



The contested boundaries of devolved legislative competence

Securing better devolution settlements

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IfG–Bennett foreword

In February 2022, the Institute for Government and the Bennett Institute for Public Policy launched a Review of the UK Constitution, to offer an evidence-based and non-partisan analysis of the strengths and weaknesses of the constitution, and where necessary make recommendations for change.

To address the bold scope of this project, we have complemented our own in-depth research with a breadth of perspectives from some of the UK's foremost constitutional experts. In this series of expert guest papers, we publish the views and proposals of academics and practitioners, who take a range of stances from constitutional conservation through to major reform. While these papers respond to the pressing constitutional questions of the day, they all also look to construct long-term solutions that will inform political decision making as well as public debate.

Given the range of views expressed, we do not necessarily endorse all of the ideas found in these papers, but we can commend the rigour with which the arguments have been constructed and sincerely thank the authors for their thoughtful contributions.

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Introduction

The devolved legislatures in Scotland, Wales and Northern Ireland are, by definition, institutions with limited law making powers. This contrasts with the unlimited legislative authority of the UK parliament, which continues to legislate for England – as well as for Scotland, Wales and Northern Ireland on non-devolved matters. The precise nature and extent of the limits on devolved power have never been entirely settled. Since the introduction of the contemporary devolution arrangements in 1998–99, there have been numerous adjustments to the boundaries of devolved competence, albeit to varying degrees in each territory, typically in the direction of expanded competences. There have also – again to varying degrees – always been disputes over the scope of existing devolved competences: notoriously, the very first Act of the Scottish parliament was the subject of an (unsuccessful) legal challenge.¹

Nevertheless, the boundaries of devolved competence have become significantly more contested in recent years, largely, albeit not exclusively, as a consequence of Brexit. This has manifested in a number of highly controversial changes to the devolution statutes and surrounding constitutional frameworks, as well as more frequent disputes about devolved competence, followed by more frequent resort to the courts to resolve those disputes. In contrast to the early years of devolution, recent developments in both the political and judicial spheres have tended to constrain devolved legislative competences in new and problematic ways.

The net effect of these changes, as I will argue in this paper, has been to threaten the ability of the devolved legislatures to discharge their central constitutional purposes effectively: to give effect to local democratic choices and to improve the quality of decision making in devolved policy areas by bringing it closer to the people it affects. A range of other constitutional values relevant to devolved law making have also been undermined, particularly process values such as transparency and accountability, intelligibility and legal certainty.

The main aims of this paper are to explore the reasons why devolved competence has become more contested, and to suggest potential solutions to the resulting problems that are achievable within the current constitutional order – that is, without moving to a federal constitution or displacing the sovereignty of the Westminster parliament. First, though, it is necessary to say something about why boundaries matter, and about the general approach to the delineation and enforcement of devolved competence. For reasons of space, this paper is limited to a discussion of devolved *legislative* competence, though controversies and disputes can and do arise in relation to devolved executive powers as well.*

* My thanks to Patrick Thomas and Jess Sargeant for their comments on an earlier draft of this paper. All views are those of the author.

Why boundaries matter

Boundary questions arise in any system of multi-level government. They also tend to bear more heavily on lower tiers of government than on the central state level.^{*} As will be explained further below, this is particularly true in the UK due to the asymmetric nature of the boundary between the UK and devolved levels. Hence the focus of this paper is on boundary questions from the devolved perspective.

There are several different ways in which the delineation of boundaries and the resolution of boundary disputes matter. Attention tends to focus on their impact on the **democratic autonomy** of devolved legislatures. The breadth and security of devolved competences determines the extent to which devolved legislatures can give effect to local political preferences and pursue their own priorities, without being at risk of arbitrary modification or override by UK legislation, or dependent upon the prior agreement of the UK government or decisions being skewed by actions taken at the UK level. Equally, democratic autonomy may be undermined by the risk of legal challenge. As Lord Hope noted in *AXA General Insurance v Lord Advocate*, “the democratic process is liable to be subverted if, on a question of political or moral judgment, opponents of an Act achieve through the courts what they could not achieve through Parliament”.²

Some might argue that lack of, or insecure, democratic autonomy is simply a function of the subordinate constitutional status of the devolved legislatures, and hence that UK institutions are entitled to ‘pull constitutional rank’ at will. However, this would be inconsistent with judicial acceptance of the special status of the devolved legislatures as democratically elected institutions,^{**} with popular endorsement of their political significance;^{***} and, above all, with the UK parliament’s own acceptance – in relation to Scotland and Wales – of the importance of the devolved institutions as permanent parts of the UK constitution,³ and the international law underpinning of devolution in Northern Ireland by the Belfast/Good Friday Agreement. Moreover, not all disputes about devolved competence directly engage the constitutional supremacy of the UK parliament.

Securing a meaningful degree of decision making autonomy is therefore an essential condition of an effective devolution settlement, but it is an incomplete account of why the boundaries of devolved competence matter. A second important set of considerations relate to **policy effectiveness** – a question of legislative capacity, rather than constitutional authority. Policy effectiveness is obviously not just a question of legal competences; administrative and policy making resources, as well as a range of political, contextual and behavioural factors, will influence the successful design and

* Eg Stephen Tierney notes a major trend in the development of federal constitutions towards centralisation of power – *The Federal Contract*, Oxford University Press, 2022, p.195.

** See Lord Hope in *AXA General Insurance* [2011] UKSC 46, para 46: “The Scottish Parliament takes its place under our constitutional arrangements as a self-standing democratically elected legislature. Its democratic mandate to make laws for the people of Scotland is beyond question. Acts that the Scottish Parliament enacts which are within its legislative competence enjoy, in that respect, the highest legal authority.”

*** Devolution was endorsed by popular referendums in Scotland, Wales and Northern Ireland, and only relatively small minorities in each territory favour its abolition: see Butt S, Clery E and Curtice J eds, *British Social Attitudes 39*, Constitutional reform, National Centre for Social Research, 2022, Table 4 (Scotland) and Table 6 (Northern Ireland); Independent Commission on the Constitutional Future of Wales, *Interim Report*, 2022, p. 50.

implementation of policy. Nevertheless, policy effectiveness may also be affected by factors like the coherence of the policy responsibilities exercised at devolved level, which may produce fragmented or unnecessarily complex decision making; by the range of policy tools (such as financial powers) available to devolved legislatures, which may force sub-optimal policy choices; and by the cross-cutting legal constraints (such as human rights obligations) that apply to devolved decision making, which may reduce policy flexibility. It may also be undermined by poor co-ordination with, or insensitive interference by, UK-level decision makers.

In addition, the boundaries of devolved competence have implications for a range of good governance values. The **transparency, stability** and **intelligibility** of competence limits affect the level of legal risk attached to devolved decision making and have important consequences for legal certainty, as well as effective for political participation – that is, whether political actors, or citizens making decisions about how to vote, can be confident that policies being advocated are within devolved competence or whether responsibility actually lies elsewhere. The clarity and security of the boundary also affects **accountability** and **scrutiny** of decision making. Uncertainty about competences may be a way of evading responsibility for political choices, while failure to respect boundaries may blur lines of accountability, as may the need for frequent intergovernmental negotiation in areas of intersecting competence. By contrast, on the principle that good fences make good neighbours, clear and secure boundaries may promote **effective intergovernmental co-operation** in those areas where overlapping responsibilities are unavoidable, or where action at the devolved level threatens autonomy, effectiveness and good governance at the UK level.

Finally, in delineating and enforcing boundaries, devolved autonomy will necessarily have to be balanced against countervailing considerations, such as maintaining the **integrity and cohesion of the UK state**, considerations of **territorial equity**, or protecting **other constitutional values**, such as fundamental rights or the rule of law.

The boundaries of devolved legislative competence: key characteristics

The limits on devolved competence are mainly contained in the devolution statutes: the Northern Ireland Act 1998, the Scotland Act 1998, and the Government of Wales Act 2006. Five points about the nature of those boundaries are worth emphasising.

First, they are **complex**, consisting of a mix of different types of constraints.⁴ In addition to the reservation of particular policy areas to the UK level, into which the devolved legislatures may not intrude, there are further restrictions which apply in devolved policy areas as well. Devolved legislation may not have extra-territorial effect; it may not modify certain protected (or entrenched) statutes, including aspects of the devolution statutes themselves; it may not breach Convention rights; and the Northern Ireland assembly may not discriminate on grounds of religious belief or

political opinion. Prior to Brexit, the devolved legislatures were also obliged to legislate compatibly with EU law, now replaced for Northern Ireland with an obligation to comply with Art 2(1) of the Northern Ireland Protocol. In addition, devolved legislation may, in extreme and somewhat unclear circumstances, potentially be invalid at common law for breach of the requirements of the rule of law.⁵

Second, as this indicates, the boundaries of devolved competence are **asymmetric** as between the different devolved territories, and **ad hoc** rather than principled, which adds further to the difficulties of understanding what is or is not devolved. The devolved/reserved boundary is drawn differently in each case, giving each devolved legislature a different set of policy responsibilities and policy capabilities.⁶ Cross-cutting constraints, and competence tests and conditions, also vary between the three statutes. The development of the initial devolution settlements was strongly driven by path dependency – reflecting, in Northern Ireland, the previous devolution arrangements under the Government of Ireland Act 1920, and in Scotland and Wales the scope of administrative devolution under the old Scottish and Welsh offices in Whitehall. Subsequent changes to devolved competences have been reactive – proceeding separately in each territory, and with attempts to develop principled approaches to the division of powers⁷ largely being overridden by party-political bargaining.⁸

Third, devolved boundaries are **dynamic** rather than static. The expectation of change is written into the devolution statutes, through the ability to adjust devolved competences by Order in Council,⁹ as well as by primary legislation. Devolved competences may also be affected by general constitutional developments, such as Brexit or human rights reform.

Fourth, devolved competences are **not legally entrenched**. Because of the preservation of the sovereignty of the UK parliament, the devolution statutes can be freely amended to reduce as well as expand devolved autonomy, or they can simply be overridden by UK legislation on an ad hoc basis.

Finally, non-entrenchment also means that the boundaries of devolved competences are legally **enforceable only against the devolved level**. Devolved legislation which breaches competence limits is “not law” and the devolution statutes create extensive opportunities for judicial intervention to enforce competence limits, as well as conferring powers in more limited (but varying) circumstances for UK ministers to block the enactment of devolved bills where these have adverse effects in reserved areas. But there are no equivalent legal mechanisms to prevent UK level intrusion into devolved competences, nor even to test whether the boundary has been breached.

This is a model which always contained the potential for significant conflict over the boundaries of devolved competence. However, for most of the time that the current devolution schemes have been in operation, conflict has been held in check in two intersecting ways: through political constraints and by interpretive protections. The Sewel Convention, which provides that the UK parliament will not normally legislate in devolved areas or alter the scope of devolved competences without the consent of the relevant devolved legislature, has acted as a *de facto* constraint on parliamentary

sovereignty, protecting devolved autonomy, promoting co-operation in areas of overlapping competences, and ensuring consensual development of devolved authority. Similarly, (non-statutory) arrangements for intergovernmental relations have helped to promote co-operative relationships and provide an alternative to the courts for the resolution of intergovernmental disputes.

Judges have also offered a degree of protection for devolved decision making in their interpretation of common law and statutory constraints, so far as they are able to do so without directly challenging parliamentary sovereignty. For instance, some (albeit not all) early case law showed an understanding of the democratic and constitutional significance of devolution,¹⁰ and a concern for the coherence, stability and workability of the devolution schemes.¹¹ While political mechanisms were effective in preventing head-on conflicts between the UK and devolved levels, the courts could temper the legally constrained and constitutionally vulnerable nature of the devolved legislatures, while simultaneously sending a message to political actors about the constitutional significance of devolution.

Why are the boundaries of devolved competence increasingly problematic?

What, then, has changed to turn the boundaries of devolved competence into a site of increasing contestation? There are three, overlapping, factors in play.

An (even) more complex law making environment

First, as summarised in Table 1, recent constitutional developments have rendered an already complex set of law making boundaries substantially more complex.

Table 1 **Boundary problems stemming from constitutional developments**

Constitutional developments	Boundary problems
<p>More shared/overlapping competences:</p> <ul style="list-style-type: none"> Scotland Act 2016; Wales Act 2017 (e.g. taxation, social security, equal opportunities, elections) 	<p><i>Democratic autonomy; policy effectiveness; intelligibility (esp. legal risk); accountability; intergovernmental co-operation</i></p>
<p>Post-Brexit internal market framework:</p> <ul style="list-style-type: none"> United Kingdom Internal Market Act 2020 Subsidy Control Act 2022 Common Frameworks 	<p><i>Democratic autonomy; policy effectiveness; intelligibility; transparency; accountability; participation</i></p>

<p>Post-Brexit external trade arrangements:</p> <ul style="list-style-type: none"> • EU Withdrawal Agreement/Northern Ireland Protocol • Trade and Co-operation Agreement • Other trade agreements 	<p><i>Democratic autonomy; policy effectiveness; intelligibility; stability; accountability; intergovernmental co-operation</i></p>
<p>Non-consensual UK legislation in devolved areas:</p> <ul style="list-style-type: none"> • Brexit-related legislation; Retained EU Law (Revocation and Reform) Bill?; Bill of Rights Bill? • Delegated legislative powers for UK ministers in devolved areas 	<p><i>Democratic autonomy; policy effectiveness; accountability, participation; intergovernmental co-operation</i></p>

This is a process that began, for Scotland and Wales, before Brexit. Whereas the initial allocation of devolved competences largely involved discrete policy fields, the expansion of devolved competences into new policy areas (including for Wales the shift from a conferred powers to a reserved powers model of devolution)* via the Scotland Act 2016 and Wales Act 2017 created substantially **more areas of overlapping or shared competences**. This reflected the policy-driven, and often grudging, nature of the concession of more powers, and has potentially serious consequences for autonomy, effectiveness, intelligibility and accountability, creating increased legal risk and putting a greater premium on effective intergovernmental co-operation. Two examples will suffice to illustrate the problems.

1. Holyrood and the equal opportunities reservation

Equal opportunities is a reserved matter under the Scotland Act 1998, but is subject to exceptions.¹² These were initially very limited: confined to action to encourage compliance with equality duties. However, the exceptions were expanded by the Scotland Act 2016 to enable Holyrood to take positive action to improve representation on the boards of Scottish public authorities, and to impose additional equality duties on public authorities, provided that these do not modify the Equality Act 2010. Nevertheless, the continuing narrowness of these exceptions, and the interaction between equal opportunities and other devolved competences, have proved to be significant ongoing constraints on Holyrood’s legislative freedom:

- There was a successful legal challenge to the Gender Representation on Public Boards (Scotland) Act 2018 – the very legislation that the 2016 Act was intended to facilitate – on the ground that it unlawfully conflated the separate characteristics of sex and gender reassignment protected by the Equality Act by extending the definition of ‘women’ to include people who self-identified as women.¹³

* When the then Welsh assembly first gained primary law making powers, it could only legislate in respect of a defined list of policy areas; now, like the Scottish parliament and Northern Ireland assembly, it can legislate in any area not specifically reserved to Westminster.

- The Gender Recognition Reform (Scotland) Bill, which sought to reform the process of obtaining a gender recognition certificate in Scotland, also ran into trouble because of its interaction with the Equality Act. Gender recognition per se is a devolved matter, as an aspect of personal status,^{*} but it has consequential effects on the protected characteristic of sex under the Equality Act and hence the operation, inter alia, of the Act's provisions on single-sex services and associations; matters that the bill itself could do nothing to modify or clarify. Although these consequential effects probably did not take the bill outwith devolved competence,¹⁴ the resulting controversy led to the first ever use of the UK government's power under s.35 of the Scotland Act 1998 to prevent the bill being presented for royal assent.
- The equal opportunities reservation is causing further difficulties for the Scottish government's proposed Human Rights Bill, which aims to incorporate a variety of international human rights treaties into Scots law. Some of the relevant treaties contain broad equality duties which cannot be straightforwardly incorporated without taking the bill beyond the limits of Holyrood's competence in this area.¹⁵

2. Cardiff Bay and the justice reservation

Unlike in Scotland and Northern Ireland, there is no separate legal jurisdiction in Wales. Notwithstanding recommendations by the Silk¹⁶ and Thomas¹⁷ commissions for justice matters to be devolved, civil and criminal justice in Wales remain largely reserved to the UK parliament, with only limited powers for the Senedd to amend private and criminal law.¹⁸ As the Welsh devolution system has shifted from a conferred to a reserved powers model, the justice reservation has become not simply an excluded area of policy, but effectively an additional cross-cutting constraint on devolved law making, creating a "jagged edge" between reserved and devolved competences.

For example, as Robert Jones and Richard Wyn Jones point out in their groundbreaking study, *The Welsh Criminal Justice System*,¹⁹ the operation of the criminal justice system in Wales necessarily intersects with, and indeed relies upon, a range of social policy frameworks (education, health, housing and social services) which are almost all devolved. Exacerbated by poor co-ordination across the jagged edge, this situation, Jones and Wyn Jones argue, hampers efficient, effective and accountable policy making at *both* the UK and devolved levels, making it harder to address Wales's poor criminal justice outcomes.

The complexity of the devolved law making environment has increased still further after Brexit. On the one hand, the removal at the end of the Brexit implementation period of the obligation to comply with EU law^{**} increased the freedom of the devolved legislatures – meaning that powers in otherwise devolved policy areas previously exercised at EU level are now (in principle) exercisable at devolved level. On the other hand, new constraints have been created which, unlike EU law, not only bear more heavily on devolved than on UK-level decision making, but which also blur the boundaries of devolved competence in ways that EU law did not.

* This issue is currently governed by the Gender Recognition Act 2004, a UK-wide statute, but which was enacted with the Scottish parliament's consent.

** European Union (Withdrawal) Act 2018, s.12. This was initially replaced by a power for UK ministers to temporarily freeze the ability of the devolved legislatures to amend specific aspects of retained EU law, but the power was never used and has now been repealed.

Three post-Brexit developments are particularly worth noting. The first is the **new UK internal market framework**, created to protect the UK's economic union against barriers to internal trade that might arise due to excessive regulatory divergence now that EU law no longer exerts an homogenising influence. The key elements of this new framework are the United Kingdom Internal Market Act 2020 (UKIMA) and the Subsidy Control Act 2022, along with non-statutory 'Common Frameworks' agreed between the UK and devolved governments. The cumulative effect of these new arrangements is to create a "shared regulatory space that cuts across the respective competences of the UK and devolved administrations",²⁰ and one in which the regulatory choices made by the UK level institutions are systematically privileged, even when they are formally acting only in respect of England.

As far as UKIMA is concerned, the more constraining effect of its 'market access principles' (mutual recognition and non-discrimination) on devolved autonomy and policy effectiveness, as compared with the EU internal market rules which they replace, have been well recognised,²¹ and their practical impacts are beginning to be felt. For example, Holyrood's ban on certain single-use plastic products²² could only be enforced against imports into Scotland from elsewhere in the UK once the UK government had agreed to amend UKIMA to create an exemption from the mutual recognition principle.²³ The Scottish government complained about delays in agreeing the exemption, and about the UK government's decision to limit it to specified products rather than making a broader policy exclusion,²⁴ thus requiring further negotiation before the Scottish ban can be extended in future. In fact, the Environmental Protection (Single-use Plastic Products) (Wales) Bill, passed by the Senedd in December 2022, does go further than the current exemption and will therefore not be fully enforceable except in relation to goods actually produced in Wales.

Similar problems have arisen in relation to Holyrood's (now delayed) deposit return scheme for drink containers.²⁵ UK ministers are reported to favour a UK-wide scheme, but with no plans to introduce one until 2025,²⁶ and hence may not agree a further exemption from UKIMA. Indeed, the Scottish secretary, Alister Jack MP, has said that the bar for making an exemption is very high.²⁷ If an exemption is refused, legal action has been threatened, both by drinks companies against the Scottish government, on the basis that the scheme will breach UKIMA's non-discrimination principle,²⁸ and by environmental campaigners against the UK government.²⁹ If successful, the former challenge would confine the scheme to Scottish-produced drinks, thereby rendering it effectively inoperable, but grounds for a successful challenge to the refusal to make a UKIMA exemption are much harder to identify given the breadth of discretion conferred on UK ministers.*

By contrast, reforms to the rules on genetically modified organisms in England made by the Genetic Technology (Precision Breeding) Act 2023 will, via the mutual recognition principle, enable gene-edited crops grown in England to be sold in Scotland and Wales, notwithstanding that the Scottish and Welsh governments disagree with the policy

* Any proposal to make an exemption is subject to the agreement of the devolved governments, although lack of consent can be overridden, but UK ministers are not under any obligation to propose an exemption in the first place – see UKIMA, s.10.

and refused to participate in a GB-wide bill.³⁰ The Subsidy Control Act has an equally asymmetrical effect; its subsidy control principles – albeit somewhat lighter touch than the EU state aid rules that they replace – are enforceable against devolved primary legislation but, because of the effect of parliamentary sovereignty, not against Acts of the UK parliament.

Perhaps less obvious, but also important, is the impact of the new internal market framework on the coherence and intelligibility of the devolution arrangements. Each element takes effect in a different way to the EU law which the new framework replaces, and in a different way to one another. Thus, where a breach of EU law constraint meant that devolved legislation was invalid, breach of UKIMA's market access principles results only in *disapplication* of the offending legislation, not invalidity. The only direct effect on the devolution statutes is that UKIMA has become a protected/entrenched statute, which the devolved legislatures may not modify (but which the UK parliament is still free to override when legislating for England).

The consequence is that challenges to devolved legislation under UKIMA will take place outside the standard procedures for raising devolution issues, and on principles that are not yet clear. It also disguises the serious effect that the Act has on devolved law making freedom, as it leaves devolved competence legally intact but in practice severely limited as to the ways in which it can be exercised. By contrast, breach of the subsidy control principles under the Subsidy Control Act *may* lead to invalidation of devolved legislation, but here the constraints are to be found wholly outside the devolution statutes, and the principles are to be enforced via ordinary judicial review. For both conceptual and normative reasons, devolved primary legislation is *not* otherwise subject to the ordinary principles of judicial review,³¹ so again there is substantial uncertainty about how the subsidy control regime will apply.

As for Common Frameworks, these are wholly non-statutory, so impose only political, rather than legally enforceable constraints. There are considerable doubts about their practical significance in the light of UKIMA: an agreement via a Common Framework that regulatory divergence in a particular policy area is acceptable may lead to an exemption being made under UKIMA, but this is not guaranteed;³² moreover, the operation of the market access principles weakens incentives (particularly for the UK government) to reach agreement on common approaches to regulation (as, for example, in relation to the Genetic Technology Act). If the Retained EU Law (Revocation and Reform) Bill is passed in its current form, this will add a further layer of uncertainty, given that many areas of retained EU law covered by Common Frameworks may potentially be repealed or unilaterally amended. There have also been criticisms about lack of consistency between, and lack of transparency of, Common Frameworks, creating further difficulties in relation to effective scrutiny and accountability of, as well as effective participation in, regulatory policy making via this process.*

* See Bosse A, *What is Happening with Common Frameworks? Views from the House of Lords and Scottish Parliament*, Scottish Parliament Information Centre, 9 January 2023. N.b. there are similar problems arising from lack of transparency in the way in which non-statutory Fiscal Frameworks condition the exercise of the Scottish and Welsh parliaments' taxation powers.

The second Brexit-related development which affects the boundaries of devolved competence are the new **post-Brexit external trade arrangements**, which are also more complex than before. While the EU Trade and Co-operation Agreement takes precedence over all pre-existing domestic law, including in devolved areas,³³ it does not directly limit future devolved decision making, although failure to adhere to its terms could attract UK government intervention either under the devolution statutes or via primary legislation. By contrast, the EU Withdrawal Agreement does take precedence over future as well as past enactments.³⁴ The implications of the Withdrawal Agreement are most significant for Northern Ireland: the Ireland/Northern Ireland Protocol ensures that EU single market rules with respect to goods and the single electricity market continue to apply in Northern Ireland, and requires 'dynamic alignment' with new EU laws in respect of which the Northern Ireland assembly has no representation in the policy making process. Citizens of Northern Ireland are also guaranteed 'no diminution' in certain rights contained in EU law.

As well as problems of democratic autonomy, the protocol arrangements create major challenges for the intelligibility of the boundaries of devolved competence in Northern Ireland, in terms of understanding which aspects of EU law apply and how they are to be interpreted.³⁵ (There are also indirect implications for other UK legislatures via UKIMA, insofar as goods subject to EU law produced in or imported into Northern Ireland may be sold in Great Britain.) Under the Windsor Framework,³⁶ MLAs will (under certain conditions) be able to object to amended or updated single market rules, triggering a power for the UK government to veto their application in Northern Ireland (the "Stormont Brake"), on top of the existing requirement for the periodic consent of the assembly to the continued application of the protocol as a whole. This partially addressed the autonomy objection, but also potentially increases the intelligibility problems and serves to underline the inherent instability of the arrangements.

Challenges to autonomy, effectiveness, intelligibility and stability similarly arise from new trade deals negotiated by the UK government, which may have implications for devolved policy areas such as food standards, or even public services like health and education. Like other international agreements, trade deals are unlikely to be directly enforceable as limits on devolved competence, but again failure to implement is likely to attract UK-level intervention. Such deals also present serious problems around accountability and scrutiny: even if the devolved *governments* manage to secure a role in negotiating new trade deals, it is very difficult for the devolved *legislatures* to exercise meaningful scrutiny (albeit the same was true pre-Brexit in respect of trade deals negotiated by the EU).

The final Brexit-related development is the increasing amount of **UK legislation on devolved matters enacted without devolved consent**. Of course, UK legislation in devolved areas *with the consent of the relevant devolved legislature(s)* under the Sewel Convention has been a feature of the current devolution arrangements since their inception. But until 2018, there was no instance – where the UK government accepted that the Sewel Convention was engaged – of Westminster legislating without devolved

consent. Beginning with the European Union (Withdrawal) Act 2018, however, six pieces of Brexit-related legislation have been passed in the face of the absence or refusal of consent from one or more devolved legislatures,^{*} which either change the law in currently devolved policy areas, or alter the scope of devolved legislative competences, or both. It also seems likely that more bills – most likely the Retained EU Law Bill and (if it proceeds) the Bill of Rights Bill – will be passed without devolved consent in the relatively near future.

The affront to devolved autonomy from setting aside the Sewel Convention is obvious, though clearly it might sometimes be constitutionally necessary or justifiable – and the convention itself provides that devolved consent is only 'normally' required. However, while all the relevant bills so far related to the admittedly abnormal circumstances of Brexit, they are all notable for the scant attempt made to justify the decision to override the lack of devolved consent in constitutional terms. In fact, only in the case of the bills implementing the EU Withdrawal Agreement and Future Relationship Agreement was there any strong justification: both were passed against significant time constraints and were necessary to give effect to international agreements made by the UK government. In the remaining cases – concerned purely with the domestic implications of Brexit – the UK government's decision to proceed without consent appears simply to have been based on its preference for uniform policy solutions on its own terms, rather than for meaningful compromise or territorial divergence.^{**} The result – particularly in relation to UKIMA and the Subsidy Control Act, as already noted – has been a significant, unilateral recasting of the operation of devolution, with a concomitant undermining of trust in the stability and security of devolved boundaries.

Blurring the boundaries of devolution in this way has other adverse consequences as well. The devolved boundary ceases to be a reliable guide to where laws are made, disrupting policy communities and encouraging forum shifting. Reacting to UK legislative initiatives also diverts governmental and parliamentary resources at the devolved level. For instance, the Retained EU Law Bill will impose an enormous – and entirely unwanted – burden on the devolved institutions to save aspects of devolved retained EU law from expiring at the arbitrary 'sunset' date set by the bill. There are also issues about policy co-ordination and coherence, and effective accountability. Of particular concern is the new practice of conferring powers on UK ministers to make delegated legislation in devolved areas – again, arising initially in Brexit-related legislation, but now becoming increasingly routine.³⁷ Such powers are subject to ad hoc and patchy requirements to consult with or seek the consent of devolved ministers, and are especially difficult to subject to meaningful democratic scrutiny in either the devolved or the UK parliaments.

* The others are the European Union (Withdrawal Agreement) Act 2020; UKIMA; the European Union (Future Relationship) Act 2020; the Professional Qualifications Act 2022; and the Subsidy Control Act 2022.

** Only in the case of the EU (Withdrawal) Act was there any significant attempt at compromise with the devolved governments, but even so the UK government was not willing to accept the possibility of the Scottish and Welsh parliaments enacting their own legislation as an alternative to a UK-wide statute.

More disputes and greater litigiousness

The second reason why the boundaries of devolution appear to be more contested is because more litigation – and litigation of a different character – is coming before the courts, though some caution is required here because the trends are not identical in each devolved territory.

Challenges to devolved legislation have always been a feature of devolution in Scotland, but these have become more frequent over time, more likely to be successful and more politicised. In addition, whereas the early cases all involved human rights arguments not peculiar to devolved legislation, more recent cases have employed a wider range of grounds of challenge and are more focused on the policy boundary between the UK and devolved levels. The other novel feature of recent devolution cases in Scotland has been the rise of intergovernmental disputes. Both UK and Scottish government law officers have used their powers to refer bills or proposed bills to the Supreme Court.³⁸ The Scottish government also intervened in the first *Miller* case to argue (unsuccessfully) that the European Union (Notification of Withdrawal) Bill would require devolved consent under the Sewel Convention, and it is now seeking judicial review of the s.35 Order blocking the Gender Recognition Reform Bill.

Challenges to devolved legislation have been much less frequent in Wales. The only cases so far were all law officer references (two UK, one Welsh), and all made under the old 'conferred powers' model of devolution, although there have been some more recent threats of further references by the UK government,^{*} and the Welsh government has also intervened in disputes before the Supreme Court.³⁹ However, most notable in Wales has been the counsel general's challenge to UKIMA, attempting to limit its effect on devolved law making competence.⁴⁰ Dismissed as premature in the absence of specific devolved legislation, the Senedd's Single-use Plastics Bill was deliberately enacted as a vehicle through which the Welsh government's argument could be tested in future.

Challenges to devolved legislation in Northern Ireland have been entirely absent until very recently. However, since 2020, there have been three challenges by private parties and one law officer reference (all unsuccessful). Brexit, and the absence of functioning devolved institutions in Northern Ireland, have also produced several challenges from Northern Ireland to UK legislation affecting devolved matters.⁴¹ Given the particular political circumstances and sensitivities in Northern Ireland, intergovernmental disputes have been less pronounced, although, like the other devolved law officers, the attorney general for Northern Ireland has intervened in devolution cases arising elsewhere.⁴²

A second caveat is that the drivers for increased litigation over the boundaries of devolution are not all devolution-specific; general factors such as the rise of crowdfunding and the greater prominence of strategic litigation are also in play. For instance, the first attempt by independence campaigners to seek a ruling on whether the Scottish parliament could unilaterally legislate for a second independence referendum⁴³ was clearly inspired by Brexit-related litigation. Similarly, the *For Women Scotland* challenge to the Gender Representation Act took place in

* The Welsh Continuity Bill would also have been referred to the Supreme Court, but the dispute was resolved politically and the reference withdrawn.

the context of widespread crowdfunded litigation on trans-related issues. Following the success of that case, opponents of the Gender Recognition Reform Bill had the possibility of legal challenge and/or UK government intervention on their radar from an early stage, and indeed the s.35 Order is unlikely to have been made had campaigners not actively lobbied for it.⁴⁴

Nevertheless, the complexity and instability of devolved boundaries create fertile ground for disagreement and consequent litigation – whether arising from genuine uncertainty about how legal rules should be interpreted, or opportunistic exploitation of legal risk to advance political objectives.

The other key factor driving increased litigation is the breakdown of political co-operation between the UK and devolved governments, largely due to Brexit. This has arisen partly because of political disagreement between the UK and devolved governments, leading to attempts by the devolved institutions to assert their authority to resist or influence UK government policy. But it is partly also due to lack of understanding of, and insensitivity towards, devolution at UK level, as well as the “muscular unionism” – actively hostile towards territorial pluralism and assertive of the primacy of UK level decision making – that Brexit has unleashed.⁴⁵

Thus, it is noticeable that several of the recent legal disputes have arisen in the context of the absence of, or disagreements about, consent to UK legislation under the Sewel Convention,⁴⁶ or the refusal by the UK government to assist devolved governments to achieve their aims,^{*} or indeed (as in relation to the s.35 Order judicial review) from active frustration of those aims. Alongside the new-found willingness of the UK parliament to legislate in the absence of devolved consent, we are also seeing many more refusals of consent,^{**} and more disputes about whether devolved consent is required at all – with the devolved governments taking a wide view of devolved competence (sometimes implausibly so)^{***} and the UK government a narrow one. All three devolved governments increasingly frequently complain about lack of advance notice of, and consultation on UK bills affecting devolved matters. There was similarly no advance warning from the UK government that it intended to block Holyrood’s Gender Recognition Reform Bill.⁴⁷ But equally there have been some assertive uses of devolved legislation in the face of UK government objections,^{****} as well as instances of the devolved governments using the legislative consent process to signal their opposition to the policy objectives pursued by UK bills, rather than simply

* E.g. *Keatings* [2021] CSIH 21, and the *Independence Referendum Reference* [2022] UKSC 31, arose because of the UK government’s refusal to facilitate a second independence referendum, as it had done ahead of the 2014 vote.

** E.g. until 2018, the Scottish parliament had only refused to consent to a UK bill on one occasion (the Welfare Reform Bill 2011), resulting in the removal of the relevant provisions from the bill, but since May 2021 alone, out of 34 Legislative Consent Memorandums published, the Scottish government has recommended refusal of consent 12 times, and partial consent in a further three cases.

*** E.g. the Senedd’s Legislation, Justice and Constitution Committee recently disagreed with the Welsh government’s argument that consent was required for the whole of the Genetic Technology Bill because of its effects in Wales via UKIMA – <https://senedd.wales/media/00qedaz5/cr-ld15607-e.pdf>. The claim that devolved consent was required for legislation triggering EU withdrawal also involved an expansive interpretation of the convention.

**** E.g. the inclusion of a power to strike down UK legislation in the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill, which was found to be outwith devolved competence by the Supreme Court (*Treaty Incorporation Bill References* [2021] UKSC 42).

objecting to clauses affecting devolved matters.* Notwithstanding the introduction of new arrangements for intergovernmental relations in early 2022, based on explicit commitments to mutual respect, effective communication and sharing information, and providing new dispute resolution mechanisms,⁴⁸ matters do not appear to have improved.

Against this background, there have been both offensive and defensive resort to the courts by the UK and devolved governments: the UK government using the courts to shore up its political advantages, and the devolved governments trying to compensate for their political weakness. In this process, we have also seen attempts by the devolved governments and others to open up new avenues for bringing disputes about the boundaries of devolved competence before the courts, to try to break political logjams and to counteract the asymmetry of the enforcement mechanisms under the devolution statutes. With the notable exception of the *Independence Referendum Bill Reference*, however, these attempts have so far been rebuffed.

Approaches to adjudication

More litigation is not necessarily undesirable: it allows particular disputes to be authoritatively and independently settled, and may bring clarity as to how boundary questions should be resolved more generally. However, the final contributing factor to the increasingly problematic nature of devolved boundaries has been the way in which the Supreme Court has approached recent devolution disputes. The key issue is the primacy the court has given to the sovereignty of the Westminster parliament in resolving those disputes, to the virtual exclusion of other constitutional considerations. This has manifested in several different ways.

To begin with, in *Miller 1*,⁴⁹ the court refused to adjudicate on the application of the Sewel Convention, notwithstanding its statutory recognition in the Scotland Act 2016. The language used, it argued, indicated that parliament had not intended to convert the convention into a justiciable legal rule; its interpretation and application therefore remained a matter for political actors, thus closing off any ability to bolster devolved autonomy through an appeal to a neutral arbiter. In fact, neither statutory recognition of the Sewel Convention, nor the statutory guarantees of permanence of Scottish and Welsh devolution have had any impact on the way in which the Supreme Court approaches devolution disputes. Similarly, the court has refused to regard the principle of consent contained in the Belfast/Good Friday Agreement as a constraining factor on the UK parliament, beyond the right of Northern Ireland to leave the UK to become part of a united Ireland contained in s.1 of the Northern Ireland Act 1998.⁵⁰

Secondly, and predating Brexit, the Supreme Court has insisted on approaching the interpretation of the Scottish and Welsh devolution statutes in the same way as any other statute,⁵¹ rejecting the approach taken by the House of Lords in *Robinson* that the Northern Ireland Act, as “in effect a constitution”, should be interpreted “generously and purposively”.⁵² The ordinary statute approach was thought to ensure predictability in determining the limits of devolved competence, and impartiality between the UK and devolved institutions in competence disputes, as well as favouring a generous grant of

* E.g. the European Union (Withdrawal Agreement) Bill.

devolved authority under a reserved powers model: that is, the court would not read in limits on devolved competence in addition to those expressly stated in the devolution statutes. However, this approach only worked while the boundaries of devolution were relatively stable and their development consensual. Where political consensus has broken down, an approach to competence disputes which asserts the primacy of the statutory text inherently favours Westminster.

This was vividly illustrated in the *Continuity Bill Reference*,⁵³ which arose in the context of the Scottish parliament's refusal to consent to the EU (Withdrawal) Act. Expecting that, in line with previous practice, this would mean that the EU (Withdrawal) Bill would be amended so as not to apply to devolved matters, Holyrood enacted the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill in order to regulate the status of EU law in devolved areas post-Brexit itself. However, by referring the Holyrood bill to the Supreme Court, the UK government prevented it receiving royal assent.

The UK parliament then proceeded to enact the EU (Withdrawal) Bill intact, and in so doing unilaterally amended the Scotland Act to make the EU (Withdrawal) Act a protected statute which Holyrood is not permitted to modify. The court held that, at the time it was passed, the Continuity Bill would have been almost entirely within devolved competence, and it rejected most of the legal objections raised by the UK government. Nevertheless, by the time the case was decided, the bill had become largely outwith competence, insofar as it conflicted with the terms of the EU (Withdrawal) Act. In other words, the UK government was able to win a legal dispute about devolved competence, and a political dispute about the post-Brexit status of EU law, by unilaterally shifting the statutory goalposts.

In the *Continuity Bill Reference*, the Supreme Court also made unexpected use of what had previously been regarded as a purely declaratory statement of Westminster's ongoing sovereignty in s.28(7) of the Scotland Act* to create a new constraint on devolved competence. As this is a provision which Holyrood is not permitted to modify, the court held that it meant that Scottish legislation could not impose any conditions on UK legislation in devolved areas. Thus, the court struck down a provision requiring that delegated legislative powers in devolved areas conferred on UK ministers could only be exercised with the consent of the Scottish ministers.

In the *Treaty Incorporation Bill References*,⁵⁴ this reasoning was extended to invalidate provisions requiring judges to interpret UK legislation in devolved areas compatibly with certain international treaties, and to strike down or declare incompatible legislation which could not be so interpreted. In both cases, the Supreme Court relied on an unorthodox and expansive notion of parliamentary sovereignty requiring Westminster to be free not only of legal, but also of practical constraints on its legislative power. The decisions are also difficult to reconcile with the fact that Holyrood undeniably has the power to amend or repeal UK legislation in devolved areas, appearing to rely on a non-delegation doctrine of the sort that the court is not supposed to read into the devolution statutes.

* S.28(7) states that the conferral of legislative power on the Scottish parliament "does not affect the power of the Parliament of the United Kingdom to make laws for Scotland". There are similar statements in the Northern Ireland Act and the Government of Wales Act.

Most recently, in *Re Allister*, which involved a challenge by certain Unionist politicians in Northern Ireland to the legality of the incorporation of the Northern Ireland Protocol, the Supreme Court has cast doubt on earlier jurisprudence suggesting that the devolution statutes, along with other constitutional statutes, are protected against implied repeal. Dismissing the issue as “academic”, the court held that both the Irish Acts of Union and the Northern Ireland Act were expressly amended by the provision in s.7A(3) of the EU (Withdrawal) Act 2018 that “every enactment” was to be read subject to the provisions of the EU Withdrawal Agreement, without needing to be specifically named.⁵⁵

What we see in these recent cases, then, is an overriding desire to preserve the autonomy and effectiveness of UK legislation against constraints imposed by devolution, but with no equivalent concern for the autonomy and effectiveness of devolved legislation, or for the wider constitutional principles at stake. For example, rather than regarding the impugned provision in the *Continuity Bill Reference* as a threat to parliamentary sovereignty, the issue might more accurately be understood as being about the control of *ministerial* law making, and the Supreme Court’s decision has made it more difficult to ensure that UK ministerial intrusion into devolved areas occurs in a coherent and accountable manner. Similarly, the decision in the *Treaty Incorporation References* showed no concern for the coherence of the devolved statute book, where laws in devolved areas are governed by a patchwork of UK and devolved legislation which cannot now be interpreted and applied according to common principles.

What can be done?

To summarise the argument so far: the boundaries of devolved competence have in recent years become excessively complex and restrictive, with adverse effects on – and an apparent lack of concern for – the autonomy and effectiveness of devolved law making, as well as other good governance values. The breakdown of the Sewel Convention means that devolved boundaries lack security – vulnerable to unilateral change or override by Westminster and Whitehall – with predictable effects on UK-devolved relations. Law making in devolved policy areas is also at risk of becoming bogged down in litigation.

The root of many of these problems lies in the constitutionally subordinate status of the devolved legislatures, subject to the continued sovereignty of the UK parliament. They cannot therefore be fully resolved without replacing parliamentary sovereignty with a constitutionally entrenched division of power. Such a constitutional revolution is not realistically in prospect, and might in any case bring problems of its own – not least the risk of excessively rigid legislative boundaries. Nevertheless, there is a range of more modest constitutional reforms which could be achievable and might make a significant difference to the workability of the devolution arrangements. Three avenues are worth exploring.

Rationalising the devolution statutes

Before considering any new principles or structures, reform should start with rationalisation of the existing devolution statutes. In the interests of transparency and intelligibility, for each devolved legislature, **all statutory constraints on devolved competence should be located in the same piece of legislation**, subject as far as possible to a consistent conceptual scheme, a common set of interpretive principles, and the same enforcement mechanisms.*

Conceptual and terminological inconsistency between the three devolution statutes should also be reduced, while still allowing for variation (where appropriate) in the extent of devolved policy responsibilities and the nature of cross-cutting constraints applicable in each case. Differences in the terminology and conceptual apparatus of competence limits are often the product of path dependency and lack of whole system thinking rather than deliberate choices, but they can make a difference to the precise powers that each legislature enjoys. A focus on the technicalities of each devolution scheme also tends to get in the way of thinking about the principles that should govern devolved law making in general.⁵⁶

While recognising that the devolved institutions are unlikely to agree to the retrenchment of devolved competences, where there are significant overlaps between UK and devolved policy responsibilities, **consideration should be given to how best to carve up the policy space to ensure coherent and effective policy making**, avoiding excessively narrow exceptions tailored to particular policy objectives. As a general rule, for reasons of policy coherence, flexibility and effective scrutiny, **executive responsibilities should follow legislative powers**, at both the UK and devolved level.

The **substance of the UK internal market rules should also be reconsidered**. There should be a more generous set of statutory grounds on which the market access principles can be disapplied or interference with free trade justified, thus creating greater space for policy divergence and limiting the dependence of effective devolved law making on the UK government agreeing to make ad hoc exemptions. In addition, while it is impossible to ensure complete symmetry in the way in which the internal market rules apply to UK and devolved legislation, efforts should be made to reduce asymmetry where possible. For instance, there is no reason in principle why devolved primary legislation should be subject to the subsidy control principles, when UK legislation is not. Similarly, processes for amending the internal market rules, to the extent they remain necessary, should be genuinely consensual rather than giving a gatekeeper role to the UK government.

* A further area of difficulty is in relation to human rights, since devolved legislation and executive decisions which breach Convention rights are subject to challenge under both the Human Rights Act 1998 and the devolution statutes. Initial inconsistencies between the two sets of regimes have been ironed out, but if the Bill of Rights Bill is enacted in its current form, it will introduce new ones – see McHarg A, 'How Does the Bill of Rights Impact Devolution?', blog, Constitutional Law Matters, 5 September 2022, <https://constitutionallawmatters.org/2022/09/how-does-the-bill-of-rights-impact-devolution>

Finally, **the statements of the ongoing power of the UK parliament to legislate in devolved areas should be deleted from the devolution statutes.** These are not necessary to maintain parliamentary sovereignty, and their removal would reverse the damaging and conceptually incoherent line of Supreme Court authority in the *Continuity Bill Reference* and *Treaty Incorporation Bills References*.

Similarly, **powers for the UK government to veto devolved legislation should be repealed,** or at a minimum the threshold for their use substantially increased. These are politically provocative and inappropriate in principle. There should be no possibility for the UK government to interfere in devolved law making simply because it disagrees with the policy being pursued. If there are genuine concerns that devolved legislation is *ultra vires*, or that it has adverse effects on reserved law or policy, other mechanisms are available to address those problems, save perhaps in situations of genuine urgency. If these powers are to be retained, they should be subject to a requirement to demonstrate that there is no other course of action reasonably available, and that reasonable notification has been given of the nature of the concerns leading to the exercise of the veto.

Reinforcing political constraints

To restore stability and predictability to the boundaries of devolved legislative competence, and reduce boundary disputes between the UK and devolved governments, the second focus for reform should be on revitalising and reinforcing political constraints on the sovereignty of the Westminster parliament, in particular by **strengthening the Sewel Convention.**

At a minimum, this should involve **clarification of, and recommitment to, the principles and processes of seeking devolved consent.** This would include a clear acknowledgment of the scope of the convention (that is, that consent is required for bills altering devolved competences as well as bills affecting devolved policy areas); agreement as to the (limited) reasons for which the consent requirement can justifiably be set aside; and procedural obligations regarding the seeking and granting of consent, including timely notification of, and consultation over, UK bills affecting devolved matters. This could be done via a political agreement, ratified by the UK and devolved legislatures. But given that there is already statutory recognition of the Sewel Convention for Scotland and Wales, there is a case for statutory codification of the rules (including their extension to Northern Ireland, as part of the process of rationalising the devolution statutes).

In addition, there need to be **improved procedures at Westminster for considering devolved consent.** Whereas the devolved legislatures have all developed procedures for justifying, scrutinising and making decisions to grant or withhold consent, there are no equivalent procedures at Westminster, meaning that a decision to legislate in the absence of devolved consent, or the existence of a dispute about the need for consent, may go unremarked (particularly in the House of Commons). Various suggestions have been made for improving Westminster procedures, of differing degrees of formality and strength.

At one end of the spectrum are proposals for ministerial statements at the beginning and end of the legislative process about the need for devolved consent and whether or not it has been granted, coupled with select committee scrutiny in case of disputes about consent.⁵⁷ At the other end are proposals for veto powers where consent is not granted, whether exercised by a reformed second chamber,^{*} or by the introduction of an additional consent stage in the House of Commons legislative process, on the model of English Votes for English Laws.⁵⁸ While none of these proposals would prevent Westminster from ignoring consent requirements, they would raise the political profile – and hence the political costs – of any decision to do so.

Finally, there needs to be a **mechanism for resolving disputes about whether devolved consent is required** for any particular bill. Although select committees might take evidence on such issues, their reports are unlikely to have sufficient authority on what might be tricky legal questions, nor sufficient independence to reassure the devolved institutions that they have been given a fair hearing. The new intergovernmental relations arrangements introduced in early 2022 include a dispute resolution mechanism, but this might not be appropriate for what are technically *inter-parliamentary* rather than intergovernmental disputes.

One option worth considering, therefore, is a statutory reference procedure for obtaining advisory rulings from the Supreme Court, which could be triggered by either the devolved or UK governments, and potentially also by parliamentarians. This would, in effect, allow for the UK/devolved boundary to be tested against UK legislation, but without impinging upon Westminster’s sovereignty. Alternatively, legally justiciable obligations might be placed on UK ministers to seek and consult over devolved consent, although enforcement – other than perhaps by way of declaratory remedies – might come into conflict with Article 9 of the Bill of Rights.⁵⁹

Reconstitutionalising devolution

The final avenue for reform is to attempt to reconstitutionalise devolution, by which I mean **enhancing the interpretive protection given to devolution by the courts**, by fostering a more nuanced understanding of the constitutional issues at stake in devolution disputes beyond parliamentary sovereignty. This is unlikely to be easy to achieve, as it requires a change in judicial culture. Reversing some of the more problematic precedents, as already suggested, will help. The way that cases are presented and argued in court is also important: head-on clashes with parliamentary sovereignty should be avoided; and advocates for the devolved institutions should draw explicit attention to the implications of disputes for autonomy, effectiveness and good governance, drawing on academic literature and comparative jurisprudence where appropriate.

* The Commission on the UK’s Future (Brown Commission), *A New Britain: Renewing Our Democracy and Rebuilding Our Economy*, Labour Party, 2022. Technically, this proposal does not need to be tied to House of Lords reform, although there would be objections to expanding the powers of an unelected house to veto bills passed by the House of Commons.

However, judges are likely to be most responsive to statutory intervention. This might take the form of a **set of interpretive principles applicable to both devolved legislation and UK legislation affecting devolved matters**. As far as devolved legislation is concerned, these might include, for example, setting out the implications of reserved model of devolution in terms of the devolved legislatures having the fullest possible legislative freedom within the limits of their competence. A subsidiarity principle could also be adopted to guide the interpretation of competence limits, perhaps coupled with a set of 'principles of union', although the drafting of an appropriate set of principles which commands general acceptance without leaving too much discretion to the courts is likely to prove extremely challenging.⁶⁰

As far as UK legislation is concerned, a statutory presumption that it is not intended to apply in devolved areas or alter devolved competences could help to reinforce political constraints on legislating without devolved consent. This would mean that the application of UK legislation to devolved matters would have to be explicit (or the implication irresistible), thus making it more difficult to overlook the need for devolved consent or to argue that the Sewel Convention is not engaged; alternatively, the failure to seek consent might be treated as evidence that presumption is intended to apply. Similarly, a rule might be laid down that UK ministerial powers in devolved areas have to be exercised with the consent of devolved ministers; again, this rule would need to be expressly set aside by later legislation in order for UK ministers to be able to act unilaterally.

Conclusion

The Independent Commission on the Constitutional Future of Wales has recently described devolution as "a major step forward for Welsh democracy".⁶¹ The same is true, in my view, for Scotland and Northern Ireland. But, as I have argued in this paper, that major achievement is at risk, and urgent action is required to ensure that devolution can fulfil its constitutional purposes. Even the modest reforms proposed here will not be easy to achieve. They go against the grain of the path dependency, asymmetry and lack of joined up thinking which has characterised the development of devolution to date. Legal and political precedents, once set, are not easy to overturn. The peripheral nature of devolution in the governance of the UK as a whole makes both political and judicial protections uncertain and precarious. And lack of entrenchment also means that even statutory reforms would be vulnerable to future reversal. Nevertheless, it is possible to return to a less contested set of boundaries of devolved legislative competence, and this is an objective which is worth pursuing.

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