the vast estates gifted by the Crown to the Indian upper classes, by dismissing the argument that provincial legislative competence could not touch prerogative grants.[129] Contemporaneously, Northern Ireland's young Parliament was also given a fairly wide latitude to regulate the sale of milk within the jurisdiction for public health, even though the impugned law negatively impacted trade between Northern Ireland and the Irish Free State, which was forbidden to the Stormont Parliament.[130] Similarly, when Stormont legislated to establish a work-permit system to take up employment in Northern Ireland, such legislation was not held to be in respect of the forbidden field of 'alienage ... or aliens as such', even though the statute undoubtedly impacted foreigners.[131]

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125 See eg F R Scott, 'The Consequences of the Privy Council Decisions' (1937) 15 Canadian Bar Review 485.

126 See Rohit De, 'Emasculating the executive: the Federal Court and civil liberties in late colonial India: 1942–1944' in Terence C Halliday, Lucien Karpik and Malcolm M Feeney (eds), *Fates of Political Liberalism in the British Post-Colony* (Cambridge University Press 2012) 59–90. In particular, De cites the case of *Keshav Talpade v King Emperor* 30 AIR 1943 FC 1, by which r 26 under the Defence of India Rules 1939, which included wide powers of expulsion and detention, was invalidated. This had the effect of calling into question up to 8000 detentions: see De, 64.

127 The Defence of India Act 1939, s 2(2)(x) (Central Indian Legislature).

128 The Defence of India Rules 1939, r 26(1)(b).

129 *Thakur Jagannath Baksh Singh v United Provinces* AIR 1943 FC 29, 87, affirmed on appeal in [1946] AC 327 (Privy Council), judgment of Lord Wright (for the Board).

130 *Gallagher v Lynn* [1937] AC 863 (HL), 870, per Lord Atkin. The relevant competence restriction on the Northern Ireland Parliament is in the Government of Ireland Act 1920, s 4(1)(7).

131 *Duffy v Ministry of Labour and National Insurance* [1962] NI 6 (NICA), 14 per Lord MacDermott CJ.

LESSONS FOR COMPETENCE TODAY

If legislative competence is conceptualised as the ability of a legislature to make laws, then we can draw three important lessons from imperial history.

First, legislative competence in its thin form speaks purely to explicit statutory limits or restrictions on the *effect* of laws made by a relevant legislature. This is true whether the relevant control on colonial and dominion legislation was political or legal. As set out earlier, for example, disallowance of a law did not prevent subsequent versions of the same law from being enacted. The laws in question would reach the statute book, possibly take effect, and then be removed by disallowance. The underlying competence to enact such laws remained intact. Similarly, a law which would almost certainly be repugnant if enacted was nevertheless allowed to be introduced, debated and enacted.[132] Again, while repugnancy would deprive the law in question of legal effect, the relevant legislature retained the ability to enact it.

Second, imperial history did not conceive of legislative competence in its thick form. Attempts by purist colonial judges to absolutely enforce the legal effects of Acts of the UK Parliament in the colonies were eroded by further such Acts, until the Privy Council itself moved in lockstep with the evolution of relations between the metropole and the colonies and dominions. Not once during this evolution was the UK Parliament *deprived* of its ability to make law in respect of the empire more generally. It is true that, under successive statues, the UK Parliament enacted clear intentions to restrict and ultimately stop such law-making, but these statutes did not place any hard restrictions on its own law-making ability. For example, barely two years after enacting the Statute of Westminster 1931, the UK Parliament authorised the UK Government to take over the administration of Newfoundland, then a dominion on the brink of financial collapse.[133] Although this metropolitan takeover of Newfoundland came as a consequence of the latter's request to this effect,[134] the requirement in the Statute of Westminster for the UK Parliament to legislate for the dominions only with their consent was effectively a manner and form restriction that the UK Parliament could legally override at will.[135] Similarly, in *Madzimbamuto v Lardner-Burke*, the Privy Council decided that

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132 *Rediffusion* (n 14 above) 1161B–F, per Lord Diplock.

133 The Newfoundland Act 1933, s 1(1). For more detail, see Declan Cullen, 'Race, debt and empire: racialising the Newfoundland financial crisis of 1933' (2018) 43(4) Transactions of the Institute of British Geographers 689–702.

134 The Newfoundland Act 1933, sch 1.

135 *British Coal Corporation v The King* [1935] AC 500, 520 per Viscount Sankey LC.

Southern Rhodesia's unilateral declaration of independence did not override Parliament's authority to statutorily intervene in the colony's affairs, notwithstanding the convention that Parliament would not thus intervene without consent.[136]

Both the Newfoundland and Southern Rhodesian examples demonstrate that the UK Parliament acted as a sovereign legislature within an unlimited competence, as compared to colonial and dominion legislatures which acted within *limited* competences. Here lay the key difference between the UK Parliament and colonial and dominion legislatures. Endowed with plenary powers within an unlimited competence, statutes of the UK Parliament were enforceable against any inconsistent legislation enacted by legislatures with limited competences. There was thus no need for a further competence restriction to ensure that the will of the UK Parliament was enforced. Equally, however, any enactment of the UK Parliament which prescribed the manner of enforcing its statutes (in other words, their legal effect) overrode any inconsistent colonial or dominion law. Seen in this light, neither the Colonial Laws Validity Act nor the Statute of Westminster deprived the UK Parliament of any of its competences – they merely instructed the courts of the empire as to the legal effect of its laws *in light* of both Acts.

Third, legislative competence was distinct from legislative sovereignty. The former concept described the fields in which a legislature had the ability to make laws, while the latter concept described the character of such ability (and its consequent breadth). This is apparent from cases such as *Ranasinghe* and *Rediffusion*. In the first of these cases, the Ceylonese Parliament was sovereign but did not have the competence to make valid law in breach of the manner and form requirements of its foundational law. In the second case, the Hong Kong Legislative Council was not sovereign, but was nevertheless competent to make repugnant legislation. These observations would apply *a fortiori* to a sovereign legislature with unlimited competence (the UK Parliament). In fact, legislative sovereignty positively *reinforces* the thinness of legislative competence. Consider that, classically, manner and form restrictions or qualifications which the UK Parliament might impose on itself can be legally undone merely with a further statute which repeals or otherwise modifies these restrictions or qualifications, expressly or by necessary implication, without having to effect repeal or modification consistently with those same restrictions or qualifications. This position subsisted by distinguishing cases such as *Harris* and *Trethowan* (in light of the

136 *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645 (Privy Council) 723A, per Lord Reid.

respective legislatures' competence in those cases),[137] and no judicial authority has since suggested otherwise. If the UK Parliament is legally competent to impliedly repeal or impliedly modify the effect of previous enactments which condition the exercise of its own powers, such that one Parliament is incapable of binding its successors, then the corollary is that a future Parliament does not, by implied repeal or modification of the effect of a predecessor's statute, *deprive* the same of the competence of having enacted that statute. On the contrary, the repeal of any implied repeal or modification may bring back into full effect the impliedly repealed (or modified) statute.[138]

The distinction between competence and sovereignty also accounts for the normative equivalence drawn between statutes of the UK Parliament and statutes of the legislatures it created or authorised. This equivalence was entrenched into the provisions of the Colonial Laws Validity Act – the restriction of repugnancy to only *specific* Acts of the UK Parliament extended to the colonies and dominions implied that those which were not so extended could be modified or repealed with impunity, provided the relevant legislature was competent to legislate in the field occupied by the relevant UK Act. The normative character of enacted law, in other words, depended on legislative competence rather than legislative sovereignty. This notion was also enacted in at least one other statute – the Northern Ireland Constitution Act 1973 – which provided for the establishment of a new Assembly after the collapse of devolution at Stormont in 1972. This envisioned that the Assembly would enact 'Measures' which had, subject to a bar relating to religious or political discrimination, 'the same force and effect as an Act of the Parliament of the United Kingdom',[139] even though, self-evidently, the Assembly would not be a sovereign legislature.

The thin form of competence thus ultimately led to a form of reciprocity in the relationship between the UK Parliament and the other legislatures – each enacting law of the same normative character, none impinging on the competence of any other, save that the UK Parliament alone possessed unlimited competence and could, by that fact alone, amend the conditions of the exercise of law-making ability for all other legislatures. This reciprocity explains why arguments seeking to distinguish the *character* of the competence of individual

137 *Attorney General for New South Wales v Trethowan* [1932] AC 526 (Privy Council). See H W R Wade, 'The basis of legal sovereignty' (1955) 13(2) Cambridge Law Journal 172.

138 *Allister and Peeples* (n 98 above) [65]–[67]. Without going into detail, the complex and convoluted discussion by all three courts involved in the *Allister and Peeples* litigation demonstrates the under-theorisation of implied repeal or implied modification of statutory effect by a subsequent statute.

139 The Northern Ireland Constitution Act 1973, s 4(3).

legislatures (with plenary powers) across the empire were rejected by the Privy Council.[140]

This discussion demonstrates the need to frame appropriate questions when conceptualising legislative competence. If competence is conceptualised only in its thin form, such that legislative ability is divorceable (and indeed divorced) from legal effect, then is the legislature really making *law* when enacting legislation with no legal effect? If instead, competence is conceptualised only in its thick form, so that legislative ability means that the relevant legislature must be able to enact *effective* law, how then can such a legislature be described as 'plenary' when its laws, in fields where it has explicit competence may, *ceteris paribus*, be rendered ineffective? The apparent rhetoricity of these questions raises deeper questions of the modern devolution settlements and their judicial interpretation, especially in relation to the relationship of the UK Parliament to its devolved counterparts.

THE RUPTURE(S)

The framework of the UKIMA represents a specific but extensive rupture in the imperial understanding of competence. It is unnecessary to set out its provisions in detail[141] as the reason for the rupture is in the manner that the UKIMA's provisions interact with its normative character. The UKIMA automatically disapplies statutory provisions which directly or indirectly discriminate against incoming goods,[142] but because the Act itself is entrenched within the devolution settlements,[143] the only legislature with the ability to modify any of the UKIMA's provisions is the UK Parliament. This means that, through the UKIMA, the UK Parliament has protected only the conditions of its own competence. The result is that the UK Parliament may enact legislation which modifies or even sets aside the automatic disapplication requirements in the UKIMA, but the devolved legislatures may not. This has consequences for the normative character of the statutes enacted by the UK Parliament when compared to those enacted by the devolved legislatures. Although there has been academic debate over the normative characteristics of Westminster

140 *Prafulla Kumar Mukherjee* (n 123 above) 42.

141 On which, however, see Nicholas Kilford (in this Special Issue), 'The market access principles and the subordination of devolved competence' 75(1) Northern Ireland Legal Quarterly 77–105.

142 The UK Internal Market Act 2020, s 5(3).

143 Ibid s 54.

legislation when compared to devolved legislation,[144] the UKIMA effectively answers this question by dramatically differentiating their respective impacts by its entrenchment in the devolution settlements. Entrenching the UKIMA leaves the UK Parliament as the *only* body capable of making law which escapes the prescriptions contained in the UKIMA (the market access principles which apply to legislation whatever its provenance).[145] This marks a complete break from the reciprocity of competence which had come to characterise the imperial experience.

But the UKIMA is not the only rupture in the understanding of competence. The Scottish Parliament (and by analogy, Senedd Cymru and the Northern Ireland Assembly) was described as 'plenary' by the Supreme Court, by which the Court meant that the Parliament was not subject to any implied limits to its law-making ability beyond those explicit in the Scotland Act 1998.[146] The Scotland Act (in common with the Government of Wales Act 2006[147] and the Northern Ireland Act 1998)[148] allows the Scottish Parliament to modify the laws effective in Scotland, subject to explicit restrictions on its ability to do so.[149] On the thin conception of competence, the Scottish Parliament and its counterparts retain these abilities regardless of the legal effect of the laws they make. But, by the *Treaty Incorporation Bills Reference*, the same cannot now be said of the UK Parliament, the laws of which must be effective in Scotland in order for its power to make laws for Scotland to remain unaffected.[150]

The Supreme Court's reasoning here turns imperial experience on its head. As previously set out, imperial experience conceptualised competence as thin, but did so across *all* legislatures within the empire. Devolution jurisprudence relating to Northern Ireland's historic devolution model (under the Government of Ireland Act 1920) is also consistent with this conceptualisation, meaning competence

144 See eg N W Barber and Alison Young, 'The rise of prospective Henry VIII clauses and their implications for sovereignty' (2003) Public Law 112; Aileen McHarg, 'What is delegated legislation?' (2006) Public Law 539; and Anurag Deb, 'Devolved primary legislation and the gaze of the common law: a view from Northern Ireland' (2021) Public Law 565.

145 The UK Internal Market Act 2020, s 6.

146 *AXA v Lord Advocate* [2011] UKSC 46, [2012] 1 AC 868, [147] per Lord Reed JSC.

147 The Government of Wales Act 2006, s 108A.

148 The Northern Ireland Act 1998, ss 5–7 generally, and specifically s 5(6).

149 The Scotland Act 1998, s 29 generally, but the implication specifically in s 29(4) is that the Scottish Parliament is permitted to make modifications of Scots private or criminal law as it applies to reserved matters if it does so consistently to reserved and transferred matters: see *Martin v Most* (n 1 above) [19].

150 *Treaty Incorporation Bills Reference* (n 15 above) [42], per Lord Reed PSC.

was understood in its thin form within the empire *and* within the metropole. In *McCann*, for example,[151] an arguably void statute enacted by the Northern Ireland Parliament was held to have been curable (and cured) in respect of its repugnancy by a later statute. Lord Denning, joining with the majority of the Appellate Committee in that case, further reasoned that 'the duty of the Court is to uphold the legislative power [of the Northern Ireland Parliament] when it is fairly and reasonably exercised and only strike it down when it is abused'.[152] In *McCann*, the restriction was an absolute bar on expropriation of property without compensation,[153] with any such legislation void as a result.[154] The effect of the Appellate Committee's decision in *McCann* was that the absolute prohibition did not void a repugnant law where it was subsequently cured of its repugnancy by the same legislature which had enacted the repugnant law in the first place. One could interpret the judgment as stating that the impugned statute was voidable rather than void *per se*, although the Appellate Committee did not infer this, and such a conclusion would in any event conflict with the clear language of the Government of Ireland Act 1920. So, either the Appellate Committee committed an error, or the UK Parliament's competence was understood as being thin – the less-than-absolute legal effect of a *prima facie* absolute prohibition not affecting the competence to have enacted such a prohibition.

It may be justifiable to distinguish the UKIMA's effect on legislative competence from the imperial experience by reference to the statute's underlying purpose: regulation of the UK internal market. By contrast, the empire was never a consolidated single market free of tariffs and equivalent measures.[155] But in order to utilise the UK internal market to justify the UKIMA, let us squarely acknowledge the justification as political rather than principled. There is no legal reason why the UKIMA effectively terminates the reciprocity in thin competence with which both caselaw and statute law understood legislative ability within the metropole and across the empire for at least a century and a half (since the enactment of the Colonial Laws Validity Act 1865). Indeed, the predominance of thin competence in this period was itself a response to, *inter alia*, stridently criticised attempts to enforce thick competence in South Australia. Perhaps the enforcement of thick competence over the entire empire would have stretched metropolitan

151 *McCann v Attorney General for Northern Ireland* [1961] NI 102 (HL).

152 Ibid 133.

153 The Government of Ireland Act 1920, s 5(1).

154 Ibid s 5(2).

155 See eg Steven E Lobell, 'Second image reversed politics: Britain's choice of freer trade or imperial preferences, 1903–1906, 1917–1923, 1930–1932' (1999) 43 International Studies Quarterly 671.

resources in a way that enforcement within the UK would not. But that is just as political a justification as is the internal market.

The jurisprudence of the UK Supreme Court, however, is more difficult to explain. The Supreme Court focused on the power of the UK Parliament to legislate for Scotland, though there is no principled reason why the word 'power', when applied *only* to the UK Parliament's legislative ability with respect to the devolved legislatures, should demand its competence be conceptually thick rather than thin. It may be, as Aileen McHarg has noted:

> ... an extended notion of Parliamentary sovereignty which not only preserves the *residual* power of the UK Parliament to legislate for Scotland, but also limits the *way in which* the Scottish Parliament is able to legislate in devolved areas.[156]

If this is indeed the case, the parallels with the South Australian crisis in the 1860s are not difficult to see. It also reveals an unprincipled element in this emerging line of jurisprudence – the UK Parliament's competence is thick in relation to devolved legislatures only, but not in relation (so far) to *itself*. No reason for imbuing the word 'power' in the Scotland Act with the ability to create such a distinction can be discerned from the Supreme Court's reasoning in this context. It is ironic, however, that the jurisprudence in this regard may have come full circle in asserting a thick conception of competence in respect of the very legislature (the UK Parliament) which intervened in 1865 to prevent this trend.

CONCLUSION

This article is a (necessarily) whistle-stop tour through two or so centuries of legal and political tools employed in service of governance in the empire. In its exploration of legislative competence during this time, it looks at how courts and Crown officials understood the ability of legislatures in different parts of the empire, with different competences, to enact law. Initially controlled highly prescriptively, over time legislative competence came to be accepted as a thin concept, separate from the effect of enacted laws. As the empire waned and its constituent parts began to dismantle their connections with the metropole, the concept of competence remained thin, so that this

156 Emphasis in the original. Aileen McHarg, 'Devolution: a view from Scotland' (*Constitutional Law Matters* 23 May 2022). McHarg looks at the notion of a substantive dimension to parliamentary sovereignty in more detail in her chapter 'Giving substance to sovereignty' in Brice Dickson and Conor McCormick (eds), *The Judicial Mind: A Festschrift for Lord Kerr of Tonaghmore* (Hart 2021) 203–222.

dismantlement was not seen as an attack on the competence of the UK Parliament.

In 2020, the UK Parliament enacted a statute which marked a significant rupture in thin competence. By the UKIMA, Parliament has underscored its ability to make *effective* law, while denying the same ability to its devolved counterparts. Legally, the statutory assertion of such an ability is both unprincipled and ahistorical. Politically, it may mark a moment in Westminster-devolved relations as significant as the Statute of Westminster had marked in metropolitan–dominion relations. But I leave the political implications to others with greater insight on the topic.

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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.

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Northern Ireland and the United Kingdom internal market: the exception that disproves the rules?

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ABSTRACT

Post-Brexit Northern Ireland (NI) occupies a unique position in the internal market of the United Kingdom (UK) due, primarily, to the Protocol on Ireland/NI, or Windsor Framework. Agreed as part of the UK–European Union (EU) Withdrawal Agreement, the Protocol/Windsor Framework provides that EU single market rules concerning the free movement of goods, customs, value-added tax, state aid and energy markets continue to apply in NI, despite it having formally left the EU along with the rest of the UK. To allow for the domestic implementation of the novel arrangements for post-Brexit NI, set out in the Protocol/Windsor Framework, the UK Internal Market Act 2020 (UKIMA) includes a series of specific provisions that except goods entering and leaving NI from the 'market access principles' established by UKIMA in certain circumstances.

This commentary first introduces UKIMA and then presents a review of its provisions that are specifically dedicated to post-Brexit NI. Concluded in March 2024, the analysis then provides an assessment of the implications of measures agreed between the UK and EU and laid down in the Windsor Framework texts published in February 2023, it also briefly considers the implications of the subsequent Safeguarding the Union deal between the Democratic Unionist Party and UK Government, finalised in January 2024.

Based on the analysis of UKIMA set against the backdrop of the Protocol, then Windsor Framework, then Safeguarding the Union, the commentary argues that the position of NI post-Brexit is not only newly unique but also newly consequential for those both inside and outside its borders.

Keywords: United Kingdom internal market; Northern Ireland; Protocol on Ireland/Northern Ireland; European Union; Windsor Framework; regulatory alignment and divergence.

INTRODUCTION

This commentary assesses the unique position Northern Ireland (NI) occupies in the internal market of the United Kingdom (UK) following withdrawal from the European Union (EU) – Brexit – and as a consequence of arrangements agreed during the lengthy and contested process.

The Protocol on Ireland/NI (the Protocol)[1] which forms part of the EU–UK Withdrawal Agreement[2] requires that certain aspects of EU law continue to apply in NI after Brexit. Under such an arrangement, goods from NI can be freely traded into and within the EU single market and no new physical infrastructure is therefore required on the winding 300km land border on the island of Ireland.[3] A corollary of these novel arrangements is, however, that new checks and controls now apply on goods moving from Great Britain (GB) into NI, and the latter is subject to different regulatory requirements than everywhere else in the UK.

Such a unique set of arrangements has both legal and political implications; this commentary focuses on the former. In keeping with the theme of this Special Issue, the first section of the commentary contextualises the analysis by providing a brief and broad overview of the United Kingdom Internal Market Act 2020 (UKIMA),[4] with a focus in particular on its implications for devolved governments and institutions. Moving on to NI-specific content, the second section of the commentary presents an overview of the Protocol. Against this backdrop, the third section returns to UKIMA and considers provisions therein that are specifically dedicated to NI and were enacted to enable the Protocol's domestic implementation. Bringing the discussion up to the present, the fourth and final section discusses changes introduced following the conclusion of the Windsor Framework, and subsequently the Safeguarding the Union deal, and considers the actual and/or potential impacts these may have in view of the unique market position of post-Brexit NI provided for and reflected in the aforementioned international and domestic law instruments.

Throughout it is argued that the position of NI, post-Brexit, within the UK internal market is not only newly unique but also newly consequential for the operation of both domestic and international market dynamics.

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1 Protocol on Ireland/Northern Ireland.

2 Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union (30 January 2020).

3 For related analysis, see Katy Hayward, *What Do We Know and What Should We Do About the Irish Border?* (Sage 2020).

4 United Kingdom Internal Market Act c 27 2020.

INTRODUCING THE UNITED KINGDOM INTERNAL MARKET ACT

The contemporary arrangements for devolution were established when the UK was an EU member state.[5] Against the backdrop of EU membership, the potential for intra-UK regulatory divergence between central government and the nascent devolved governments of Scotland, Wales and NI was more limited than it otherwise would have been at the inauguration of the post-1998 era of UK devolution. The requirement for the whole of the UK to follow EU rules by dint of its membership provided, in effect, a legal and policy scaffolding that restricted the degree of divergence that was possible between its constituent parts. By 2016, substantial areas of devolved competence in Scotland, Wales and NI intersected (fully or partially) with areas of EU competence;[6] the legal obligation for the Westminster Parliament and the devolved parliaments to comply with EU laws in these areas had, therefore, had a uniformising effect on policy development across the UK during its period of EU membership.

The UK's decision to withdraw from the EU therefore raised the prospect of much greater internal policy divergence between its different administrations. Facing such a scenario, the UK Government opted to mitigate the risk of unmanaged intra-UK divergence by introducing legislation 'in connection with the internal market for goods and services in the United Kingdom'.[7] An overarching objective of the United Kingdom Internal Market Bill (later Act) was, in the language of the UK Government, to 'preserve the ability to trade unhindered in every part of the UK'[8] – its provisions are thereby purposed to serve a similar function to that of the EU law and policy frameworks which ceased to have effect across the UK when Brexit (to borrow a phrase) 'got done'[9] on 31 January 2020 and took full effect at the end of the transition period 11 months later.

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5 From 1920 to 1972 there was a devolved parliament and government in Northern Ireland. For an overview of pre-1998 devolution, see Lisa Claire Whitten, 'Constitutional change in Northern Ireland' (Institute for Government and Bennett Institute for Public Policy 2023).

6 According to the Common Frameworks initiative, in total 152 areas of devolved policy intersected with EU law or policy (in whole or in part): of these – reflecting the scope of each devolution settlement – 149 were in NI, 101 in Scotland, and 65 in Wales. See Cabinet Office, 'Frameworks analysis 2021' (9 November 2021).

7 UKIMA long title.

8 Department for Business and Trade, 'UK Internal Market' (21 September 2021).

9 Prime Minister Boris Johnson's campaign in the 2019 general election was orientated around a promise to 'Get Brexit done'. See Billy Perrigo 'Get Brexit done! The 3 words that helped Boris Johnson win Britain's 2019 election' (*Time Magazine* 13 December 2019).

UKIMA introduced two 'market access principles' to govern trade within and between the different parts of the UK. First is the principle of mutual recognition, according to which any goods or services that are regulated in one of the UK's constituent territories can be traded in any other part of the UK without having to satisfy regulations set in those local markets. Second is the principle of non-discrimination, according to which goods or services being moved into one of the UK's constituent territories from any other part of the UK cannot be treated differently from locally produced goods and/or local service providers.

Striking a balance between regulatory autonomy and free trade is a challenge with which all internal market regimes must contend. In this respect, UKIMA market access principles are not unusual in and of themselves; indeed, they are relatively liberal compared to other internal market regimes given that they do not require regulatory harmonisation but instead enable each UK constituent territory to set its own regulations and standards within the bounds of competence.[10] Notwithstanding its comparative liberality in theory, however, for several reasons the UKIMA's market access principles can be expected in practice to have a centripetal effect on regulation (and control of it) within the UK. While the Act preserves the autonomy of each UK legislature, it also effectively reduces their reach: if, for example, the Welsh Government were to adopt a law that obliges an increase in welfare standards for farmed animals, those new higher standards will apply to the meat farming industry in Wales, but they cannot apply to all meat sold in Wales because products from elsewhere in the UK, or imported into the UK, which do not conform to the (hypothetical) higher Welsh standard, must still be recognised and accepted for sale there. Moreover, any increase in regulatory or welfare standards is likely to increase costs of production. This means that, in the event of a local legislature raising standards, local producers are likely to be undercut by non-local goods entering the local market which have not had to absorb the cost of a higher regulatory burden.[11] For this reason, UKIMA is also likely to have an overall deregulatory impact on the UK market.

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10 See George Anderson (ed), *Internal Markets and Multi-Level Governance: The Experience of the European Union, Australia, Canada, Switzerland, and the United States* (Oxford University Press 2012).

11 This example is not entirely hypothetical, particularly in respect of welfare standards of imported meat products – recent trade deals negotiated by the UK Government with Australia (in 2021) and New Zealand (in 2022) raised concerns in the devolved institutions regarding the potential detrimental effect of imported meat on the local agricultural and farming industries. See Senedd Economy, Trade and Rural Affairs Committee, Letter to Vaughan Gething MS Minister for Economy – UK–Australia Free Trade Agreement – impact on Wales (Official Correspondence 2 May 2022).

Although the market access principles apply to the whole of the UK – albeit with some NI exceptions which are discussed in detail below – the asymmetric nature of the UK's territorial arrangements makes it very likely that rules set by the Westminster Government for the English market will have a pervasive effect across the state. While devolved governments may still choose to set distinctive and/or higher standards which reflect their own policy priorities or commitments – for example in the case of Scotland, remaining aligned with EU standards[12] – doing so now risks putting producers or service providers in the relevant jurisdiction at a competitive disadvantage, assuming the distinctive or higher standards come with associated higher costs. The incentive against opting for higher regulatory standards in any given UK territory due to the possibility of undercutting may also therefore serve to undermine the principles and/or values which would underpin any such standards. In this context, it is also worth noting that the market access principles – again setting aside the NI case for now – come with a very limited list of permissible exceptions which primarily relate to biosecurity matters (ie combating the spread of pests, diseases, or unsafe food products) and/or responses to a 'public health emergency' posing an 'extraordinary threat' to human health.[13]

Overall, therefore, UKIMA can be said to, in the main, prioritise unfettered internal trade – NI exceptions notwithstanding – and deregulation over the law-making autonomy of the constituent territories of the UK. As subsequent sections make clear, the overarching implications of the legislation are contextually important when it comes to understanding UKIMA's NI-specific exceptions.

INTRODUCING THE PROTOCOL ON IRELAND/ NORTHERN IRELAND

Post-Brexit, NI occupies a novel position both within and between the UK and EU markets. Designed to address the 'unique circumstances on the island of Ireland', the Protocol, which forms part of the EU–UK Withdrawal Agreement, provides that aspects of EU law continue to

12 Lisa Claire Whitten, 'European Union law tracker: a report for the Scottish Parliament Constitution, Europe, External Affairs and Culture Committee' (Scottish Parliament Constitution, Europe, External Affairs and Culture Committee 14 September 2023).

13 This contrasts with the EU single market which does have inbuilt mechanisms and procedures which allow member states or regions therein to seek derogations and/or exceptions to its 'four freedoms' on the basis of justified circumstances. These can include local environmental concerns, health objectives, consumer protection needs or employment standards.

apply in NI despite it no longer being part of a member state, having left the bloc along with the rest of the UK on 31 January 2020.

Under the (unamended) terms of the Protocol, while NI remains part of the UK customs territory,[14] the EU customs code continues to apply there[15] as do specific EU Acts that regulate certain individual rights,[16] free movement of goods,[17] VAT and excise,[18] state aid[19] and electricity markets.[20] New EU Acts deemed to fall within the scope of the Protocol may also be added to those which already apply in NI, subject to agreement between the UK and EU.[21] Additionally, the Protocol requires that any amendments or replacements made at EU level to those Acts which it has made applicable in NI will automatically have effect.[22] NI, therefore, is in a relationship of dynamic regulatory alignment with aspects of the EU single market, primarily related to the movement of goods.[23] Among the purposes and consequences of such an arrangement is the avoidance of need for a physical hardening of the winding 300km land border on the island of Ireland. Free movement of goods on the island of Ireland can continue, notwithstanding Brexit, and, unlike their counterparts in GB, traders in NI can continue to enjoy free access to the EU single market in respect to goods. The corollary, however, is that new checks and controls are required on goods entering NI from GB, particularly in light of the broader arrangements for EU–UK trade after Brexit which, under the Trade and Cooperation Agreement, allow for divergence of regulatory requirements between the two signatories in respect of goods (excluding, in the UK case, NI).

For both the UK and the EU, the arrangements provided for in the Protocol are novel. Under its terms, the UK Government is responsible for ensuring that those EU rules and regulations that continue to apply to NI under the Protocol are properly implemented. From an EU perspective, this constitutes an outsourcing of the management of its single market for goods to the now third-country UK. From a UK perspective, the Protocol introduces barriers to trade within its internal market due to the obligation for EU rules to be followed in NI

14 Withdrawal Agreement 2020; Protocol, art 4.
15 Protocol, art 5.
16 Ibid art 2.
17 Ibid art 5.
18 Ibid art 8.
19 Ibid art 10.
20 Ibid art 9.
21 Ibid art 13(4).
22 Ibid art 13(3).
23 Lisa Claire Whitten, 'Post Brexit dynamism: the dynamic regulatory alignment of Northern Ireland under the Protocol on Ireland/Northern Ireland' (2022) 73 (S2) Northern Ireland Legal Quarterly 37.

but not in Great Britain. This latter effect – the creation of a so-called 'Irish Sea border' – has been the cause of considerable controversy. Leaving aside the (divisive and extensive) politics of the Protocol, its pertinence for our purposes is in how it relates to and is reflected in the UKIMA; to this, the next section turns.

THE UNITED KINGDOM INTERNAL MARKET ACT AND NORTHERN IRELAND

The regulatory implications of the Protocol are evident in UKIMA. To allow for the domestic implementation of the novel arrangements for post-Brexit NI, set out in the Protocol, UKIMA includes a series of specific provisions that serve to except goods entering and leaving NI, in certain circumstances, from the 'market access principles' established by the Act. This section sets out the NI-specific provisions of UKIMA and briefly notes their significance – the subsequent section takes the analysis further, including by considering the potential implications of amendments agreed by the UK and EU in the Windsor Framework, and later between the UK Government and the Democratic Unionist Party (DUP) in Safeguarding the Union.

UKIMA, section 11, and qualifying Northern Ireland goods

A first collection of NI-specific provisions in UKIMA relates primarily to the movement of goods from Great Britain to Northern Ireland (GB–NI). Section 11 of UKIMA introduces 'modifications' (read 'limitations') to the market access principles such that, in relation to goods, they apply to any part of the UK *other than* NI. Regarding rules on the sale of goods in NI, generally, the Act defers to the Protocol and the provisions of UK law for its domestic implementation.[24] What this means is that GB goods cannot be automatically acceptable for sale in NI and, therefore, the principles of mutual recognition and non-discrimination cannot be upheld. The acceptability or otherwise of goods placed on the market in NI is instead governed by the Protocol generally and its article 5 and annex 2 in particular, which make approximately 300 EU law instruments related to the regulation of goods applicable to the UK in respect of NI.

To complicate matters further, in addition to the overarching non-application of the market access principles to NI goods, under section 11(2) and 11(5) the mutual recognition and non-discrimination principles *do* apply to so-called 'qualifying Northern Ireland goods' (or QNIGs) – this amounts to a UK Government delivery of its promise to ensure 'unfettered access' for goods moving NI–GB. To determine

24 European Union (Withdrawal) Act 2018, c 18, ss 7A, 7C and 8C.

what the provision for QNIGs means in substance, section 11 of UKIMA must be read in tandem with the Protocol, aspects of the EU (Withdrawal) Act 2018 (EUW Act) and a statutory instrument passed under powers it bestowed.

The Protocol states that nothing in its provisions 'shall prevent the United Kingdom from ensuring unfettered market access for goods moving from Northern Ireland to other parts of the United Kingdom's internal market';[25] and (paradoxically) to that end provides that any applicable EU laws that 'prohibit or restrict the exportation of goods shall only be applied to trade between Northern Ireland and other parts of the United Kingdom to the extent strictly required by any international obligations of the [European] Union'.[26] What this means in practice is that, according to the Protocol, the movement of goods NI–GB can be relatively unrestricted, essentially subject only to controls for a small number of dangerous or illicit products. Enacting this commitment domestically would require dedicated legislation.

Among the (considerable) regulation-making powers granted by the EUW Act, UK ministers were empowered to make regulations to 'facilitate the access to the market of Great Britain of qualifying Northern Ireland goods' (section 8C(3)) and also to define, by regulations, what exactly these QNIGs would be (section 8C(6)). Just before the end of the transition period, in December 2020, a definition of QNIGs was adopted in legislation. Under the relevant statutory instrument,[27] goods that have either undergone processing in NI[28] or which are present in NI and are not subject to, or have successfully completed, any customs supervisions, restriction, or control[29] meet the definitive threshold of 'qualification'. While this is a relatively broad definition, read in the context of the obligation under the Protocol for EU laws on customs to apply in NI, and to goods entering the territory, this domestic law definition of QNIGs is without prejudice to the full implementation of the Protocol. Returning to the provisions of section 11 of UKIMA, the application of the market access principles to

25 Withdrawal Agreement; Protocol, art 6(1).

26 Protocol, art 6(1).

27 The Definition of Qualifying Northern Ireland Goods (EU Exit) Regulations 2020, SI 2020/1454.

28 NI processed products are goods which: have undergone processing operations carried out in NI only and incorporate only goods which (i) were not at the time of processing under any form of customs supervision, restriction, or control or (ii) have been 'domestic goods' meaning they are wholly obtained in the UK or have been subject to a chargeable customs procedure; see Definition of QNIGs, Regulation SI 2020/1454, s 3 and Taxation (Cross-border Trade) Act 2018, c 22, s 33.

29 Except that which arises from the goods being taken out of the territory of NI or the EU (ie including into GB).

'qualifying NI goods' in substance only includes goods that move NI–GB and not GB–NI because, under the Protocol (as originally agreed), the latter are subject to customs controls and therefore do not 'qualify'. Additionally, any goods moving NI–GB and which, under article 6(1) of the Protocol, are subject to prohibitions or restrictions due to the international obligations of the EU, also do not meet the threshold for 'qualification'.

UKIMA, part 5, and 'special regard'

Part 5 of UKIMA is specifically dedicated to NI.[30] Provisions here require that public bodies (of all kinds including ministers and/or departments across all UK administrations, central and devolved) have 'special regard' for the need to: 'maintain' NI's 'integral place' in the UK internal market; 'respect' NI's place as part of the UK customs territory; and 'facilitate free flow of goods' between GB and NI when either implementing the Protocol or taking 'any action related to the movement of goods' in the UK.[31] Part 5 goes on to set out a guarantee for 'unfettered access' for NI goods to the rest of the UK. A prohibition is introduced regarding new checks or controls on goods moving NI–GB unless required to: (i) facilitate access; (ii) comply with international obligations (including the Protocol); (iii) carry out voluntary customs procedures; (iv) or procedures required re VAT or excise under the Protocol; or (v) safeguard biosecurity or food safety of GB.[32] Thus, while these guarantees of 'unfettered' access are important, they are also conditional; nothing in this section conflicts with the direct effect of the Protocol in UK law or the 'modifications' (limitations) of UKIMA market access principles in relation to NI provided for elsewhere in the Act.

Further provisions are also made in the Act which relate to article 10 of the Protocol concerning state aid (in sections 48–49). These, in short, grant the Secretary of State for Northern Ireland significant powers in relation to operationalising UK commitments made in the Protocol to ensure compliance with relevant EU state aid laws in respect to NI–EU trade.[33] This is broadly in keeping with an effect of UKIMA on

30 This is where, as introduced, the UKIM Bill contained controversial 'specific and limited' law-breaking clauses; these were removed following UK–EU agreement in December 2020 when the two parties acting together in the Joint Committee took several decisions and made respective unilateral declarations regarding implementation of the Protocol. The 2020 Joint Committee decisions included an agreed definition of 'at risk' goods in the context of the Protocol (with implications for the scope of checks required on GB–NI movements) and established so-called 'grace periods' for some checks, most of which continued to apply until the Windsor Framework changes came into effect on 1 October 2023.

31 UKIMA, s 46.

32 Ibid s 47.

33 Withdrawal Agreement; Protocol, art 10, annex 5.

devolved powers more generally, whereby it (newly) made state aid an excepted or reserved area across the UK.[34]

To summarise, under UKIMA, trade in goods from NI to GB is guaranteed 'unfettered access' subject to international obligations (including the Protocol) and biosecurity monitoring (under the general provisions of the Act) – in practice this is unlikely to lead to much 'fettering' of NI–GB trade. When it comes to trade in goods moving from GB–NI, UKIMA market access principles are 'modified' to allow for the implementation of the Protocol – in practice this means that placing goods on the NI market is essentially governed by EU rules and not the UKIM principles, thus leading to 'Irish Sea border' checks and controls. UKIMA also, however, introduces a 'best endeavours' obligation on UK ministers and authorities to have 'special regard' for the place of NI in the UK market and customs territory when making any provision for the movement of goods. If taken seriously, this latter provision for 'regard' *could* be consequential for UK-wide regulation – the conclusion of the Windsor Framework, however, makes this scenario less probable.

THE BRUSSELS (VIA BELFAST) EFFECT, THE WINDSOR FRAMEWORK, AND SAFEGUARDING THE UNION

Under the UKIMA framework, read together with the (pre-Windsor Framework) Protocol, NI could hypothetically serve as a legislative anchor or guideline for policymakers *if* the UKIMA obligation for 'special regard' for NI were to be taken seriously in Cardiff, Edinburgh and London.[35] In this scenario, choices regarding the regulation of goods across the UK could opt to mirror the 'UK(NI)' market and, by proxy, the EU market; notably, this would be in keeping with commitments already made by the Scottish Government for its devolved law to stay aligned with EU law.[36] Aspects of the Windsor Framework amendments to the Protocol, however, make it less likely that a 'Brussels via Belfast effect' will ever be realised.

On 27 February 2023, UK Prime Minister Rishi Sunak and European Commission President Ursula von der Leyen jointly announced the conclusion of the 'Windsor Framework' (WF) package of measures which proposed amendments to the legal text of the Protocol and a series of agreed easements to the arrangements for its implementation. In substance these were spread across an array of different legal and political documents which addressed a range of issues and (assuming

34 UKIMA, s 52.
35 Ibid s 46.
36 Whitten (n 12 above).

operationalisation) amount to a complex and contingent new arrangement for trade to and from NI. For our purposes, the most pertinent aspect of the WF relates to movement of goods from GB to NI and the establishment of a so-called 'green-lane, red-lane' system.

In its effort to address 'in a definitive way, unforeseen circumstances or deficiencies that have emerged since the start of the Protocol', the WF introduces a system for the movement of 'retail goods' from GB to NI that relies on differentiation according to destination.[37] Where 'retail goods' entering NI from GB are for use or consumption in NI they can enter via a 'green lane' process characterised by simplified certification procedures and non-application of some EU rules and regulations; where 'retail goods' entering NI from GB are or may be for use or consumption in Ireland or elsewhere in the EU they must enter via a 'red lane' process where all EU checks, controls, rules, and regulations will apply.[38] The WF definition of retail goods is narrow. It includes pre-packaged products of plant or animal origin, food and food contact goods, plants (other than for planting), ready to sell pet food and dog chews as well as composite food products. According to the UK Government, the WF results in '1700 pages of EU law' being 'disapplied' in NI;[39] however, much of this relates to the 'green lane' process where any so-called 'removal' of EU law relates only to GB–NI movements, only applies to certain goods being imported in specific circumstances, subject to trader authorisation and compliance with data-sharing, labelling requirements and market surveillance.[40] Importantly therefore, any EU law that is not applied to GB–NI goods entering through the green lane still applies to goods being produced for sale in NI. Read together with the UKIMA 'market access principles' this creates the risk (and arguably the probability) of NI producers being undercut in their own market.

Given timelines for implementation, assessing the significance of WF revision on the UK regulatory environment, NI's place within it, and the EU's relationship to it, is difficult. Much of the practical effects of the WF provisions, particularly as regards GB–NI movement of

37 European Commission and United Kingdom Government, 'Windsor Political Declaration by the European Commission and the United Kingdom Government' (27 February 2023).

38 Notably, now absent a series of 'grace periods' that have been in operation since the Protocol entered into force – initially on the basis of UK/EU agreement then under unilateral UK extensions.

39 UK Government, 'The Windsor Framework: A New Way Forward' (Cm 806 27 February 2023).

40 David Phinnemore and Lisa Claire Whitten, 'Analysis: How green is the green lane for goods under the Windsor Framework? There are situations in which it could fade or become blotchy' (*News Letter* 11 August 2023)

goods, will depend on the extent and nature of their use; this will only really become clear in time.

For our purposes, the important observation that can be made of the WF revisions is that they expose NI to the potential negative undercutting impact of the UKIMA 'market access principles' experienced in Scotland and Wales, but, under the revised system, NI will likely have to weather this market dynamic to a greater degree. The (Protocol-derived) obligation for NI producers to follow EU laws in respect to 'retail goods' (as defined by the WF) combined with the (UKIMA-derived) obligations to ensure non-discrimination and mutual recognition of GB imports of 'retail goods' to NI via the green lane which are not obliged to follow those same EU laws means that, while NI producers can be expected to experience some of the potential UKIMA undercutting effects that may also arise in Scotland and Wales, the authorities in Stormont will not have the same freedom that counterparts in Holyrood and Cardiff may have to act to address the matter (including in the case of the latter two, via the UKIMA exclusions procedure).[41] Because the requirements on NI producers derive from EU laws that apply under the Protocol – an international treaty negotiated and signed by the central UK Government – they are beyond the competence of devolved authorities. By contrast, in Wales and Scotland any undercutting effects that arise will be the result of decisions made by their respective institutions to adopt certain standards in the knowledge (and likely despite) any potential competitive disadvantages accrued as a result. While, therefore, there may be an (arguably understandable) frustration among Scottish and Welsh representatives at the possibility of UKIMA leading to undercutting, at least in any given instance there will be a measure of control and accountability for choices made; the same cannot be said for their counterparts in NI.

In January 2024 the UK Government published details of a deal that it had brokered with the DUP – Safeguarding the Union – with a view to providing sufficient assurance for the party to end its boycott of the Stormont institutions in protest against the implementation of the Protocol/Windsor Framework. Elements of the deal concerned the UKIMA, in particular, its guarantee for 'unfettered access' for NI goods to the rest of the UK market. Through a subsequently made statutory instrument – the Windsor Framework (UK Internal Market and Unfettered Access) Regulations 2024[42] – the UKIMA was amended such that its existing arrangements for (almost) unfettered movements of goods directly from NI to GB would also apply to goods moving indirectly from NI to GB via Ireland. Additionally, the new instrument

41 UKIMA, s 10.

42 SI 2024/163.

amended the definition of QNIGs such that the status of 'qualification' is more focused on goods produced by NI-based traders rather than just those being in free circulation in the NI market. It also granted the Secretary of State new powers to issue statutory guidance to assist relevant authorities in the exercise of their duty to have 'due regard' for the place of NI within the UK internal market in accordance with section 46 of the Act (discussed above). These new UKIMA provisions, taken together with other measures in the Safeguarding the Union deal, served as the basis for the DUP to re-enter the power-sharing institutions of NI devolution; they did not, however, fundamentally alter the (actual or potential) effects of the UKIMA in/on Northern Ireland, when read together with the Protocol/Windsor Framework.

CONCLUSION

Implementation of the Windsor Framework revisions to the Protocol is due to be staggered, with key milestones stretching from late 2023 to early 2025.[43]

As noted in this commentary, the WF revisions to the Protocol (notwithstanding subsequent Safeguarding the Union assurances) have the potential to water down the significance, visibility and potential UK-wide repercussions of NI exceptions and NI specific provisions contained in UKIMA. Prior to the conclusion of the WF, the accommodations in UKIMA for the domestic implementation of the (unamended) Protocol served to, in effect, shield the NI market in goods from the otherwise deregulatory and centralising implications of the legislation (loudly decried in Cardiff and Edinburgh). At the same time an in-principle obligation, created by UKIMA, for all UK ministers to have 'special regard' for the NI position in general and its alignment with certain EU rules in particular created the possibility of a (continued) Brussels via Belfast effect if such an obligation was taken seriously. With the inauguration of the WF changes to the (as originally agreed) Protocol, however, the likelihood of this still-hypothetical Brussels/Belfast effect being realised is diminished. Aspects of the Safeguarding the Union deal arguably reflect an attempt to further mitigate any 'Brussels/Belfast' effect insomuch as they provide (at least in principle) commitments to ensure the NI market maintains parity with that of GB.

Notwithstanding the most recent changes, under current arrangements (applicable in spring 2024), the NI market is due to be newly exposed to the general (deregulatory and centralising) effects of UKIMA while also having uniquely constrained powers to mitigate

43 NI Assembly, 'Timeline and key documents' (2023).

against potential negative implications of the same due to binding obligations of the Protocol/WF in the first instance and potential future periods without a functioning devolved government in the second. If the (very real) potential opportunities of Northern Ireland's (newly) unique position as a place within and between the two markets of the EU and the UK are to be realised and maximised, effective devolution alongside full engagement with the novel structures for NI representation in EU–UK institutions that flow from the Protocol/Windsor Framework ought to be pursued, and swiftly.

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Beyond UKIMA: challenges for devolved policy-making in the post-Brexit era

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ABSTRACT

This commentary builds on other articles in this special issue, identifying how tensions between United Kingdom and devolved institutions permeate a number of policy areas and how it affects devolved policy-making in those areas. It focuses on three discrete areas of law and policy: constitutional reform, human rights and environmental protection.

Keywords: devolution; constitutional reform; human rights; environmental protection.

INTRODUCTION

From inception to implementation, the United Kingdom Internal Market Act 2020 (UKIMA) has contributed to the considerable tension between the UK and devolved institutions which has characterised the period since the Brexit referendum in 2016. This commentary will consider how this tension permeates a number of policy areas and how it affects devolved law and policy-making. We shall focus on three discrete areas of law and policy: constitutional reform; human rights; and environmental protection. The unifying theme – as elsewhere in this special issue – is the aforementioned tension between the UK and devolved institutions and the challenges faced by devolved institutions in pursuit of their policy goals. Some of these tensions and challenges – especially in the case of environmental protection – arise directly from the implementation of UKIMA. Others do not arise from UKIMA itself, but rather reflect the breadth of the tension and political divergence between the UK and devolved executives which have arisen – or at least been exacerbated

– since 2016, as well as the centralising tendency which dominated approaches to devolution at the UK level in that period.[1]

THE CONSTITUTION OF DEVOLUTION

In this section, our focus is on proposals for reform of the constitution of devolution, especially those recommended by independent Commissions of Inquiry in relation to Wales, now extending over a 20-year period. Proposals for reform to the constitution of devolution are, of course, particularly sensitive to the attitudes of UK-level institutions, since powers to amend the principal statutes establishing, empowering and constraining devolved institutions are reserved to the UK Parliament.[2] And while the post-Brexit era has brought new tensions and, arguably, in response a shift in approach from the devolved institutions, there is nevertheless continuity with pre-Brexit reform proposals. Perhaps the most significant tensions and challenges arise from the increasingly ambitious reform agenda, reflected in recent Commissions' terms of reference and recommendations.

As outlined elsewhere in this issue, a 'hyper-unionist',[3] centralising attitude is redolent in UKIMA and has defined UK institutional attitudes to devolution in the Brexit era.[4] One might, therefore, presume that UK institutions would be increasingly hostile to proposals to alter the structure of devolution, especially those which would expand devolved competence at Westminster's expense. Indeed, it is tempting

1 Conflict and centralisation have been notable and persistent features of Brexit-related law and policy-making (see the other papers in this issue, especially Chris McCorkindale, 'UKIMA as red flag symptom of constitutional ill-health: devolved autonomy and legislative consent' 75(1) Northern Ireland Legal Quarterly 45–76), but conflicts between UK and devolved institutions have also extended to policy issues which are not directly Brexit-related. Prominent examples, in addition to those discussed below, include the tensions arising over divergent responses to the Covid-19 pandemic and the UK Government's decision to exercise its power under Scotland Act 1998, s 35, to block the Scottish Parliament's gender recognition reforms (SP Bill 13 Gender Recognition Reform (Scotland) Bill Session 6 (2022)). Of course, even those conflicts which do not concern Brexit directly may reflect shifts in political attitudes which can themselves be traced to Brexit: see, for a discussion of one such shift in political attitudes, Michael Kenny and Jack Sheldon, 'When planets collide: the British Conservative Party and the discordant goals of delivering Brexit and preserving the domestic union, 2016–2019' (2021) 69(4) Political Studies 965.

2 See, for example, GoWA 2006, sch 7B, pt 1, s 1(1).

3 One characteristic of the post-Brexit phenomenon of 'hyper-unionism' is a more overtly interventionist and integrationist approach by the UK Government. See Kenny and Sheldon (n 2 above).

4 See n 1 above.

to perceive the same centralising attitudes at work in the short shrift given by the UK Government[5] to the Thomas Commission's 2019 recommendations on devolution of powers over the Welsh justice system.[6] Yet, while the Brexit-era attitudes of Westminster institutions may well have contributed to this dismissive reaction, when it comes to the constitution of devolution – especially in Wales – there is a great deal of continuity between the rejection of the Thomas Commission proposals and UK institutions' reactions to previous Commission-led recommendations for reform.[7]

Commission-recommended reform to devolution, especially in Wales, has a long history of lukewarm reception and partial implementation by UK Governments of all political stripes. In particular, UK institutions have, since the outset of devolution, displayed a longstanding resistance to *expansionary* reform – reforms which expand devolved competences at the expense of UK institutions – deploying it only in cases of exceptional public demand or (Westminster-recognised) functional necessity. Such resistance was evident even in the Westminster response to the Richard Commission,[8] established by the Welsh Assembly Government to review the widely derided original devolution arrangements under the Government of Wales Act (GoWA) 1998, and which recommended a wide range of both functional and expansionary reforms. At the functional end of the spectrum, there were recommendations to formalise the distinction between the Assembly and its government. At the more expansionary end, the Commission recommended legislative powers for Wales on a reserved powers basis, where there were no primary legislative powers before. The UK response, in the form of the GoWA 2006, implemented some of these recommendations, though changes were, in the main, limited to those of a primarily functional nature. The approach to the more expansionary, albeit functionally justified,

5 See, for example, government ministers' responses to Westminster Hall debates on the Thomas Commission recommendations: HC Deb 22 January 2020, vol 670, cols 154WH–159WH; HC Deb 29 November 2022, vol 723, cols 273WH–276WH.

6 Commission on Justice in Wales, 'Justice in Wales for the People of Wales' (Commission on Justice in Wales 2019).

7 For reasons of space, this section focuses only on the most prominent Commissions of Inquiry prior to Thomas: the Richard Commission (Commission on the Powers and Electoral Arrangements of the National Assembly for Wales, 'Report of the Richard Commission' (Richard Commission, 2004)) and the Silk Commission, Part I (Commission on Devolution in Wales, 'Empowerment and Responsibility: Financial Powers to Strengthen Wales' (Silk Commission 2012)) and Part II (Commission on Devolution in Wales, 'Empowerment and Responsibility: Legislative Powers to Strengthen Wales' (Silk Commission 2014)).

8 Richard Commission (n 7 above).

recommendations relating to legislative competence was altogether more restrained. Legislative competence, in the form of the Assembly Measures regime,[9] was on a conferred, not reserved, powers basis and the conferral of powers was envisaged to be glacially incremental. Welsh legislative power was to be subject to a high degree of central control. The more complete and independently exercisable legislative powers in GoWA 2006, part 4, were not immediately available and would only be conferred following a clear demonstration of both Assembly and public support, as indicated in a referendum in 2011. Significantly, the UK Government rejected some of the most overtly expansionist proposals outright. Expansionary recommendations on issues such as the devolution of tax powers and the adoption of a reserved powers model of competence allocation were to be subject to the attention of further Commissions of Inquiry, and finally implemented many years later.

Similar trends can be discerned in UK institutional responses to the two Silk Commission Reports. The predominantly finance-related reforms recommended by Silk I[10] – largely enacted by the Wales Act 2014 – reflected a UK Government view that growing political power must be accompanied by financial accountability.[11] These changes were no doubt eased by the fact that in these respects Wales was following in the wake of reforms already enacted in relation to Scotland.[12] Again, additional powers – in this instance over income tax – were to be subject to clear evidence of political and public demand in the form of a referendum, albeit this requirement was superseded by the Wales Act 2017.

As for Silk II,[13] many of its expansionary recommendations were not implemented – youth justice competence being a prominent example. The most headline-grabbing reform enacted in the Wales Act 2017 was the shift to a reserved powers model, but this reform to the formal allocation of functions was not accompanied by a significant expansion in their breadth and certainly not to anything approaching the range

9 GoWA 2006, pt 3.

10 Silk I (n 7 above).

11 Richard Rawlings, 'The strange reconstitution of Wales' (2018) Public Law 62–83.

12 See especially the Scotland Act 2012, which implemented recommendations made by the Calman Commission (Commission on Scottish Devolution, 'Serving Scotland Better: Scotland and the United Kingdom in the 21st Century' (Commission on Scottish Devolution 2009)). Indeed, for Laura McAllister the financial reforms to Welsh devolution bear a greater resemblance to the Scotland Act 2012 than to the Silk Commission's recommendations: Laura McAllister, 'The UK Government's recent approach to the Silk Commission has been inflexible and unimaginative' (*Democratic Audit* 5 December 2013.

13 Silk II (n 7 above).

of competence of the Scottish Parliament. This practice of essentially functional or formal tinkering fits with the UK institutions' tendency to accommodate non-expansionary reform much more readily. Indeed, the adoption of reserved powers for Wales was arguably driven by an anti-expansionary, centralising ethos in at least two respects: first, the list of reserved matters, with some exceptions, sought to replicate or even shrink pre-existing competencies.[14] Second, one reason the reserved powers model, long resisted by UK institutions as a model for devolution to Wales, became suddenly attractive to a UK Government was its potential to defuse the potentially expansionary effects of the UK Supreme Court's *Agricultural Sector (Wales) Bill*[15] decision.[16]

Resistance to expansionary reform is not limited to Wales. But the dynamics of resistance to and accommodation of expansionary demands have been rather different in Scotland and Wales. As above, where modest expansionary demands have been accommodated in relation to Wales, functional considerations have typically been decisive. In Scotland, a sense of pro-unionist political necessity exerts considerable influence, as exemplified by the infamous 'vow'[17] inspired by unionist jitters in the run-up to the 2014 independence referendum and the subsequent Smith Commission[18] and Scotland Act 2016. Wales, unlike Scotland, lacks this near-constant threat of independence and the consequent political capital when it comes to negotiating reform with Westminster.

In light of this brief history, UK institutional reluctance to transfer the additional functions recommended by the Thomas Commission may appear to fit with a longstanding trend of resistance to expansionary reform recommendations, especially where they are not perceived to be either functionally or politically necessary. Although there is continuity in UK attitudes to expansionary Commission recommendations, in the post-Brexit era we may be able to discern an increasingly overtly expansionist agenda from both Welsh Government and the Commissions of Inquiry it has established. The Independent Commission on the Constitutional Future of Wales,

14 Elisabeth Jones, Matthew Richards and Alys Thomas, 'The Wales Bill: Reserved Matters and their Effect on the Assembly's Legislative Competence' (National Assembly for Wales Legal and Research Briefing, 16-051 September 2016); Rawlings (n 11 above).

15 *Agricultural Sector (Wales) Bill* [2014] UKSC 43.

16 Rawlings (n 11 above).

17 David Clegg, 'David Cameron, Ed Miliband and Nick Clegg sign joint historic promise which guarantees more devolved powers for Scotland and protection of NHS if we vote No' *Daily Record* (Glasgow 16 September 2014).

18 The Smith Commission, 'Report of the Smith Commission for Further Devolution of Powers to the Scottish Parliament' (Smith Commission 2014).

which issued its final report in January 2024,[19] is a good example. Its terms of reference, established by the Welsh Government, are extremely broad, including consideration of 'fundamental reform of the constitutional structures of the United Kingdom', as well as 'options to strengthen Welsh democracy and deliver improvements for the people of Wales'.[20] The Commission's interim[21] and final reports[22] reflect this expansive remit, insofar as they consider both the possible expansion of devolved competences and radical constitutional reform, on a spectrum from entrenched or enhanced devolution, through federalism, to full independence. Ultimately, the Commission concludes that each of these options for constitutional reform is 'viable',[23] albeit declining to 'come to a view on which option is the right one for Wales [because] that choice is for citizens and their representatives'[24] – arguably a sensible recognition of the limits of its institutional competence.[25]

Why is the approach to constitutional reform in devolved institutions becoming more expansionary, despite clear reluctance at the UK level to countenance reform of this nature? It may simply be there is less urgency, and indeed less scope, for a focus on glaring functional defects, owing to the extensive remedial work already undertaken. It may be that a build-up of frustration with the piecemeal, incremental, and sometimes incoherent approach to the constitution of Welsh devolution since its inception has inspired a push for more radical reform. The increasingly antagonistic relationship between the UK and devolved governments may also be a contributing factor, exemplified by the UK Government's post-Brexit centralising tendencies, its increasing willingness to breach the Sewel Convention,[26] and by glaring political differences between Conservative-dominated UK institutions and devolved institutions controlled by progressive political parties.[27]

19 The Independent Commission on the Constitutional Future of Wales, 'Final Report' (Welsh Government 2024).

20 Independent Commission on the Constitutional Future of Wales, 'Broad objectives' (*Gov Wales* 19 October 2021).

21 Independent Commission on the Constitutional Future of Wales, 'Interim Report by the Independent Commission on the Constitutional Future of Wales' (Independent Commission on the Constitutional Future of Wales 2023).

22 Independent Commission on the Constitutional Future of Wales (n 19 above).

23 Ibid 94.

24 Ibid 94.

25 For an argument in favour of embracing a more constitutionally radical approach to reform of the constitution of devolution, see Gareth S Williams, 'The illusions of parliamentary sovereignty' (*Institute of Welsh Affairs* 19 January 2024).

26 For example, see Institute for Government, 'Sewel Convention' (16 January 2018).

27 For examples, see sections on 'Human rights' and 'Environmental protection' below.

In the case of Wales, in particular, the increased prominence of devolved institutions during the Covid-19 pandemic seems to have increased public understanding and support for devolution and may have increased the Welsh Government's confidence in confronting Westminster head-on.[28] The shift towards establishing more overtly expansionary remits for Commissions of Inquiry may also reflect an increasing recognition that even those Commission recommendations which are flatly rejected at the UK level initially often have 'soft impacts' in the longer term:[29] they shape ongoing debates, becoming the benchmark for future reform.

At the time of writing, anti-expansionary, antagonistic attitudes towards devolved competences prevail within the UK Government.[30] The Independent Commission on the Constitutional Future of Wales has laid the groundwork for demands for yet more expansionary reform, perhaps even fundamental reform to the UK Constitution in the form of federalism or independence. And while the Commission resiled from formally recommending any particular model for constitutional reform, it is clear in its recommendation for legislation to enhance and further constitutionally protect the powers of devolved institutions.[31] The tension between UK and devolved institutions in relation to UKIMA seems destined to be replicated in the constitutional context. Whether a change in government will lead to a radical change in attitude is, at the very least, doubtful, given the history of UK governments of all political stripes resisting expansionary reform to devolution.

HUMAN RIGHTS

Human rights governance in the UK is similarly marked by divergence between UK and Welsh and Scottish devolved institutions. Whereas the UK Government has increasingly sought to reduce the impact of its international human rights obligations in domestic policy, occasionally

28 For an example, see Gareth Evans (in this Special Issue), 'Devolution and declaratory judgments: the Counsel General's legal challenge to the UK Internal Market Act 2020' 75(1) Northern Ireland Legal Quarterly 140–153.

29 Laura McAllister and Diana Stirbu, 'Influence, impact and legacy – assessing the Richard Commission's contribution to Wales's evolving constitution' (2008) 44 Representation 209–224.

30 BBC, 'No more powers for Wales, says Prime Minister Rishi Sunak' (*BBC News* 28 April 2023).

31 Independent Commission on the Constitutional Future of Wales (n 19 above) chs 4 and 5.

flirting with resiling from those obligations altogether,[32] as discussed below, the devolved governments and legislatures have sought both to expand the range of domestically applicable human rights treaties and to improve the efficacy of human rights protection. This divergence presents serious challenges in the post-Brexit era, particularly to devolved institutions seeking to promote the UK's international human rights commitments within the relevant territory.

The interface between devolved competences and human rights is complex, with international human rights standards serving as both limits on devolved competence and as a legitimate ground for devolved action. GoWA 2006 makes it unlawful for either Welsh ministers or the Senedd (Welsh Parliament) to act in breach of the European Convention on Human Rights (ECHR).[33] While the Human Rights Act 1998 (HRA 1998) makes it unlawful for any public authority in the UK to act in a manner which is incompatible with select articles of the ECHR,[34] it preserves the principle of parliamentary sovereignty by expressly excluding the UK Parliament from this prohibition.[35] Similarly, as international human rights treaties (with the exception of the ECHR) are not incorporated by UK legislation, there is no domestic legal requirement on either the UK Government or Parliament to comply with the UK's wider international human rights obligations. However, when it comes to devolved legislation, the UK Secretary of State has power to intervene to prevent action by Welsh ministers[36] or enactment of Senedd legislation[37] which they deem to be in breach of the UK's international obligations, which will include human rights treaties to which the UK is a state party. The exercise of devolved executive and legislative functions in Wales is therefore framed by the requirement of compliance with human rights. The

32 Such threats have become increasingly prominent in relation to the UK Government's policy under which those claiming asylum in the UK could be deported to Rwanda. See, for example, Matt Dathan, 'No 10 backs threat to leave rights convention' *The Times* (London 28 September 2023) 1. As a result of the decision of the United Kingdom's Supreme Court (UKSC) that the policy is unlawful, due in part to its contravention of international human rights law (*R (AAA and Others) v Secretary of State for the Home Department* [2023] UKSC 42), the Government is, at the time of writing, pursuing legislation which would at least partially insulate the policy from the application of various international human rights instruments as a matter of domestic law: see Safety of Rwanda (Asylum and Immigration) HC Bill (2023-34) [38].

33 Government of Wales Act 2006, ss 81 and 108A.

34 Human Rights Act 1998, s 6. This prohibition is limited to articles of the ECHR and relevant optional protocols made part of UK law by the HRA 1998, s 1 and sch 1.

35 HRA 1998, s 6(3).

36 GoWA 2006, s 82.

37 Ibid s 114.

same may be said of Scotland, where similar restrictions apply.[38] In Northern Ireland, in addition to the HRA 1998, courtesy of the Belfast (more popularly, the Good Friday) Agreement's endorsement of the incorporation of the ECHR into domestic law,[39] human rights play an even more prominent role.

While GoWA 2006 establishes limits on the powers of Welsh ministers and the Senedd, it does not prevent either institution from taking steps to progress human rights. The framing provided by GoWA 2006 and the HRA 1998 provides a floor rather than a ceiling on how far Wales can go to implement human rights through law. In fact, GoWA 2006 confirms that the Senedd is competent to enact legislation to 'observe and implement' the UK's international obligations.[40] The Welsh ministers are also given power to promote economic, social and environmental wellbeing in Wales, including by introducing Bills to the Senedd.[41] Similarly, arrangements for devolution in Scotland mean that devolved institutions are able to progress human rights through law and policy.[42]

An increasingly prominent feature of human rights governance in the UK is divergence between the UK Government and devolved governments in Wales and Scotland. The UK Conservative Party leadership – as well as many backbenchers – has consistently displayed frustration, and sometimes outright antipathy, towards the HRA 1998 since its enactment.[43] This hostility is not limited to the HRA, with party leaders expressing dissatisfaction with European Court of Human Rights (ECtHR) case law,[44] even if they usually stop short of criticising the ECHR itself as opposed to its interpretation. While this antipathy pre-dates the Brexit era, it certainly persists and has arguably concretised, with rhetoric in some cases translating into action (or at least plausible threats of action). Prominent examples include the

38 Scotland Act 1998, ss 29, 35 and 57.

39 Northern Ireland Office, The Belfast Agreement: An Agreement Reached at the Multi-Party Talks on Northern Ireland (Cm 3883, 1998) 16–20.

40 Government of Wales Act 2006, sch 7A, para 10.

41 Ibid s 60.

42 Scotland Act 1998, sch 5, para 7.

43 Proposals to review or reform the HRA 1998 in some way feature in every Conservative General Election manifesto since 2001.

44 For example, see 'Cameron sickened by prisoner vote' *The Times* (London 3 November 2010). It is worth noting that this rhetoric is not always limited to the Conservative Party. See, for example, in relation to the ECtHR jurisprudence relating to the deportation of foreign terror suspects: Joshua Rozenberg, 'Clarke raises issue of quitting rights convention' *The Telegraph* (London 9 September 2005).

abandoned (for now) British Bill of Rights Bill,[45] tussles over the ECtHR's power to issue injunctions in relation to the controversial Rwanda asylum policy,[46] as well as continued flirtation with the notion of departing the ECHR altogether.[47]

On the contrary, the Welsh Government has a longstanding commitment to using its executive powers and the legislative competence of the Senedd to progress human rights in Wales. This commitment has been given effect through policy initiatives which reference human rights, in particular for groups given special protection under international human rights law. Recent examples include the introduction of a Race Equality Action Plan which promotes the objectives of the United Nations (UN) Convention on the Elimination of All Forms of Racial Discrimination,[48] and the Framework for Independent Living, which is underpinned by the social model of disability promulgated by the UN Convention on the Rights of People with Disabilities (UNCRPD).[49] More broadly, the Welsh Government's current Programme for Government (2021–2026) includes a commitment to incorporate the Convention on the Elimination of Discrimination Against Women (CEDAW) and the UNCRPD into Welsh Law to promote social justice.[50] This commitment builds on innovative (for the UK) devolved legislation in 2011 to incorporate the UN Convention on the Rights of the Child (UNCRC) into Welsh law.[51] This places a duty on Welsh ministers to have due regard to specified provisions of the UNCRC in the exercise of their functions.[52] Since 2011, sectoral legislation has seen both the UNCRC and the UN Principles on Older Persons incorporated in the field of

45 For an overview of the proposals, see Ministry of Justice, 'Human Rights Act reform: a modern Bill of Rights, Consultation Response' (*Gov UK* 12 July 2022). For the Welsh Government's response: Welsh Government, 'Written statement: UK Government Bill of Rights' (Gov Wales 22 June 2022).

46 Tim Baker, 'Rishi Sunak calls for change to rules that stopped Rwanda deportation flight in meeting with European court chief' (*Sky News* 16 May 2023).

47 For recent examples. Adam Forrest, 'Suella Braverman sparks new government row after calling for UK to quit ECHR' *The Independent* (London 5 October 2022); Jessica Elgot, 'Tory MPs to push for UK exit from European Convention on Human Rights' *The Guardian* (London 5 February 2023).

48 Welsh Government, *An Anti-Racist Wales: Race Equality Action Plan for Wales* (WG41912, 2022) 109.

49 Welsh Government, *Action on Disability: The Right to Independent Living* (WG38772, 2019) 6.

50 Welsh Government, 'Programme for Government – Update' (*Gov Wales* 7 December 2021).

51 Rights of Children and Young Persons (Wales) Measure 2011.

52 Ibid s 1.

social services;[53] and the UNCRC and UNCRPD incorporated in the field of additional learning needs education.[54] In both these sectors, authorities exercising functions under the applicable legislation are required to have due regard to incorporated rights.

While there have been advances in the promotion and recognition of human rights in Wales, there is ongoing concern about a persistent 'implementation gap' between the rights set out in international law, and the experience of people in Wales: in particular, the experience of those from disadvantaged or discriminated groups, for example, women, disabled people and people from black and minority ethnic groups.[55] These concerns led the Welsh Government to commission research in 2021 to examine ways to strengthen and advance equality and human rights in Wales.[56] The research took place against the backdrop of the UK Government's commitment to reform the HRA 1998 which attracted widespread criticism from the Welsh Government as well as civil society stakeholders in Wales (and elsewhere in the UK), who argued the proposed reforms were largely regressive, unnecessary and unwelcome.[57]

The report, submitted to the Welsh Ministers in August 2022,[58] advanced 40 recommendations for measures to strengthen and advance equality and human rights in Wales on: leadership, policy and guidance, impact assessment, support for advocacy, and raising awareness of human rights. Key amongst these recommendations was for the Welsh Government to bring forward legislation to incorporate international human rights treaties through a Human Rights (Wales) Bill which would make rights enforceable by individuals before a court or tribunal.[59] The recommendations were all accepted in full or in part by the Welsh Government in May 2022,[60] and a Human Rights Advisory Group chaired by the Welsh Minister for Social Justice, with members from civil society, has been established to monitor progress on their implementation (July 2022). Significantly, the recommendations on incorporation were accepted without qualification leading the Welsh Government to set up an independent

53 Social Services and Well-being (Wales) Act 2014, s 7.

54 Additional Learning Needs and Education Tribunal (Wales) Act 2018, ss 7 and 8.

55 See, for example, Equality and Human Rights Commission, 'Is Wales fairer?' (Equality and Human Rights Commission 25 October 2018).

56 Simon Hoffman et al, 'Strengthening and advancing equality and human rights in Wales' (*Gov Wales* 26 August 2021).

57 See n 37 above.

58 Hoffman et al (n 56 above).

59 Ibid recommendations 1 and 25.

60 Welsh Government, 'Welsh Government Response to the "Strengthening and Advancing Equality and Human Rights in Wales" Research Report' (*Gov Wales* 23 May 2022).

Legislative Options Working Group (LOWG) to bring forward proposals on legislation to incorporate international human rights in Welsh law. At the time of writing the LOWG has completed its initial scoping of options, although its report to Welsh ministers is yet to be published.

The steps being taken to advance human rights through devolved legislation in Wales mirror developments in Scotland, where two distinct processes are underway to incorporate international human rights in Scots law. Based on recommendations from an Advisory Group on Human Rights Leadership in 2018 the Scottish First Minister established a National Taskforce for Human Rights Leadership to make recommendations on human rights leadership in Scotland.[61] The Taskforce reported in March 2021, making numerous recommendations on incorporation of international human rights and on enforcement.[62] The Scottish Government then announced it would introduce a new human rights bill by 2026, which would incorporate four UN human rights treaties directly into Scots law, as well as a bespoke right to a healthy environment.[63]

Separately, Scotland is moving towards incorporation. In March 2021 the Scottish Parliament unanimously passed the UNCRC (Incorporation) (Scotland) Bill to incorporate the UNCRC into Scots law so that the rights guaranteed may be enforced before a court or tribunal.[64] However, the UK Government challenged the legality of the Bill before the UK Supreme Court, arguing that certain sections were outside devolved competence of the Scottish Parliament. The Supreme Court found that provisions included in the Bill which would have enabled a court to strike down UK legislation as incompatible with the UNCRC, and a requirement for courts to 'read down' the legislation so as to limit its application to devolved public authorities, were beyond the legislative competence of the Scottish Parliament.[65] While the decision of the Supreme Court means a revised Bill will need

61 Scottish Government, 'Human Rights Leadership: National Taskforce' (*Gov Scot*).

62 Ibid.

63 Scottish Government, 'New Human Rights Bill' (*Gov Scot* 12 March 2021). The four conventions are: International Covenant on Economic, Social and Cultural Rights; Convention on the Elimination of All Forms of Discrimination against Women; Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Rights of Persons with Disabilities.

64 Scottish Government, 'United Nations Convention on the Rights of the Child implementation: introductory guidance' (*Gov Scot* 19 November 2021).

65 *Reference by the Attorney General and the Advocate General for Scotland – United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill; European Charter of Local Self Government (Incorporation) (Scotland) Bill* [2021] UKSC 42.

to be drafted and passed by the Scottish Parliament, the judgment nevertheless confirms that devolved governments and legislatures have the power to incorporate international human rights into devolved law.[66] Moreover, it provides implicit guidance to devolved institutions as to how wider international human rights commitments can be incorporated without exceeding devolved competence.

ENVIRONMENTAL PROTECTION

In policy areas such as environmental protection, tension between UK and devolved governments arguably undermines the cultivation of the relationships required to make the cooperation, newly necessitated by Brexit, work. In the case of environmental protection, both the necessity of cooperation and the tension and distrust between central and devolved governments can, at least in part, be traced to UKIMA itself. This section will situate the impact of the UKIMA on environmental protection in the wider context of the consequences of Brexit.

Multi-level governance is particularly important in the context of environmental protection. Environmental protection is a devolved function in Scotland, Wales and Northern Ireland, but prior to Brexit European Union (EU) environmental law provided a shared framework of rules across the four nations of the UK. Bringing back power to the UK raised important questions as to how these nations would collaborate in seeking to address environmental challenges going forward. The responses, both in terms of the development of UK collaborative frameworks and exceptions for environmental objectives under the UKIMA, are subject to criticism.

Brexit has had profound implications for environmental protection in the UK. Environmental law in the UK has been largely framed by EU law for more than 40 years.[67] Thus the current devolution settlement has always operated against a legal framework that has, at least notionally, secured a common baseline applicable across all of the nations of the UK, regardless of increasingly divergent governance provision in this sphere. As well as concerns about the arrangements for the retention of EU law post-Brexit, the following key considerations have arisen:

66 Ibid [4].

67 There are estimated to be more than 1000 pieces of EU retained law applicable in the UK: Greener UK and Wildlife and Countryside Link, 'Written Evidence to the Public Bill Committee on the Retained EU Law (Revocation and Reform) Bill Session 2022–2023' (*Parliament UK* 29 November 2022).

- the need to ensure environmental laws in the UK continue to apply the EU environmental principles of prevention, precaution, rectification at source and the polluter pays;[68]
- the need to replace the Commission's role in enforcing environmental laws against the UK government in the European Court of Justice; and
- the impact of new trade arrangements with the EU and other countries.[69]

Unlike some other areas of policy, there is a strong argument in favour of UK collaboration on environmental protection, especially on the island of Britain, though acknowledging that the Scottish and Welsh borders with England differ in many important ways. In any case, nature does not respect political and administrative boundaries. It is also important in ensuring that the UK as a nation state can to respond effectively to its commitments under international environmental agreements, of which there are many.[70] These issues were identified as key concern long before Brexit became a reality.[71] Many of the existing common frameworks relate to environmental protection, but there is an argument that there should be more.[72] This is notwithstanding the need to ensure that devolved nations have discretion within these broad frameworks to adapt law and governance frameworks to more local environmental conditions. For Wales, owing to the central role played by sustainable development in the devolution settlement[73] and its consequent role in shaping the law, this issue is particularly acute.

Common frameworks and institutional arrangements for intergovernmental cooperation in the UK post-Brexit are, arguably,

68 Here there is already divergence in provision with, for example, the prevention and precaution principles already enjoying domestic legal status as principles of sustainable management of natural resources under ss 4(e) and (h) respectively of the Environment (Wales) Act 2016.

69 For further discussion, see Colin Reid, 'The future of environmental governance' (2019) 21(3) Environmental Law Review 219; Chloe Anthony, Post-Brexit Legal Frameworks for Environment and Trade (United Kingdom Environmental Law Association 2023).

70 Brexit and Environmental Law: The UK and International Environmental Law after Brexit (UK Environmental Law Association 2017).

71 Robert Lee, 'Always keep a hold of nurse: British environmental law and exit from the European Union' (2017) 29(1) Journal of Environmental Law 155.

72 Victoria Jenkins, A New Perspective on UK Common Frameworks: The Opportunities for the Sustainable Management of Natural Resources in Wales (Senedd Research 2018).

73 Karen Morrow, 'Actualising sustainability in the United Kingdom – recent developments in devolved and local government' in K Bosselmann, R Engel and P Taylor (eds), *A Guide to Governance for Sustainability – Issues, Challenges and Successes* (Environmental Policy and Law Paper No 70, IUCN, World Conservation Union 2008) 171–183.

the best means of achieving this balance between co-ordination and devolved autonomy. The way in which common but differentiated approaches might work is clearly exemplified by the introduction of new arrangements for agriculture payment systems post-Brexit. It is clear that farming in the highlands of Scotland and uplands of north Wales may present different challenges to farming in the lowland fens of north-east England. Following the UK's exit from the Common Agricultural Policy, Scotland, Wales and England are all developing systems that create a framework for funding around the provision of 'public goods', including ecosystem services as well as food production; albeit in different ways and with varying timescales.[74] Thus, shared environmental objectives for agricultural payment systems, broadly defined, might have fairly easily been agreed in a collaborative approach by the four nations of the UK.

A collaborative approach will only be successful with a political will to achieve 'true' collaboration on all sides, and it will not always be appropriate if there is an urgent need for a particular measure. In reality, UK common frameworks have been created through a process that has been criticised as a fairly weak form of intergovernmental cooperation.[75] The development of common frameworks for environmental protection has also largely focused narrowly on direct impacts of environmental laws on the 'level playing field' in terms of trade. A top-down, centralist approach is also evident in the context of the UKIMA as it applies to devolved action on environmental protection. The significance of environmental laws to trade in the EU was recognised early in the development of the Union;[76] but so too was the need to allow member states some discretion in developing approaches to environmental protection. Hence, following the judgment in *Cassis*, the Court of Justice accepted that environmental protection could be an exception to the rule on mutual recognition as long as the measures were both necessary and proportionate.[77] The

74 Agriculture Act 2020, Agriculture (Wales) Bill 2022 and Farming and Food Production Future Policy Group: Recommendations to Government (Draft) (2021).

75 Jo Hunt and Rachel Minto, 'Between intergovernmental relations and paradiplomacy: Wales and the Brexit of the regions' (2017) 19(4) British Journal of Politics and International Relations 647.

76 The first environmental Directive introduced under the internal market provisions of the European Economic Community Treaty was Council Directive 67/548/EEC of 27 June 1967 on the approximation of laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances.

77 Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung fur Branntwein* (1979) ECR 649 (*Cassis*) and Case 302/86 *Commission v Denmark* (1988) ECR 4607 (*Danish Bottles*).

UKIMA takes a very different approach. The exceptions to the principle of mutual recognition created by the UKIMA are very narrowly defined as measures related to the following:

- threats to human animal or plant health defined as legislation that is specifically aimed at:
  - the prevention or reduction of the movement of a pest or disease
  - the prevention or reduction of the movement of unsafe food or feed or
  - as a response to a public health emergency;
- chemicals;
- fertilisers and pesticides.[78]

In all other circumstances devolved governments must request a specific exemption from the UK Government.[79] Such an exemption has been requested by both the Scottish and Welsh Governments for their single-use plastics legislation.[80] It is interesting that this legislation provided the first opportunity for the Welsh Government to provide a specific exemplar to pursue a court action challenging the legislation in this regard.[81] However, this route to challenge was not sought.

So far, the exemptions that have been sought from the UKIMA on environmental grounds have been in relation to policy imperatives shared by all the devolved nations and supported by the UK Government. Should there ever be an issue on which the governments of the different nations did not agree in terms of its environmental impact there may be a very different response. This could stifle the kind of innovation that we need in addressing environmental issues. Smaller nations of the UK may well be in a better position to trial such new approaches, effectively providing a 'legal laboratory' for other nations.[82] Devolved nations are also sometimes able to be more agile in the introduction of such legislation.

The concerns outlined here are clearly demonstrated by the example of legislation banning the introduction of horticultural products containing peat. This has been promised by all the devolved

78 UKIMA 2020, sch 1.
79 Ibid s 10.
80 United Kingdom Internal Market Act 2020 (Exclusions from Market Principles: Single-Use Plastics) Regulations 2022/857.
81 Evans (n 28 above).
82 See, for example, the way Wales and Scotland led on the introduction of charges for plastic carrier bags.

nations of the UK, in some cases for many years.[83] This action is desperately needed to address one of the most direct sources of peat destruction; peat being a resource that is increasingly recognised to be essential in addressing the climate and nature crises.[84] Like the use of single-use plastics it is a measure that should be, and is, supported by all the nations of the UK and will impact on peat destruction not just in the UK, but abroad.[85] In this instance, the development of a collaborative framework may be an unnecessarily lengthy process given the simplicity of this single-issue legislation focused on a the relatively simple mechanism of an outright ban. This could be introduced through UK legislation as a 'trade measure', but it is clearly of wider environmental concern. These issues are only likely to become more acute as climate change and increasingly divergent law and policy engagement with it[86] – including concerns around UKIMA's restraints on action around regulating goods and services – provide yet another area of tension between Westminster and the devolved administrations. In this situation, devolved nations should be able to introduce this legislation as a matter of urgency, without being impeded by the necessity of applying for a specific exemption from UKIMA.

CONCLUSION

This commentary has outlined challenges for devolved policy-making in a range of subject areas. Common themes across these policy areas – perhaps across most or all policy areas in the post-Brexit era – include substantial divergence in policy preferences between devolved and UK institutions, centralist or centralising tendencies at the UK level, and growing tension between the different levels of government. No doubt these three features of the devolution landscape are connected. Whether, subsequent to the next general

83 The Department for the Environment, Food and Rural Affairs (DEFRA) introduced a policy framework in this regard, in England, in 2010: DEFRA, *Consultation on Reducing the Use of Peat in the Horticultural Industry in England* (UK Government 2010). It has now promised a ban for horticultural purposes by 2024; DEFRA, *England Peatland Action Plan* (UK Government 2021). In Wales and Scotland there have also been recent consultations on ending the sale of peat: Scottish Government, Ending the Sale of Peat in Scotland Consultation (Scottish Government 2023); Welsh Government, 'Retail sale of peat in horticulture in Wales to end' (*Gov Wales* 5 December 2022).

84 See further IUCN UK, 'Peatland benefits' (IUCN UK).

85 Two-thirds of the peat sold in the UK comes from Europe. DEFRA, England Peatland Action Plan (UK Government 2021) 20.

86 See, for example, UK Climate Change Committee, 'Sixth Carbon Budget: The UK's Path to Net Zero' (December 2020) 23.

election and a probable Labour Government, increased political harmony can substantially reduce these tensions is at least doubtful. As devolved institutions (especially in Wales) become increasingly assertive of their constitutional legitimacy, their views of the appropriate bounds of devolved power, and their policy preferences, tensions are likely to persist.

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