# Brexit and the mechanisms for the resolution of conflicts in the context of devolution

Do we need a new model?

# 2

# Brexit and the Mechanisms for the Resolution of Conflicts in the Context of Devolution: Do We Need a New Model?

Elisenda Casanas Adam

## INTRODUCTION

The referendum vote in 2016 to leave the European Union (Brexit) and the process for its implementation have had a significant impact on the devolution framework, and in particular on its legal mechanisms for ensuring harmonious relations between Westminster and the devolved legislatures, and for resolving conflicts between them. Prior to Brexit, there had been very few conflicts between the United Kingdom and the devolved institutions over the distribution of competences set out in the devolution settlements, and any disagreements were resolved primarily through political means. Since the vote, however, a significant breakdown in trust has been followed by a shift to the resolution of disputes through litigation in the courts. The *Miller* and *Scottish Continuity Bill* cases are particularly significant in this sense.[1] These cases have, in turn, highlighted the problems arising from the use of the mechanisms established in the devolution settlements, primarily designed to ensure that the devolved legislatures do not act ultra vires, for the legal resolution of competence conflicts between both orders of government. Taking into consideration the significant role that the courts play in federal or quasi-federal systems by providing an independent and balanced interpretation of the constitutional framework, this chapter reflects on the effectiveness of these mechanisms in the UK system and considers if, in the light of recent developments, they need to be reformed.

The chapter begins with some brief comparative considerations on the role of courts in the resolution of competence disputes in federal or quasi-federal systems. It then highlights particularities of the UK model within the

[1] *R (Miller)* v. *Secretary of State for Exiting the European Union* [2017] UKSC 5; [2017] 2 WLR 583 and *The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill – A Reference by the Attorney General and the Advocate General for Scotland* [2018] UKSC 64.

devolution framework, and the problems arising from the use of its existing mechanisms for the legal resolution of conflicts between both orders of government. Next, it considers the significant impact of Brexit on these mechanisms, with a focus on the *Miller* and *Scottish Continuity Bill* cases from the perspective of the territorial constitution. Finally, it makes some proposals for the development of a new model for dealing with competence disputes. Overall, the chapter argues that, depending on the final Brexit outcome and if the increasingly litigious political climate continues, this model will become unsustainable and new mechanisms will need to be considered.

The focus of the chapter will be primarily on Scotland, but some references will also be made to Wales and Northern Ireland where necessary, and some of the wider considerations in the chapter also apply across all three devolution settlements.

## THE RESOLUTION OF CONFLICTS OF COMPETENCE IN FEDERAL, QUASI-FEDERAL, AND DEVOLVED STATES

A defining element of a federal, quasi-federal, or devolved system is the territorial distribution of competences between the federal nationwide unit and federated sub-units.[2] While there is a diversity of models of multilevel states, and of systems of distributions of competences, what is common to all these systems is the distribution of power based on the federal principle. A second key element in a majority of these systems is that courts are given the final decision on the interpretation of these norms that distribute competences among the different orders of government.[3] In many cases, this will enable the courts to review the legislation enacted by both the federal parliament and those of the component units, and their powers may also involve the striking down of the challenged legislation, if this is found to be outwith their competence.[4]

When considering the role of courts in a federal system, much of the focus is on their power to strike down legislation. However, this chapter will focus on

[2] Akhtar Majeed, Ronald Watts, Douglas Brown and John Kinkaid (eds.), *Distribution of Powers and Responsibilities in Federal Countries* (Quebec: McGill-Queen's University Press, 2006); Francesco Palermo and Karl Kössler, *Comparative Federalism: Constitutional Arrangements and Case Law* (Oxford: Hart Publishing, 2017).

[3] Nicholas Aroney and John Kinkaid, 'Introduction: courts in federal countries', in Nicholas Aroney and John Kinkaid (eds.), *Courts in Federal Countries: Federalists or Unitarists?* (Toronto: University of Toronto Press, 2017).

[4] See, for example, the different case studies included in Aroney and Kinkaid (eds.), *Courts in Federal Countries*.

their role as the final *interpreter* of the competence norms, which is related to, but significantly distinct from their power to overturn legislation. Indeed, the main justification for conferring these powers on the courts is the need for some dispute settlement mechanism, or for an independent arbiter (or set of arbiters) to police and uphold the distribution of powers against disagreement between political forces who may be tempted to alter this distribution in a more centralist or decentralist direction.[5] By their very nature, competence clauses will always have a degree of generality or indeterminacy which may lead to disagreements on specific definitions or on the scope or content of specific clauses. This is common in most federal or quasi-federal systems. Disagreements may also arise in relation to new developments and the updating of previously defined clauses. When carrying out this role as final interpreters of the distribution of competences, courts can ensure that the balance between the positions of the federation and the federated units is maintained, and that any new developments remain faithful to the federal principle.[6]

As in other contexts, there is a lively debate about the benefits or shortcomings of the intervention of courts in this area.[7] There are, of course, many arguments put forward against the judicial intervention in federal competence questions.[8] Some are specific to the functioning of federal polities, such as the fact that courts tend to favour the federation and show bias against the sub-state units; other arguments are more general, noting a democratic deficit in relying too heavily upon an unelected judiciary, for example, or highlighting the problems arising from the legalisation of political conflicts. However, despite these theoretical debates, from an empirical perspective the conferral of this role on the courts is widespread across federal systems, with few exceptions, and even scholars who would not consider that this role needs to be performed by the courts would defend the need for some form of impartial arbiter for resolving disagreements between both orders of government.[9] On the other hand, there are risks for the position and perception of legitimacy of the courts

[5] Aroney and Kinkaid (eds.), *Courts in Federal Countries*, and Jean-François Gaudreault-DesBiens, 'The Role of Apex Courts in Federal Systems' (2017) 17:1 *Jus Politicum* 171–91.

[6] Koen Lenaerts, 'Constitutionalism and the Many Faces of Federalism' (1990) 38 *Am. J. of Comp. Law* 205–63 and Gerald Baier, *Courts and Federalism. Judicial Doctrine in the United States, Australia and Canada* (Vancouver: UBC Press, 2006).

[7] For example, Gaudreault-DesBiens, 'The Role of Apex Courts'.

[8] Ibid.

[9] Cheryl Saunders, 'Legislative, Executive, and Judicial Institutions: A Synthesis', in Katy Le Roy and Cheryl Saunders (dir.), *Legislative, Executive and Judicial Governance in Federal Countries*, vol. 3 (Montreal & Kingston, Forum of Federations/IACFS, McGill-Queen's University Press, 2006); and Kenneth C. Wheare, *Federal Government* (New York: Oxford University Press, 1947), p. 66.

themselves, if their decisions are not sufficiently balanced and responsive to both the arguments of the federation and sub-state units in conflict.[10]

In practice, we can see the impact of the courts' interpretative function on the development of specific federal or quasi-federal models, where litigation over competence divisions is an ordinary part of the working of the system. Thus, in Spain, for example, many of the constitutional provisions concerning the 'State of the Autonomies', especially the competence provisions, have been developed and fleshed out by hundreds of decisions of the Spanish Constitutional Court.[11] In this way, the Constitutional Court has contributed significantly to the establishment and development of the system, and in the initial years of self-government, helped to protect the sphere of autonomy of the Autonomous Communities by resisting the strongest centralising tendencies of central government.[12] More recently, however, the court has adopted a much more restrictive and centralised interpretation of the constitutional framework, largely endorsing the arguments put forward by central government.[13] As a result, it is no longer seen as an independent arbiter by many Autonomous Communities. This example therefore also highlights the importance of courts taking a thoughtful and balanced approach to the interpretation of the constitutional framework in this context.

## THE UK MODEL IN THE CONTEXT OF DEVOLUTION

The UK model is one of devolution and therefore not of federalism in a strict sense. The distinction between a devolved and a federal model is that while in a federal system the division of competences is constitutionally entrenched, in a devolved model the central parliament retains ultimate law-making authority in all matters, including the power of unilateral revocation.[14] In the United Kingdom, this is included specifically in each of the devolution settlements and marks a constitutional asymmetry between the sovereign Westminster

[10] Elisenda Casanas Adam and François Rocher, '(Mis)recognition in Catalonia and Quebec: The Politics of Judicial Containment' in Jaime Lluch (ed.), *Constitutionalism and the Politics of Accommodation in Multinational Democracies* (London: Palgrave Macmillan, 2014).

[11] Elisenda Casanas Adam, 'The Constitutional Court of Spain: From system balancer to polarizing centralist.' in Aroney and Kinkaid (eds.), *Courts in Federal Countries*.

[12] Ibid.

[13] Ibid.

[14] Michael Keating and Guy Laforest 'Federalism and Devolution: the UK and Canada', in Michael Keating and Guy Laforest (eds.), *Constitutional Politics and the Territorial Question in Canada and the United Kingdom: Federalism and Devolution Compared* (London: Palgrave Macmillan, 2017).

Parliament and the non-sovereign devolved legislatures.[15] However, despite these provisions, there are contrasting views on the constitutional impact and significance of the devolution settlements, and in particular, on whether they represent a constraint on Westminster's parliamentary sovereignty understood in its traditional sense.[16] As McHarg notes, the status of devolution within the UK constitution is therefore ambiguous and contested.[17] More generally, in their introduction to the comparative discussion of the multi-level systems in the United Kingdom and Canada, Keating and Laforest highlight that in the twenty-first century, the distinction between unitary (devolved) states and federal ones is less clear cut.[18] Similarly, Tierney states that federalism, understood in general terms as a means of accommodating territorial pluralism in a constitutional system, is a 'useful prism' through which to assess the United Kingdom's territorial model.[19]

In common with the models discussed above, the distribution of competences between the UK Parliament and the devolved legislatures is set out in statute. Thus, the legislative competence of the Scottish Parliament is defined in ss. 28 and 29 of the Scotland Act 1998.[20] These follow a 'reserved powers' model whereby the Scottish Parliament is given plenary power to make laws by s. 28(1), but this is subject to the limits set out in s. 29, most notably the list of policy areas 'reserved' to the Westminster Parliament.[21] Also in common with the models above, the Scotland Act 1998 contains a range of mechanisms designed to ensure that the Scottish Parliament remains within competence when carrying out its legislative functions. These include political controls, such as requirements on the minister or other member introducing a bill to state that its provisions are intra vires, as well as an independent requirement

[15] Scotland Act 1998, s. 28(7); Government of Wales Act 2006, s. 93(5); Northern Ireland Act 1998, s. 5(6).

[16] Christopher McCrudden and Daniel Halberstam, '*Miller* and Northern Ireland: A Critical Constitutional Response' (2016) 8 *The UK Supreme Court Yearbook* 299–343.

[17] Aileen McHarg, 'Devolution in Scotland', in Jeffrey Jowell and Colm O'Cinneide (eds.), *The Changing Constitution* (Oxford: Hart, 9th edn., 2019).

[18] Keating and Laforest, 'Federalism and Devolution'.

[19] Stephen Tierney, 'The territorial constitution and the Brexit process' (2019) 72 *Current Legal Problems*, 59–83.

[20] Parallel provisions apply in Wales; see ss. 107 and 108A of the Government of Wales Act 2006, as amended by s. 3 of the Wales Act 2017. The Northern Ireland devolution settlement is more complex, distinguishing between 'transferred', 'reserved' and 'devolved' matters, in reflection of the particular nature of the Northern Irish Constitution. For a discussion in the context of the issues considered in this chapter, see Gordon Anthony, 'Sovereignty, Consent, and Constitutions: The Northern Ireland References', in Mark Elliot, Jack Williams and Alison Young (eds.), *The UK Constitution after* Miller: *Brexit and Beyond* (Oxford: Hart, 2019).

[21] Scotland Act 1998, ss. 28 and 29 and Schedule 5.

on the Parliament's Presiding Officer to state her opinion as to the competence of the bill.[22] They also include judicial controls which allow a bill or an Act of the Scottish Parliament to be referred to the courts, and in final instance to the Supreme Court, to consider its compatibility with the Scotland Act 1998. Before a bill receives Royal Assent, this power is conferred on the UK or Scottish government Law Officers.[23] Once an Act has entered into force, post-enactment competence challenges may be initiated by the UK Law Officers or by private parties, under the 'devolution issues' procedures.[24] The Scotland Act states clearly that an Act of the Scottish Parliament is not law in so far as any provision of the Act is outside its legislative competence.[25]

In contrast with the federal or quasi-federal models considered above, however, there are no equivalent procedures to question whether the Westminster Parliament remains within its sphere of reserved competences when legislating for Scotland. The lack of such procedures is a manifestation of the Westminster Parliament's sovereignty, and of the retention of its competence to legislate for devolved matters despite empowering the devolved legislatures to do so.[26] From the perspective of the issues considered in this chapter, there are two significant consequences that flow from this. The first is that in the UK model, while the courts are given the final decision on the interpretation of the devolution settlements (as they are currently set out in statute)[27] in the context of a legislative conflict, a question regarding the interpretation or scope of the competence provisions included in the Scotland Act 1998 can only reach the courts if it is raised in relation to legislation of the Scottish Parliament (or other devolved legislature). The second consequence is that the devolved governments therefore have very limited options to enable them to raise competence questions for consideration and clarification by the courts. Although the Scottish Law Officers could refer a Scottish bill to the Supreme Court before its coming into force for the court to certify that it is within the competence of the Scottish Parliament, in order to avoid it being challenged once it comes into force, in the majority of cases these cases will be the result of a direct challenge to the Scottish Parliament's exercise of legislative power either by the UK Law Officers or by a private party. When considered from this perspective, it

[22] Ibid., s. 31(1) and (2).
[23] Ibid., s. 33.
[24] Ibid., s. 98 and Schedule 6.
[25] Ibid., s. 29(1).
[26] McHarg, 'Devolution in Scotland'.
[27] The UK Parliament is free to amend the devolution statutes, including the reversal of an interpretation given by a court.

becomes evident that in the UK model, rather than establishing a dispute resolution mechanism between both orders of government, these processes are designed to ensure that the devolved institutions stay within their sphere of competences, and to apply punitive consequences if they do not.

However, there does exist a political constraint on the legislation of the Westminster Parliament: the Sewel Convention, which states that the UK Parliament will not normally legislate in respect to devolved matters without the consent of the Scottish Parliament.[28] As is well known, the convention originated from a statement by the Scottish Office minister, Lord Sewel, during a parliamentary debate on the Scotland Bill 1998.[29] His statement has since been included and further developed in the Memorandum of Understanding between the UK and devolved governments and various Devolution Guidance Notes, and was codified in s. 28(8) of the Scotland Act 1998, as amended by s. 2(2) Scotland Act 2016. It is currently understood that the consent of the Scottish Parliament is *normally* required for legislation which 'contains provisions applying to Scotland and which are for devolved purposes' *or* 'which alter the legislative competence of the Parliament or the executive competence of the Scottish Ministers'.[30] The same convention also applies in Wales, where it was codified in s.2 of the Wales Act 2017, and with some differences, in Northern Ireland, where it remains uncodified.[31]

The Sewel Convention is the United Kingdom's own distinct model of incorporation or safeguarding of the federal principle in general terms, and of recognising that, in ordinary circumstances, despite its overarching legislative sovereignty, the Westminster Parliament will respect and comply with the distribution of competences as agreed and established in the devolution settlements. Furthermore, in a situation where it deemed it necessary to legislate within devolved competences, Westminster will not do so without the consent of the corresponding parliament. As McHarg explains, the convention therefore performs a defensive function, providing devolved legislatures with reassurance that Westminster will normally gain the consent of the

[28] On the Sewel Convention see Graeme Cowie and David Torrance, 'Devolution: The Sewel Convention', HC Briefing Paper CBP-8883 (13 May 2020).

[29] During the second reading debate, Lord Sewel said: 'we would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish parliament'. *Hansard*, HL Deb, vol. 592, col. 791, 21 July 1998.

[30] See Devolution Guidance Notes 8–10, 14 and 17, www.gov.uk/government/publications/devolution-guidance-notes.

[31] On Wales, see now Government of Wales Act 1998, s. 107(6). On Northern Ireland, see, for example, the decision of the High Court of Northern Ireland in *Re McCord* [2016] NIQB 85 at para. 119, where the court stated that only the narrower dimension of the convention applied.

relevant devolved legislature before legislating on devolved matters.[32] In the light of the initial comparative discussion above, the question then arises concerning what happens when there is a disagreement between the UK and devolved governments (and/or parliaments) over whether, in the ordinary functioning of devolution, a specific matter falls within the reserved competence of Whitehall, and cannot be resolved through political negotiation. While the Westminster Parliament can theoretically legislate on any matter, the model would be unsustainable if all potential conflicts were to end in this way. Yet, the devolved governments or legislatures cannot refer the matter to the courts; nor can the UK government do so, even if it legitimately believes that in this case the specific matter is within the Westminster Parliament's sphere of reserved competences. In these situations, therefore, the only option available is for the devolved legislature to legislate on the matter and for the devolved bill to then be referred to the Supreme Court for consideration.

The incorporation of the Sewel Convention into statute led to some discussion (and significant uncertainty) over whether this would make it legally enforceable.[33] If this were to be the case, it would have resulted in a new and distinctive UK mechanism for bringing questions of competence arising from Westminster legislation before the Supreme Court: the devolved legislatures could not challenge a UK bill because the UK Parliament was legislating within the sphere of devolved competence, but they *could* challenge the fact such a bill had been enacted without their consent. However, the consideration of the consent question would necessarily require the court to consider whether the bill was indeed within devolved powers, and as such would enable the Scottish Parliament to bring issues regarding the interpretation of the competence provision before the court. As will be discussed below, though, this possibility was rejected by the Supreme Court in the *Miller* case.

The lack of legal security (or lack of entrenchment) afforded to the devolved settlements in the current constitutional arrangements has already been highlighted as one of the problems of the UK model of devolution, as have other potential models to overcome this, and the obstacles to achieving such models.[34] A fully federated UK model would, of course, overcome these

[32] Aileen McHarg, 'Constitutional change and territorial consent: The *Miller* Case and the Sewel Convention', in Elliott, Williams, and Young (eds.), *The UK Constitution after* Miller, p. 159.

[33] Chris Himsworth, 'Legislating for permanence and statutory footing' (2016) 20 *Edinburgh Law Review*, 361–7.

[34] Aileen McHarg, 'The future of the United Kingdom's territorial constitution: can the Union survive?', in Alberto López-Basaguren and Leire Escajedo San-Epifanio (eds.), *Claims for Secession and Federalism. A Comparative Study with a Special Focus on Spain* (Heidelberg: Springer, 2019).

problems, and may be the only sustainable solution in the long term. Yet this chapter aims to put forward a different argument in relation to the model in its current form. While the principle of parliamentary sovereignty as it applies to the Westminster Parliament is a justification for not giving the courts the power to strike down its legislation in the context of the devolution settlements, the principle is not necessarily a justification for limiting the access of the devolved governments and legislatures to the courts, in the case of a conflict over the interpretation of the corresponding devolution framework itself. In other words, there is an interest in establishing with clarity and certainty *when* the UK Parliament is legislating within devolved competences, even if under the devolution settlements it may legally do so. Furthermore, even if understood in very general terms, the federal principle would seem to require a degree of symmetry of access to the courts for the devolved and UK governments for the resolution of conflicts over the interpretation of the competence provisions. In the context of intransigent disagreement between the devolved and UK governments, it is also only with this certainty that the Sewel Convention as a political mechanism can work effectively.

However, prior to the Brexit vote, the limited access of the devolved institutions to the courts in this context was not a matter of significant concern due to the small number of disagreements over the interpretation of the competence provisions in the devolution settlements.[35] In the case of Scotland, no Scottish Acts had been referred to the Judicial Committee of the Privy Council, or later to the Supreme Court, by the Law Officers and no cases had reached the courts that involved a disagreement on competences between the Scottish and UK institutions.[36] Of the cases raised by private parties, only three involved a challenge regarding devolved/reserved boundaries.[37] Various reasons have been put forward to explain the lack of challenges and disagreements.[38] These include the initial harmony between a Labour-led government in Holyrood and Westminster in the initial years of devolution (1999–2007); yet the situation continued with the first minority (2007–11, 2016–present) and then majority (2011–16) SNP governments that have followed. It is also suggested that the attention paid to these matters

[35] Christopher McCorkindale, Aileen McHarg and Paul Scott, 'The courts, devolution and constitutional review' (2018) 36 *University of Queensland Law Journal*, 289–310; and Eugenie Brouillet and Tom Mullen, 'Constitutional jurisprudence on federalism and devolution', in Keating and Laforest (eds.), *Constitutional Politics*.

[36] Ibid.

[37] McCorkindale, McHarg, and Scott, 'The Courts, Devolution and Constitutional Review' and McHarg, 'Devolution'.

[38] Ibid.

during the process of parliamentary review of a bill, and in particular the cooperation between the Scottish and UK governments during this period contributed to the lack of challenges. Indeed, disagreements on competence questions are resolved in on-going dialogues between officials and legal advisors acting on behalf of the UK and Scottish governments, and the Scottish Parliament.[39] However, it is also worth noting that such discussions are conducted taking the existing jurisprudence of the Supreme Court as one of their main points of reference.[40] Therefore, even despite the lack of conflict, this confirms the significance of the role of the Supreme Court in this context, and also of the type of issues it considers and decides on, and brings the question of access back into focus.

A final explanation for the lack of conflict over the competence provisions is the willingness of both governments to make use of the flexibility of the devolution settlement to transfer more competences or provide consent for UK-wide legislation where necessary.[41] There is no doubt that despite the constitutional asymmetries of the model, in its initial years it has functioned largely on a trust basis between the UK institutions and the devolved institutions, with a clear preference for the political resolution of disputes over the use of courts. A clear example of this is, as McHarg notes, that the most important function performed by the Sewel Convention in the initial years of devolution has been a facilitating function, enabling the cooperation between the UK and devolved governments to achieve their policy goals, when the devolved legislatures are constrained by competence provisions or a UK-wide approach is more beneficial.[42] As the next section will argue, this context has changed significantly with the Brexit process.

## THE IMPACT OF BREXIT AND ITS WIDER IMPLICATIONS

The impact of the Brexit vote and the developments that have followed upon all the above cannot be overstated.[43] In the lead-up to the vote, the territorial differences on EU membership were already notably evident, leading the SNP (with the support of Plaid Cymru) to argue for the adoption of a principle of

[39] Christopher McCorkindale and Janet Hiebert, 'Vetting bills in the Scottish Parliament for legislative competence' (2017) 21 *Edinburgh Law Review* 319–51.

[40] Ibid.

[41] Ibid., and McHarg, McCorkindale, and Scott, 'The Courts, Devolution'.

[42] McHarg 'Constitutional change', p. 159; and see also Andrea Batey and Alan Page 'Scotland's other parliament: Westminster legislation about devolved matters in Scotland since devolution' (2002) *Public Law* 501–23.

[43] See McHarg 'Devolution', and also Sionaidh Douglas-Scott, 'Brexit, Art. 50, and the Contested British Constitution' (2016) 79 *Modern Law Review* 1019–40.

parallel consent to secure a Leave victory: a majority of votes across the United Kingdom as well as in each of its constituent nations.[44] This was rejected by the UK government and the territorial divisions were then confirmed on the day of the vote, when Scotland and Northern Ireland voted strongly to remain, in contrast to the victory for Leave in England and Wales.[45] In relation to Scotland, the UK government then also refused to consider proposals for a 'differentiated Brexit' and for a second independence referendum which could allow Scotland to remain in the EU.[46] Two subsequent developments, however, had a particular impact on the processes for regulating the division of competences.

The first resulted from the challenge regarding the requirements for the activation of the Art. 50 TEU withdrawal process, which developed a devolution dimension.[47] The discussion over the need for legislation by Westminster then led to the argument that, under the Sewel Convention, the consent of the devolved legislatures was also required, as the process of withdrawing from the EU would affect their devolved competences (by removing the obligation to act in accordance with EU law). This argument was first raised in Northern Ireland, in the *McCord* case, where it was rejected by the High Court of Northern Ireland (NIHC), which also adopted a very restrictive interpretation of the convention.[48] This was also the position of the UK government. In the Supreme Court, the appeals and devolution references requested by the Attorney General for Northern Ireland were joined with the analogous English *Miller* case, appealed from the Divisional Court.[49] Concerned that the Supreme Court might follow the NIHC's restrictive interpretation of the convention, the Scottish and Welsh governments then decided to intervene in defence of the application of the convention and the need for the consent of the devolved legislatures, although the Northern Irish government intervened in support of the UK government's position. Therefore, *Miller* became the first case that reached the Supreme Court involving a direct conflict between the UK and Scottish governments. *Miller* also became the first test of the legal consequences of the statutory recognition

[44] Ibid.

[45] Scotland voted to remain by 55.8% and Northern Ireland by 62%; England voted to leave by 53.4% and Wales by 52.5%.

[46] Tobias Lock, 'Taking Stock: Scotland and Brexit', Centre for Constitutional Change Blog, 6 September 2018, www.centreonconstitutionalchange.ac.uk/opinions/taking-stock-scotland-and-brexit.

[47] On this case from the devolution perspective see McHarg, 'Constitutional Change'.

[48] *McCord and Agnew* [2016] NIQB 85.

[49] *R (Miller)* v. *Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin); [2017] 1 All ER 158 at para. 102.

of the Sewel Convention. From the perspective of the territorial constitution it became a highly significant case.

In contrast with the cases where devolved legislation was challenged by a private party, the *Miller* case put the Supreme Court at the centre of the tensions between Westminster and Holyrood. As is common in such cases in other federal or quasi-federal systems, both sides put forward strongly diverging interpretations of the contested provision; in this case, the provisions in the Scotland Act 1998 providing recognition of the Sewel Convention, and also of the convention itself. In brief, the Lord Advocate and the Counsel General for Wales adopted a broad interpretation of the Sewel Convention and argued that it not only applied to devolved competences, but also to situations where Westminster legislated to alter the devolved competences.[50] As the triggering of Art. 50 and leaving the EU would alter the competences of the devolved legislatures and governments, their consent was required for any legislation enacted with this purpose. In the case of the Scottish Parliament, the argument was reinforced by the recognition of the convention in the Scotland Act 1998. On the other hand, the UK government adopted a much narrower interpretation of the convention, arguing that it only applied when Westminster legislated on a devolved matter, and that foreign affairs (and the relationship between the United Kingdom and the EU) were not devolved.[51] Furthermore, it argued that even if the Sewel Convention did apply in this case, statutory recognition had not made the convention legally justiciable, and accordingly, as a convention it could not be legally enforced by the courts.

As is well known, while the Supreme Court decided that legislation by the Westminster Parliament was required to trigger Art. 50, it also unanimously held that, as a matter of convention rather than law, the Sewel Convention did not give rise to legally enforceable obligations, nor could the courts give rulings on its operation or scope[52]. Regarding the statutory recognition of the convention in the Scotland Act 2016, the court held that this had not rendered it any more justiciable and that this mechanism remained primarily a political one.[53] In a small number of not extensively reasoned paragraphs, the court largely deactivated much of the potential significance or impact of the legal recognition of the Sewel Convention that had been carefully negotiated and

[50] See the written submissions of the Lord Advocate, Counsel General for Wales, www.supremecourt.uk/news/article-50-brexit-appeal.html.

[51] See the written submissions for the UK government by the Advocate General, www.supremecourt.uk/news/article-50-brexit-appeal.html.

[52] *Miller* at paras. 136–52.

[53] Ibid., at paras. 147–9.

agreed in a multi-party consultation process in Scotland which had then been crystallised in an Act of Parliament at Westminster. It also left the devolved institutions notably weakened at a time of constitutional turmoil. As a result, in contrast to responses to its previous decisions on the devolution settlements, where it was considered overall to have contributed positively to the development of the model, the court found itself under criticism both for its approach to, and the impact of its decision upon, the devolved settlements. For example, Welikala highlighted that 'it may have been possible to articulate a more imaginative interpretation of these provisions that was more responsive and sensitive to both the historical traditions and the contemporary needs of our multination Union'.[54] McCrudden and Halberstam put it more strongly: 'The devolution aspects of the Supreme Court's judgment in *Miller* will come to be seen as a significant misstep, in that it failed to live up to the challenge of becoming a truly constitutional court for the UK as a whole.'[55]

The second development of significance to the discussion in this chapter arose from what can be described as 'the Continuity Bill saga'.[56] The disagreement between the UK government and the devolved governments continued into the enactment of what became the European Union (Withdrawal) Act 2018, designed to regulate the domestic consequences of the United Kingdom's withdrawal from the European Union. The Scottish and Welsh governments described the bill's impact on devolved competences as a 'naked power grab', and recommended that consent to the bill under the Sewel Convention be withheld.[57] The Scottish Parliament then proceeded to pass its own UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill which regulated the domestic consequences of the withdrawal for Scotland, and the Welsh Assembly passed its own analogous bill for Wales. Both were referred to the Supreme Court by the UK government's Legal Officer. Before the court heard the case, the Welsh government reached an

[54] Asanga Welikala, 'The Need for a "Cartesian Cleaning of the Augean Stables"? *Miller* and the Territorial Constitution', UK Constitutional Law Blog, 7 February 2017, https://ukconstitutionallaw.org/2017/02/07/asanga-welikala-the-need-for-a-cartesian-cleaning-of-the-augean-stables

[55] Christopher McCrudden and Daniel Halberstam, 'Northern Ireland's Supreme Court Brexit Problem (and the UK's too)', UK Constitutional Law Blog, 21 November 2017, https://ukconstitutionallaw.org/.

[56] Christopher McCorkindale and Aileen McHarg, 'Continuity and Confusion: Legislating for Brexit in Scotland and Wales (Part II)', UK Constitutional Law Blog, 7 March 2018, https://ukconstitutionallaw.org/. Also Christopher McCorkindale and Aileen McHarg, 'Continuity and Confusion: Legislating for Brexit in Scotland and Wales (Part I)', UK Constitutional Law Blog, 6 March 2018, https://ukconstitutionallaw.org/.

[57] 'Nicola Sturgeon claims Brexit repeal bill is a "power grab"', BBC News website, 18 July 2017, www.bbc.co.uk/news/uk-scotland-scotland-politics-40586269/comments.

intergovernmental agreement with the UK government on the Withdrawal Bill, the Welsh Assembly granted its consent, and the referral was withdrawn.[58] While the Welsh bill then received Royal Assent, it was repealed shortly after. However, the Scottish government stood its ground and, following its recommendation, the Scottish Parliament voted to refuse its consent to the UK bill.[59] The Scottish Parliament's 'Withdrawal Bill' therefore became the first Scottish bill to be referred to the Supreme Court by the UK Law Officers for being outwith its competence and, again, the Supreme Court found itself at the centre of the tensions between Westminster and Holyrood.[60]

As McCorkindale and McHarg explain, the passing of the Scottish bill is significant because it was the culmination of an approach by the Scottish government (initially in coordination with the Welsh government) to negotiate with the UK government over the contested aspects of the Withdrawal Bill. It also served the political purpose of adding pressure on the UK Parliament in relation to the Westminster Withdrawal Bill; and from a practical perspective, it was the logical consequence of their decision to refuse to give their consent to the UK bill.[61] In this sense, it was a defensive move to ensure the Scottish legislation was in place before the enactment of the UK Act, to avoid Westminster proceeding with the bill as originally put forward without the Scottish Parliament's consent. This can be seen in statements by both Nicola Sturgeon and Mike Russell, defending the need to proceed with the Scottish Act as something they were required to do to 'protect the interests of the parliament' and to assert its 'right to legislate for itself'.[62] From the perspective of the issues considered in this chapter, the enactment of the Scottish Parliament's own legislation on the matter also resulted in the escalation of the conflict with the UK government for consideration by the Supreme Court.

Again, as is common in cases of conflicts of competence, the UK Law Officers challenged the Scottish bill on numerous and notably expansive grounds. For example, they argued that the Scottish bill was 'contrary to the constitutional principles underpinning the devolution settlement' and that the Continuity Bill as a whole was outwith competence because it related to

[58] Manon George, 'Agreement Reached on Amendments to the EU (Withdrawal) Bill', Senedd Research Blog, 1 May 2018, https://seneddresearch.blog/2018/05/01/agreement-reached-on-amendments-to-the-eu-withdrawal-bill/.

[59] SP OR 18 May 2018, cols. 9–76.

[60] *The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill – A Reference by the Attorney General and the Advocate General for Scotland* [2018] UKSC 64.

[61] McCorkindale and McHarg 'Continuity and Confusion I'.

[62] 'MSPs agree emergency timetable for Scottish Brexit bill', BBC News website, 1 March 2018, www.bbc.co.uk/news/uk-scotland-scotland-politics-43248551.

the reserved matter of relations with the EU.[63] This is relevant as during the passage of the UK Withdrawal Bill, the UK government had conceded that some devolved competences were affected and therefore had requested the Scottish Parliament's consent. The Lord Advocate, meanwhile, defended the Scottish Parliament's competence to legislate for the legal consequences in Scotland of the UK leaving the EU.[64] The Counsel General for Wales and the Attorney General for Northern Ireland also intervened in support of the competence of the bill. Notably, the referral of the Scottish bill had the effect of delaying it being granted Royal Assent. The UK Parliament then proceeded to enact the UK Withdrawal Act with effect also for Scotland, becoming the first Act to be enacted where the Scottish Parliament had withheld its consent under the Sewel Convention. The UK Withdrawal Act also amended the Scotland Act so that it became a 'protected statute' which the Scottish Parliament could not modify.[65] Accordingly, the court had to consider if the bill was within competence when it was passed, and – if so – whether it still would be within competence when it received Royal Assent.

The challenges to the competence of the bill were unsuccessful on the majority of grounds, and the court therefore ruled that, when it was passed, the bill was largely within the competence of the Scottish Parliament. The only provision found to be outwith its competence at that point was s. 17, which required the consent of the Scottish Ministers for the exercise of delegated legislative powers conferred on UK ministers under UK Acts enacted after the Continuity Bill, in areas of devolved competence.[66] However, the court also decided that the competence of a bill was to be judged at the point it would have received Royal Assent, rather than when it was passed.[67] As a result, the enactment of the UK Withdrawal Act and its nature as a 'protected statute' meant that, by the time of the decision, many of the Scottish bill's provisions had been rendered outwith competence.[68] Nevertheless, the judgment was much more balanced from the perspective of the territorial constitution than the Supreme Court's previous decision in *Miller*. On the one hand, the court reaffirmed the reserved powers model, stating that 'the Scottish Parliament is a democratically elected legislature with a mandate to make laws for people in

[63] See the arguments of the Attorney General and the Advocate General for Scotland, www.supremecourt.uk/cases/uksc-2018–0080.html.

[64] Ibid, see the arguments of the Lord Advocate.

[65] European Union Withdrawal Act 2018, Schedule 3, Part 3, 21(1) (2).

[66] *The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill – A Reference by the Attorney General and the Advocate General for Scotland* [2018] UKSC 64 at paras. 37–65.

[67] Ibid., at paras. 91–7.

[68] Ibid., at paras. 98–124.

Scotland. It has plenary powers within the limits of its legislative competence'.[69] On the other, 'in contrast to a federal model, a devolved system preserves the powers of the central legislature of the state in relation to all matters, whether devolved or reserved'.[70]

The court's decision was also much better received from the perspective of its approach to, and its impact upon, the territorial constitution. For example, Elliott highlights that, 'In some respects, the judgment reaffirms the importance of the constitutional position occupied by devolved institutions', and at the same time, 'serves to reaffirm that the UK's territorial constitutional settlement continues to be … a devolved, not a federal, model, of which the sovereignty of the UK Parliament remains a cardinal feature'.[71] McCorkindale and McHarg describe the case as 'a landmark in the developing devolution jurisprudence, with the Court having taken the opportunity to reaffirm established principles, as well to address a number of novel questions, which are relevant across the UK's devolved jurisdictions'.[72] These assessments confirm the important role that courts can play, the Supreme Court in particular, in providing a balanced interpretation of the constitutional framework in the context of a conflict between different orders of government, even within the United Kingdom's model of devolution.

From the perspective of the Scottish institutions, despite numerous provisions of the Scottish Continuity Bill having ultimately been declared ultra vires, the Supreme Court's decision provided the symbolic recognition that the bill had initially been within the Scottish Parliament's competence. Furthermore, the court's strong affirmation of the reserved powers model will strengthen the Scottish Parliament's position when considering new areas of legislation in the future. But it must also be noted that the only means the Scottish Parliament had to bring these issues before the court in the context of an ongoing dispute regarding a Westminster bill was to draft its own competing legislation in order for it to be challenged. The shortcomings of the UK model discussed in the previous section are therefore clearly highlighted in this case. The case also highlights the extreme vulnerability of the model to unilateral changes to legislative competence, with Sewel offering little protection.

[69] Ibid., at para. 12.

[70] Ibid., at para. 41.

[71] Mark Elliott, 'The Supreme Court's Judgement in the Scottish Continuity Bill Case', Public Law for Everyone, 14 December 2018, https://publiclawforeveryone.com/2018/12/14/the-supreme-courts-judgment-in-the-scottish-continuity-bill-case/.

[72] Aileen McHarg and Christopher McCorkindale 'The Supreme Court and Devolution: the Scottish Continuity Bill Reference' (2019) *Juridical Review* 190–97.

## LOOKING TO THE FUTURE: DO WE NEED A NEW MODEL?

The litigation discussed above has highlighted both the unsuitability of the existing UK mechanisms for the resolution of competence disputes between the United Kingdom and devolved levels and also the importance of the role of the courts, in particular, the Supreme Court, in this context. It is also worth highlighting that this litigation forms part of a wider increase of litigation of constitutional issues before the courts. Indeed, as highlighted by McCorkindale and McHarg's contribution to this volume, the Brexit process has been characterised by 'hyper-litigation'. And this trend seems set to continue beyond the Brexit context, as can be seen in the surge in litigation challenging different aspects of the first Covid lockdown in 2020.[73] Similarly, the *Miller* and *Scottish Continuity Bill* cases highlight a clear loss of trust between the UK government and the devolved governments which has continued throughout the Brexit process. In response to the UK Parliament enacting the EU Withdrawal Act 2018 without the Scottish Parliament's consent, the Scottish government declared that it would not seek consent from the Scottish Parliament for any further Brexit bill and has not done so, with the exception of the Healthcare (International Agreements) Bill.[74] More recently, all three devolved legislatures refused consent for Westminster's Withdrawal Agreement Bill (now Act), which was required to implement the UK government's Brexit deal, and which was again passed despite the refusal of consent.[75] Both of these wider developments seem to indicate that the conflicts that led to both of the cases discussed above may become much more common in the future, therefore resulting in a significant change in the dynamics of the devolution model.

In the light of the above, it seems likely that the UK government will start taking a much more restrictive approach to when devolved consent is required. Following the Scottish Parliament's refusal to grant consent to the EU Withdrawal Bill, the UK government wrote to the Scottish government reiterating its commitment to the Sewel Convention, and justifying proceeding with the bill under the exception the convention itself

[73] Joe Tomlinson, Jo Hynes, Jack Maxwell and Emma Marshall, 'Judicial Review during the COVID-19 Pandemic (Part II)', 28 May 2020, https://adminlawblog.org/2020/05/28/joe-tomlinson-jo-hynes-jack-maxwell-and-emma-marshall-judicial-review-during-the-covid-19-pandemic-part-ii/.

[74] Jess Sargeant, 'Sewel Convention', Institute for Government Blog, 21 January 2020, www.instituteforgovernment.org.uk/explainers/sewel-convention.

[75] Jess Sargeant, 'The Sewel Convention has been broken by Brexit – reform is now urgent', Institute for Government Blog, 21 January 2020, www.instituteforgovernment.org.uk/blog/sewel-convention-has-been-broken-brexit-reform-now-urgent.

provides.[76] In this sense, it stated that while the Sewel Convention holds that the Westminster Parliament should not *normally* press ahead with legislation without the consent of the devolved legislatures, the circumstances of the United Kingdom's departure from the European Union are 'specific, singular and exceptional'.[77] Because of the largely uncontroversial way the convention has functioned until recently, there is a lack of clarity as to when the 'normally' exception applies, and some proposals for reform have been put forward in this regard.[78] Yet, at the same time, for the functioning of the model to be sustainable, the recourse to this exception cannot become the general rule when there is a disagreement between the UK government and the devolved administrations. It seems, therefore, that in a new context of ongoing tensions, the UK government may take a much narrower approach to the interpretation of the content of devolved matters which may be affected by proposed Westminster legislation, and would accordingly require devolved consent. In this way, it can avoid the complex negotiations to secure consent for the bill at the devolved level, and also the political consequences of proceeding with the enactment of the bill if consent is denied. There is already a recent example of a disagreement between the UK and Scottish governments over whether devolved consent is required for Westminster's Agriculture Bill.[79] Under the current legal framework, the Scottish government and Parliament have no way of challenging the UK government's interpretation, despite the final decision on the competence question ultimately lying with the Supreme Court. It seems, therefore, that some form of reform of the model is desirable.

A third element to consider when looking to the future are the changes to the devolution settlement that are going to result from the overall Brexit process itself, as are discussed in Hunt's contribution to this volume. Indeed, the repatriation of competences that will result from EU law ceasing to be binding in the United Kingdom will enhance the autonomy of the devolved administrations in important areas of policy, in some of which the boundaries between reserved and devolved competences are not

[76] Letter from the Rt Hon Steve Barclay MP to Michael Russell MSP, 17 January 2020, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/859145/2020–10-20_Letter_to_Michael_Russell_MSP.pdf.

[77] Ibid.

[78] Scottish Government, 'Strengthening the Sewel Convention: Letter from Michael Russell to David Lidington', 12 September 2018, www.gov.scot/publications/strengthening-the-sewel-convention-letter-from-michael-russell-to-david-lidington/. Also Welsh Government, 'Reforming our Union, Shared Governance in the UK' 2019, https://gov.wales/sites/default/files/publications/2019–10/reforming-our-union-shared-governance-in-the-uk.pdf.

[79] Sargeant 'Sewel Convention'; Cowie and Torrance 'The Sewel Convention', p. 29.

clearly delimited.[80] Furthermore, the proposed establishment of UK-wide frameworks to provide a level of common standards across the United Kingdom, and most recently of a UK internal market, will further increase the overlap between reserved and devolved competences and the potential for disagreement over the scope and boundaries of each.[81] This has led Hunt and others to argue for the need to enhance the 'shared rule' dimension of the model, and to strengthen and reform the mechanisms of intergovernment cooperation and political dispute resolution between the UK and devolved governments.[82] In response to the 'deactivation' of the significance of the legal recognition of the Sewel Convention, there have also been proposals to strengthen its effectiveness, such as creating an outright or a suspensive veto for the devolved parliaments (in the latter case, for example, the Westminster Parliament could overcome the veto after a year), or requiring a super-majority at Westminster to overrule their objections.[83] Similar proposals have been put forward by the Scottish and Welsh governments.[84] While all of these proposals would be extremely beneficial for the development of the current model, their impact would be further enhanced by increasing the access of devolved institutions to the courts, thus also contributing to the development of clarity and legal certainty in the interpretation of the devolution legal frameworks.

As a result, all the above seems to point to the need for a review of the current mechanisms for the resolution of conflicts of competences in the United Kingdom, and for the introduction of some form of procedure that would enable the devolved governments and parliaments to obtain a legal answer from the courts, and more specifically, from the Supreme Court, on

[80] Tierney, 'The territorial constitution' and Alan Page , 'Brexit, the Repatriation of Competences and the Future of the Union' (2017) 39 *Juridical Review* 38–47.

[81] Akash Paun, 'Common UK Frameworks after Brexit', SPICe Briefing, Scottish Parliament, 2 February 2018, https://sp-bpr-en-prod-cdnep.azureedge.net/published/2018/2/2/Common-UK-Frameworks-after-Brexit/SB%2018–09.pdf. Also 'Policy Paper. UK Internal Market', gov.uk, 16 July 2020, www.gov.uk/government/publications/uk-internal-market/uk-internal-market.

[82] Hunt, Chapter 1, this volume; Nicola McEwen, Michael Kenny, Jack Sheldon and Coree Brown Swan, 'Intergovernmental Relations in the UK: Time for a Radical Overhaul?' (2020) *The Political Quarterly* 632–40.

[83] Akash Paun, 'Saving the Union from Brexit will require bold thinking about the constitution', Institute for Government Blog, 13 September 2018, www.instituteforgovernment.org.uk/blog/saving-union-brexit-will-require-bold-thinking-about-constitution). Also Paul Reid, 'Time to Give the Sewel Convention Some (Political) Bite?', UK Constitutional Law Blog, 26 January 2017, https://ukconstitutionallaw.org/.

[84] Scottish Government, 'Strengthening the Sewel Convention' and Welsh Government, 'Reforming Our Union'.

the interpretation of the competence and related clauses in the devolution settlements. In the case of Scotland, such a mechanism could enable the Scottish and UK Law Officers to refer to the Supreme Court the question whether a bill or any provision of a bill introduced in the Westminster Parliament would make changes to the law in a devolved area of competence. In addition, the Supreme Court could also consider the issue of whether a bill would alter either the legislative competence of the Scottish Parliament or the executive competence of the Scottish government. The referral could take place as soon as the bill was introduced, and the disagreement on the competence question between the UK and Scottish governments was established. This would enable further negotiation and amendment if, in accordance with the Supreme Court's decision on the competence question, the bill or one of its provisions required devolved consent. It would also enable the activation of the different mechanisms that have been suggested to strengthen the functioning of Sewel Convention, for example within Westminster's own parliamentary procedure, should these be adopted. The analysis which the Supreme Court would be required to make of the disputed competence provisions in these cases would be very similar to the analysis it already carries out when considering challenges to devolved legislation under the current legal framework, and would provide not only an answer to the specific competence conflict, but also clear guidance on the interpretation of these provisions for the future.

A final point to highlight is that such a mechanism would not be completely new in the United Kingdom's constitutional framework. Indeed, a similar mechanism is included in s. 4 of the Human Rights Act 1998, which enables certain courts to make a declaration of incompatibility, when they consider that a provision of an Act of the Westminster Parliament is incompatible with a convention right. This declaration does not, as such, affect the validity of the Act and is therefore respectful of Westminster's parliamentary sovereignty. Similarly, in the case of the mechanism proposed in this chapter, the Supreme Court's declaration on the competence question would not be binding on the Westminster Parliament, as the legislation could still be enacted under its overarching competence to legislate across devolved matters. However, it would provide clarity and certainty regarding whether the legislation did indeed encroach on devolved competences, and in those cases where it did and consent under the Sewel Convention was not obtained, it would provide the symbolic recognition of the devolved government's grievances. More generally, the establishment of such a mechanism would also strengthen the Supreme Court's role as an arbiter between the UK government and the devolved

administrations in competence disputes, and as the final interpreter of the devolution settlements.

## CONCLUSIONS

In most federal or quasi-federal systems, courts play a fundamental role in resolving competence conflicts between both orders of government and in providing an independent and balanced interpretation of the constitutional provisions that provide the structure of the federal framework. In the United Kingdom's model of devolution, however, while the different devolution settlements confer the final decision on their competence provisions on the courts, the mechanisms that enable the courts to carry out their functions in this context present significant limitations from the perspective of the devolved governments and legislatures. The changes in the relationship between the UK and devolved governments that have followed the Brexit vote, and the complexity of the future articulation of the devolution competence frameworks that will result from the repatriation of competences from the EU indicate that potential disagreements between the two levels of government over the reserved/devolved boundary will become more common. Together with existing proposals to strengthen intergovernmental relations between the UK and devolved governments and the political mechanisms for ensuring respect for the distribution of competences, mechanisms for enabling access to the courts, and in particular the Supreme Court, must therefore also be considered.