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The Autonomy of Devolved Scotland

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Abstract

The paper explores the institutions and procedures by which the devolution settlement under the Scotland Act 1998 has delivered to Scotland the degree of autonomy it currently enjoys, including consideration of legislative and executive competences, funding arrangements and relationships between tiers of government.

Keywords

Law, public law, constitutional law, devolution, United Kingdom, Scotland.

THE AUTONOMY OF DEVOLVED SCOTLAND

Chris Himsworth

INTRODUCTION

This is a chapter about devolved government in Scotland but, because it is also a chapter written with comparative purposes in mind, its subject matter, though wholly based on Scotland and the United Kingdom, has been selected with a view to its comparative utility. There are, however, limits to comparative understanding in constitutional law. All analysis will depend on the context; and differences will always tend to outweigh similarities. This is especially true in situations where the use of law to secure constitutional autonomy is under scrutiny. Not only have the conditions of autonomy (operational or proposed) to be considered—and these will vary widely—but also the potential and actual contribution of the institutions and procedures of the law to creating and then sustaining autonomous government within a state. How far can the law make an autonomous contribution to autonomy?

When that question is posed, whether in relation to a single state or more generally and comparatively, a distinction will be drawn between those situations in which the political autonomy derives from the ‘settled will’ of both the people to whom autonomy is accorded and the people in the remainder of the state and, on the other hand, where the claim to autonomy remains contested. Whilst a check list of rules for autonomy in conditions of consensus is, all other things being equal, relatively easy to achieve and relatively transferable to similar situations elsewhere, the role of law and the scope for its autonomous contribution is much more fraught where the politics of autonomy are contested. Equally, however, most political situations will, to a degree, combine consensus and contestation and, on a ‘consensus-contestation’ continuum, Scotland probably takes its place at a mid-point on the scale. Devolution, as a continuing process, poses stark questions about Scotland’s constitutional future.

The contested nature of Scotland’s autonomy is reflected in what have been regarded as the diametrically opposed ambitions of those who have supported devolution. Some have been supporters because it appears to provide a step on the longer road to

ultimate secession and independence. Such ambitions have been reflected in the policies of the Scottish National Party ('SNP') Governments in Scotland since 2007 and their proposal for a referendum in support of the start of independence negotiations. On the other side are those who see devolution, through its potential for the accommodation and suppression of separatist tendencies, as a means of strengthening the United Kingdom. This was the intention of those who promoted the Scotland Act 1998; who set up a body to review devolution in 2008 (the Calman Commission¹); and are now promoting the current Scotland Bill in the UK Parliament.²

Scotland stands poised to make significant new decisions. In the longer term, however, the extent to which the opposing views on devolution may be destined eventually to converge on the common ground of a differently defined and much stronger autonomy for Scotland is a matter of some speculation. Scotland may be the future site for intriguing new institutional developments for autonomy within the United Kingdom and the European Union. And they may be of even wider relevance and application?

INTERNATIONAL FOUNDATIONS OF AUTONOMY

As will be explained below, the foundations of Scotland's autonomy lie almost exclusively within the United Kingdom itself. There are, it is true, international influences on the current working of autonomy in Scotland and in other parts³ of the United Kingdom such as the relationships forged between the Scottish Government⁴ (and Parliament) and other regional institutions within the European Union ('EU')⁵

¹ The Report of the Calman Commission ('Serving Scotland Better: Scotland and the United Kingdom in the 21st Century', 2009) provides a wealth of information and analysis of the current state of devolution in Scotland.

² The Bill contains a number of modest amendments to the 1998 Act

³ The division of the UK into geographically defined areas gives rise to problems of terminology. Sometimes legislation simply refers to 'parts'. Elsewhere the language of 'territories' (especially 'devolved territories') is used. 'Regions' often serves as a generic term but there is sensitivity in Wales and Scotland where 'region' is often thought to be demeaning and 'nation' preferred. But, of course, the use of 'nation' (or indeed 'country') can create ambiguities where confusion with the UK as a whole arises, unless 'state' (not a term used in the UK for a 'sub-state' entity) is adopted. Northern Ireland is sometimes referred to as a 'province' (and Wales as a 'principality').

⁴ The Scotland Act 1998 refers to the 'Scottish Executive' but for a long time now, and especially since the SNP came into power in 2007, the Scottish Executive has been informally known as the 'Scottish Government'. If the current Scotland Bill of 2010-11 is enacted, that will become the official term. Throughout this chapter, 'Scottish Government' is used.

⁵ See p 40 below.

and the impact of UK membership of the EU on the distribution of functions between the state and the regions.⁶ Scotland's membership of the civilian family of legal systems (as opposed to the common law family) also adds an international aspect.⁷ Nor were these influences wholly irrelevant to the emergence of Scotland-based institutions. In particular, the United Kingdom's division into economic planning regions (including Scotland, Wales, Northern Ireland and eight English regions) draws in part upon EU imperatives. European Parliament elections have been held on the basis of twelve UK regions, including Scotland (until 1999 with eight Scottish constituencies and then a single eight (and now only six) member Scottish constituency). Membership of the EU Committee of the Regions, although adjusted at the time of devolution in 1999, recognised Scotland as the 'region' from the start. The text of the new Treaty on the Functioning of the European Union contains a second Protocol on the principles of subsidiarity and proportionality which includes a limited obligation to consult 'regional parliaments with legislative powers'.

Two other influences, of perhaps greater foundational character, should be mentioned. Weakly influential has been the treaty regime of the Council of Europe. Distinct from the European Union, this Strasbourg-based 47 member body has, especially through its Congress of Local and Regional Authorities of Europe, maintained a high profile on the creation of local and regional democracy. Since 1985 the European Charter of Local Self-Government has articulated standards of local autonomy monitored by the Congress. There has not been an equivalent charter of regional autonomy, although the Council of Europe did adopt an advisory Reference Framework on Regional Democracy in 2009.

Completely different in its age and form of internationalism, there should also be mentioned the Treaty of Union between Scotland and England (and Wales) of 1707 under which was founded the United Kingdom of Great Britain.⁸ From 1603 the independent countries of Scotland and England shared a single monarchy but it was the union not only of the crowns but also of the two countries themselves and the

⁶ See p 17.

⁷ See p 35.

⁸ The United Kingdom of Great Britain and Ireland (subsequently Northern Ireland) was later established in 1801.

creation of a single Parliament from 1707 which not only created the new state but also contributed very substantially to establishing Scotland's special status within it.

LOCAL FOUNDATIONS OF AUTONOMY⁹

The prospect of an autonomous status for Scotland within the United Kingdom was constructed from the launch of the state itself in 1707. The Treaty of Union, whilst creating a single UK Parliament and the basis for a single UK government which became the institutions at the heart of a highly centralised state, sought to secure the independence of a separate system in Scotland of courts and private law,¹⁰ and of local government.¹¹ In due course, this produced a framework within which Scotland's domestic governance was conducted by a separate department of government—the Scottish Office established in 1885¹²—with a separate minister in the UK cabinet—a Secretary for Scotland from 1885 and a (higher-status) Secretary of State from 1925—and special Scottish procedures in the Westminster Parliament which led to a separate body of primary legislation covering most domestic Scottish affairs. From the late nineteenth century there was pressure to establish a parliament in Scotland and, by the time this ambition was achieved at the end of the twentieth century, the foundations of autonomy were very strong. Nor was this an autonomy confined to the institutions of government. As Professor Lindsay Paterson has shown in *The Autonomy of Modern Scotland*,¹³ the development of Scotland's autonomy in the 18th and 19th centuries drew on characteristics of its political management, organisation of local society with its distinctive sheriffs, parishes and burghs, patterns of economic development, the Presbyterian church and the 'moderate rationalism' of the enlightenment, the education system (both in schools and universities) and the legal system. These provided the basis for a distinctiveness of governmental organisation (especially the Scottish Office) and policy-making in the welfare state of the 20th century. Voluntary (non-governmental) organisations in Scotland (including

⁹ For fuller accounts, see TB Smith, *A Short Commentary on the Law of Scotland* (1962), JDB Mitchell, *Constitutional Law* (2nd ed, 1968), N MacCormick (ed), *The Scottish Debate* (1970). See also CMG Himsworth and CM O'Neill, *Scotland's Constitution: Law & Practice* (2nd ed, 2009) (hereafter *Himsworth and O'Neill*).

¹⁰ Arts XVIII and XIX.

¹¹ Art XXI (Royal Burghs).

¹² Prior to that, Scottish arrangements had diverged strongly, in their use (for example) of the Lord Advocate and sheriffs in central and local administration.

¹³ Edinburgh UP, 1994.

charities, political parties and arts organisations) tend to have a separate Scottish identity either as independent bodies or with an autonomous status within UK or GB organisations. Scotland's separate representation in international sport (in particular, rugby and football) is well-known.

Although some of Scotland's governmental and social differences have parallels in Wales and Northern Ireland, the distinctiveness of Scotland's legal system is more profound. Scotland joins Northern Ireland in being a separate 'jurisdiction' within the United Kingdom (the third being England and Wales), with a separate court structure (subject to civil appeals going to the UK Supreme Court - formerly the House of Lords¹⁴), separate legal professions and separate forms of legal education. On the other hand, Scotland is unique in the United Kingdom in its civilian origins and thus its modern hybrid or 'mixed' system combining civilian and Anglo-American 'common law' rules. Particularly distinctive is the robust (but much reformed) system of property law.

Whilst the principal focus of this paper has to be upon the recently established system of devolved government under the Scotland Act 1998, the pre-existing—and, indeed, continuing—autonomy which has developed over the 300 years since 1707 is an essential backdrop. The Act of 1998 was in no sense written on a blank sheet of paper, but has to be seen as a new chapter in a much longer story. The new institutions may or may not endure. As we shall see, the degree of autonomy which they secure has yet to be fully revealed. The longer term autonomy of Scotland within the 'union state' of the United Kingdom has, however, been an enduring phenomenon.

The coexistence of these two Scottish autonomies makes the concept of the 'purpose' of autonomy problematic. It is, in particular, difficult to speak now of the 'purpose' of the autonomy established since 1707. That autonomy has no strong ethnic, linguistic,¹⁵ or economic base but is nevertheless undoubtedly strongly represented in the governmental, social and legal characteristics already mentioned. It has provided the basis for the national identity of Scotland and, therefore, for the form of Scottish

¹⁴ See p 41 below.

¹⁵ Although the Gaelic and (southern) Scots languages are certainly both distinctive features. On the distinction between ethnicity and civic nationalism as the basis of separate identity, see eg S Tierney, *Constitutional Law and National Pluralism*, OUP, 2004, pp 36-37.

nationalism espoused by the SNP since its foundation in 1934. And there would be a general recognition that the autonomy of devolution since 1998 builds on and develops the earlier forms by providing a new directly-elected Scottish Parliament with broad legislative competences exercisable in Scotland and with the capacity to exert new forms of supervision and control over Scottish government. New competences and new accountabilities are provided by the new institutions.

As to the desirability of this new constitutional development from 1998, there are widely differing views which derive from different visions of the future of Scotland and different perceptions of the probable contribution of devolution. The different visions, as earlier explained, are distributed across those who see Scotland's future as an independent state, albeit within the European Union—broadly the view of the more fundamentalist wing of the Scottish National Party—and, on the other hand, those whose loyalty is to a continuing United Kingdom. That latter group includes, however, those of a federalist persuasion whose aim would be a stronger and constitutionally entrenched autonomy for Scotland and, on the other and, those UK unionists who are apprehensive of any such division of the state. Fundamentalist separatists resisted devolution as a distraction. Strong unionists resisted it as a threat. In the middle ground are the more pragmatically inclined nationalists who see devolution as a staging-post to much stronger autonomy or even to independence, federalists who also see devolution as progress towards their ultimate objective, and the more pragmatic unionists whose perception of devolution is as a concession to democratic pressures which is necessary to save the union itself rather than, in the memorable words of a high-profile Labour Party opponent of devolution, a 'motorway without exit to a destination that may not have been intended but is indistinguishable from a separate state'.¹⁶ The different political goals of the members of the broad coalition in favour of devolution¹⁷ and the different perceptions of the probable future effects of devolution contribute to the dynamic of devolution itself. There is, in any event, an acceptance that it is not in Wales alone that 'devolution is a process not an event'.¹⁸

¹⁶ Tam Dalyell MP, HC Debs 31 July 1997 col 486.

¹⁷ Including those members of the Conservative and Unionist Party whose natural predisposition might have been to resist devolution but who have benefited from the higher political profile in Scotland produced by the PR electoral system adopted for the Scottish Parliament.

¹⁸ The words of Ron Davies MP, former Secretary of State for Wales.

A more detailed discussion of the institutions of devolution follows in the next section of the paper but it is useful at this stage to provide a brief introduction to the UK constitutional context within which they have emerged. Four principal features should be mentioned:

The absence of a written constitution and the endurance of parliamentary sovereignty

The lack of a written constitution is not a merely trivial feature that distinguishes the United Kingdom from practically all other states world-wide. The absence of entrenched rules, with courts to enforce them, establishing and controlling all organs of state means that we cannot talk of a ‘constitution’ for the United Kingdom or indeed for its constituent parts in the same way that the term is used elsewhere. It may be that the European Communities Act 1972 which preceded UK accession to the European Community and, less strongly, the Human Rights Act 1998, have dented and, in some measure, contradicted Diceyan certainties. It is true that, in a recent English case,¹⁹ the court (Laws, LJ) wrote of a category of ‘constitutional statutes’ of higher status than ordinary Acts of Parliament. And, most importantly in a Scottish context, there has been a much longer-standing case for regarding the Treaty of 1707²⁰ as a partial written constitution for the United Kingdom²¹ arguably with consequences for the Westminster Parliament when making laws which contradict the terms of the Treaty and for the courts in reaction to such laws.²² Such considerations apart, however, the general principles of parliamentary sovereignty continue to have very important effects on the UK constitutional order and especially for constitutional reforms which are made, but can also be modified, overridden or undone, by the Westminster Parliament. As we shall see, this has important consequences for the devolution settlement itself.

The Blair Government’s constitutional reform project

¹⁹ *Thoburn v Sunderland City Council* [2003] QB 151.

²⁰ One of Laws, LJ’s ‘constitutional statutes’, along with *int al* the Scotland Act 1998.

²¹ *MacCormick v Lord Advocate* 1953 SC 396 and see D N MacCormick, ‘Does the United Kingdom have a Constitution?’ (1978) 29 NILQ 1.

²² See, for instance, N Walker and CMG Himsworth, ‘The Poll Tax and Fundamental Law’ 1991 JR 45.

Whatever the consequences of parliamentary sovereignty for constitutional reform, they did not stand in the way of the Blair Government, elected in 1997, producing a reform agenda which, on paper at least, was extraordinarily wide-ranging. Probably most significant has been the devolution programme discussed below. This was, however, joined by the project to ‘incorporate’ or ‘bring home’ the European Convention on Human Rights by the Human Rights Act 1998; the reform of the House of Lords which, though still far from complete, was started with the removal of most of the hereditary peers by the House of Lords Act 1999; the reform of official secrecy and access to official information by the Freedom of Information Act 2000²³ and the creation of a new UK Supreme Court from 2009.²⁴ It is evident that the devolution proposals have to be understood against this wider background of constitutional reform. Indeed, devolution interlocks at many points with the other reforms.

Asymmetric devolution in the United Kingdom

Within that general programme of constitutional reform lies the devolution programme and it is important to recognise that Scotland is only one project among many. Historically, this has not been unusual. In the 19th century, a primary emphasis on home rule for Ireland was joined by pressure for home rule for Scotland, Wales, Northern Ireland as well as for (the regions of) England. In 1973, the report of the (Kilbrandon) Royal Commission on the Constitution provided a substantial and comprehensive analysis of the then state of regional government across the United Kingdom, a survey of possible future frameworks including a federalist solution, and recommendations for different degrees of legislative and executive devolution. In 1978 Acts of Parliament were passed under which there would have been devolution to both Wales and Scotland²⁵ but these were aborted because insufficient popular support was demonstrated in referendums held in 1979.

²³ With the complementary Freedom of Information (Scotland) Act 2002 passed by the Scottish Parliament.

²⁴ Under the Constitutional Reform Act 2005.

²⁵ In Northern Ireland this was a period in which there were successive attempts to relaunch devolved government following the break-down of the Stormont system and the introduction of direct rule from 1972.

By 1997-98 the devolution project had extended more widely and the Blair Government introduced Bills leading to the Scotland Act 1998, the Government of Wales Act 1998, the Northern Ireland Act 1998 and the Greater London Authority Act 1999 together with proposals for the introduction of elected regional assemblies across the rest of England. Because of continuing difficulties in the Province, the Northern Ireland Act has only rather haltingly been implemented, and initial steps to introduce a prototype regional assembly in the north-east of England were derailed by an adverse referendum in November 2004. Thus the current asymmetric pattern of devolution across the United Kingdom is represented by the strong model of legislative devolution in Scotland, the initially weaker model of 'executive' devolution in Wales but, from May 2011, expanded to legislative devolution,²⁶ an even narrower model of regional government for Greater London, a delayed legislative model in Northern Ireland and a lack of any form of devolution to elected assemblies across England. Scotland's top place in this hierarchy derives from its historically stronger autonomous form of government, the electoral strength of the Scottish National Party and, in the period between 1979 and 1987, the well-organised preparatory work of the Campaign for a Scottish Parliament and the Scottish Constitutional Convention²⁷ producing a manifesto commitment to legislative devolution by the Labour Party in 1997. A convincing referendum result in Scotland in September 1997 in favour of both a Scottish Parliament and its tax-raising powers demolished lingering opposition in the Westminster Parliament and has been a continuing element in maintaining the Parliament's legitimacy.

Lack of constitutional review

As already indicated, the concept of parliamentary sovereignty continues to dominate British constitutional discourse and no more strongly than in its denial of a role for a constitutional or supreme court capable of invalidating or disallowing an Act of the Westminster Parliament, save in relation to EU law. This did not prevent, however,

²⁶ Proposals for the strengthening of devolution in Wales were made by the (Richard) Commission on the Powers and Electoral Arrangements of the National Assembly for Wales (March 2004). The UK Government published its own proposals as *Better Governance for Wales* Cm 6582 (2005) and this was followed by the Government of Wales Act 2006 which produced a two-stage transition to legislative devolution.

²⁷ An organisation broadly representative of political parties (though not the Conservatives or the SNP), trades unions, and churches.

the creation of new devolution-related powers for the Judicial Committee of the Privy Council (JCPC)²⁸ or the implementation in 2009 of proposals for a new UK Supreme Court to replace the appellate committee of the House of Lords.²⁹

THE INSTITUTIONS OF AUTONOMY³⁰

The Scotland Act 1998 created two principal institutions—the Scottish Parliament and the Scottish Government³¹—whose composition and relationship to each other broadly replicate the ‘Westminster model’ of parliamentary government but which were designed to depart in some measure from the institutions and relationships of the UK Parliament and government. The Scottish judicial system has been left substantially in place,³² but with modifications to reflect the transfer of responsibilities under the devolution settlement to the Parliament and Government and to provide (through new powers first for the Judicial Committee of the Privy Council and subsequently for the UK Supreme Court) for the resolution of ‘devolution issues’.³³ Local government was not reorganised in consequence of devolution³⁴ and nor were all the bodies which constitute ‘intermediate’ government in Scotland.³⁵

Turning briefly to the principal new institutions, the Parliament is a directly-elected, 129 member single-chambered body with a fixed four-year term.³⁶ Seventy-three MSPs are elected by single-member constituencies on the ‘first past the post’ system,

²⁸ See p 38 below. Those powers were subsequently transferred to the UK Supreme Court in 2009.

²⁹ See p 37 below.

³⁰ In this paper, a distinction is drawn between this section whose focus is ‘institutions’ and the next section on ‘methods’. Such a distinction probably comes under pressure in the analysis of any constitutional order but it is especially problematic in a UK context. The lack of a written constitution and the prevalence instead of a tradition of a ‘political constitution’ (see eg JAG Griffith. ‘The Political Constitution’ (1979) 42 MLR 1) means that distinctions between the constitutional or legal and political, between formal and informal are difficult to sustain.

³¹ As explained above, the Scotland Act 1998 refers to the ‘Scottish Executive’.

³² The Judiciary and Courts (Scotland) Act 2008, enacted by the Scottish Parliament contains many important provisions relating to judicial appointments and removals as well as courts administration.

³³ See p 30 below.

³⁴ The 32 councils created with effect from 1996 were retained. Since the Local Governance (Scotland) Act 2004, elections to authorities have used the STV voting system.

³⁵ But see cross-border public authorities, p 25 below.

³⁶ Subject to the exceptional possibility of an early dissolution if supported by a two-thirds majority of MSPs. It has been proposed (Fixed-term Parliaments Bill 2010-11) that the current Scottish Parliament elected in May 2011 should run through to 2016 to avoid Scottish and UK parliamentary elections coinciding in 2015.

with the other 56 elected on the (proportional) additional member system from eight regions. Already these rules provide a Parliament very different from Westminster, and with different consequences for executive-formation and parliament-executive relations. There is no doubt that the system of proportional representation was intended to deny any single political party an overall majority in the Parliament and indeed coalition governments (Labour with Liberal Democrat) were produced in 1999 and 2003 and these were followed in 2007 by a minority SNP Government. The general election of 2011, however, produced an overall majority for the SNP. The fixed term denies any equivalent of the existing UK prime ministerial power to call a general election at a time of his or her choosing.³⁷

Following a general election (or vacancy in the office), a First Minister is appointed by the Queen on the recommendation of the Parliament's Presiding Officer following a vote in the Parliament. Other ministers in the Scottish Government (known collectively as 'Scottish Ministers' for the purposes of the vesting of powers) are appointed by the Queen on the recommendation of the First Minister and the approval of the Parliament. These procedures broadly track those at the UK level, save that some rules which are merely 'conventional' in London are made explicit in the Scotland Act and are joined by the express rules for parliamentary approval of nominations. Also made explicit are rules requiring the resignation of the Scottish Government if there is a vote of no confidence in the Parliament.

These formal differences in the rules between Westminster and Holyrood (Edinburgh) derive from assumptions made by the Scottish Constitutional Convention that whilst, in the words of the UK Government's White Paper, the 'relationship between the Scottish Executive and the Scottish Parliament will be similar to the relationship between the UK Government and the UK Parliament',³⁸ there should nevertheless be a different relationship between Government and Parliament representing a 'new politics' further articulated in the report and recommendations of a broadly-based Consultative Steering Group (1998) whose work was influential in the framing of the Parliament's Standing Orders and has continued to provide bench-mark criteria of

³⁷ Although that UK prime ministerial power will end, temporarily at least, if the Fixed-term Parliaments Bill is passed.

³⁸ *Scotland's Parliament* (Cm 3658, 1997) para 2.6.

power-sharing, accountability, accessibility and equality of opportunity which have been points of reference for the Parliament in its early years.³⁹ Whether the aspiration of a less executively-dominated Parliament has been achieved will need to be assessed over a longer term but it is clear that the Government-Parliament relationship is one which affects not only the dynamic of Scottish democracy but also the Edinburgh-London relationship. A Scottish Government under pressure from London to conform with centralising measures has its room for manoeuvre restricted (or, alternatively, is better protected) by a strong Parliament whose inclination to conform may be less.

The starting point of any analysis of the overall relationship between the UK and Scottish institutions of government must be the essential formal vulnerability of the Scottish Parliament and Government which derives from the continuing legislative supremacy of the Westminster Parliament. The lack of a written constitution for the United Kingdom leaves that Parliament formally unconstrained in its power to adjust governmental relationships. Membership of the European Union may have created exceptional restrictions on Parliament's powers in those areas which the Union regulates but those do not include the governmental structure of member states. UK governments can use the legislative power of Parliament for constitutional restructuring but government and Parliament retain the freedom to modify or to undo the new arrangements. Parliament has the power to provide devolutionary structures but also the power to take them away. Devolution in Northern Ireland could be created in 1922 under the Government of Ireland Act 1920 but suspended by the Northern Ireland (Temporary Provisions) Act 1972. The arrangements now created by the Scotland Act 1998 could formally be modified or removed by a subsequent Act of Parliament.⁴⁰ Westminster can modify the powers of the Scottish Parliament or the Scottish Government by subsequent Act of Parliament⁴¹—in addition to which there are powers to make adjustments by ministerial order, provided that both the

³⁹ See, in particular, the report of the Parliament's Procedures Committee *The Founding Principles of the Scottish Parliament* SP Paper 818 (2003).

⁴⁰ The Scotland Act has indeed already been amended in (mainly) small ways. Perhaps the most significant has the amendment made by the Scottish Parliament (Constituencies) Act 2004 to retain the size of the Parliament at 129 MSPs rather than have that number reduced in line with the reduction (with effect from the UK general election of 2005) of the number of Scottish MPs at Westminster.

⁴¹ This has been done quite frequently. The current Scotland Bill already contains several new competences for the Scottish Parliament (as well as removing eg insolvency) and may be extended to include others.

Westminster and Scottish Parliaments consent.⁴² Furthermore, the Westminster Parliament retains, by virtue of its continuing legislative supremacy, complete constitutional power to legislate for Scotland not only in respect of reserved matters but also in respect of the matters formally devolved to the Scottish Parliament. This is a position expressly confirmed, perhaps only for the avoidance of doubt, in s 28(7) of the Scotland Act itself.

The flipside of these powers retained by the Westminster Parliament is a corresponding vulnerability of the Scottish Parliament. Just as the Government of Ireland Act 1920 was often referred to, during the Stormont years, as the ‘Constitution’ of Northern Ireland, so the Scotland Act 1998 can, reasonably and with meaning, be referred to as Scotland’s ‘Constitution’. In formal terms, however, it is a ‘Constitution’ whose provisions are expressly protected almost entirely⁴³ from adjustment by the Scottish Parliament itself. This affects not only the powers of the Parliament but also its procedures. Although the Scottish Parliament makes its own Standing Orders, much of the framework for the Parliament’s operations is handed down in the Scotland Act itself—a feature of the devolution arrangements which has attracted quite severe criticism within the Parliament.⁴⁴ This was also criticised by the Calman Commission and the current Scotland Bill contains provisions giving the Parliament greater discretion as to the appointment of Deputy Presiding Officers.

There is need for one other prefatory observation before the rules of inter-governmental relationships are explored. There is a potential complication, familiar in the exported federal versions of the Westminster model of government and also in the Stormont model in Northern Ireland, in the overlapping role of the monarch. The Queen is not directly described as the head of government in Scotland but, as with the UK government, it is she who formally appoints ministers and it is in her name that their powers are exercised. It is, however, to be assumed that convention demands that the Queen’s powers in relation to the devolved government of Scotland be exercised

⁴² Scotland Act ss 30(2), 63.

⁴³ Sched 4 to the Scotland Act permits the Scottish Parliament to make very limited amendments to the Act.

⁴⁴ See eg the report on *Founding Principles of the Scottish Parliament*, note 39 above.

on the advice of her Scottish ministers and not her UK ministers.⁴⁵ Specific provision is also made by the Scotland Act to enable, for the purposes of their several legal rights and liabilities and the freedom to conduct legal proceedings, the Crown to act in different capacities, whether ‘in right of Her Majesty’s Government in the United Kingdom’ or ‘in right of the Scottish Administration’.⁴⁶

Within that framework, there are a number of ways in which the UK government can intervene in the law-making and decision-making processes of the Scottish Parliament and Executive. These are formally designated in the Scotland Act and their limits defined. There are no overarching powers of veto exercisable by the UK government in relation to the devolved institutions. As to the Scottish Parliament’s law-making powers, however, there are two principal forms of intervention prescribed. The first is the power of the UK Attorney General⁴⁷ to refer the question of whether a Bill (which has been passed by the Parliament but before its submission by the Presiding Officer for Royal Assent) would be within competence to the UK Supreme Court.⁴⁸ Separately, however, there is a more political form of pre-Assent control⁴⁹ vested directly in the Secretary of State. It is described as a ‘power to intervene in certain cases’.⁵⁰ If a Bill contains provisions ‘(a) which the Secretary of State has reasonable grounds to believe would be incompatible with any international obligations⁵¹ or the interests of defence or national security, or (b) which make modifications of the law, as it applies to reserved matters which the Secretary of State has reasonable grounds to believe would have an adverse effect on the operation of the law as it applies to reserved matters’,⁵² the Secretary of State may make an order prohibiting the Presiding Officer from submitting the Bill for royal assent. This power (presumably judicially reviewable if it were abused) has also not yet been deployed by the UK

⁴⁵ Perhaps, though, there may be a future problem here in the retention of a single Privy Council for the making of Orders in Council.

⁴⁶ S 99. This is a position reflected in subsequent ‘Crown application’ provisions. See eg the (UK) Equality Act 2006 s 92; Reservoirs (Scotland) Act 2011 s 110.

⁴⁷ Or the Advocate General for Scotland, another UK law officer.

⁴⁸ See p 00 below.

⁴⁹ To enable consideration to be given to the possible exercise of these controls, the Parliament’s Presiding Officer is required not to submit Bills for Royal Assent within four weeks of their passing.

⁵⁰ Scotland Act s 35.

⁵¹ Defined by s 126(10) to exclude obligations to observe European Union Law or Convention (ECHR) rights which, in part, define the limits of the Parliament’s competence in the first place.

⁵² This power is to be understood with reference to the provisions of the Act which define the Parliament’s legislative competence. The Parliament is restrained from legislating in relation to ‘reserved matters’ but this might not prevent an ‘adverse effect’ on the law applicable to reserved matters.

government. Nor has a similar power available to the Secretary of State⁵³ to ‘prevent or require’ action by the Scottish Government (including the revocation of delegated legislation). On the other hand, certain less intrusive and more technical interventions have been made under powers available to the UK government to make provision considered to be ‘necessary or expedient’ in consequence of a provision made by or under an Act of the Scottish Parliament.⁵⁴

There are other ways too in which the powers of the Scottish Executive and the ways in which they may be used can be affected by UK ministerial intervention. One is in relation to EC law. Not only does UK membership of the EU affect the devolution settlements by enabling UK ministers to control the content of UK (including Scots) law in the areas of strong EC competence such as fisheries through their membership of the Council of Ministers but, as earlier mentioned, the power of UK Ministers as well as the Scottish Ministers to exercise powers of implementation under s 57(1) of the Scotland Act provides the opportunity for important UK-level interventions.

Quite separately, the Scotland Act arrangements for shared control of ‘cross-border public authorities’, even though not formally encroaching on the power of the Scottish Parliament to arrange things differently in the longer term, provide for a substantial level of central intrusion and an adjustment of the general model of devolved powers.⁵⁵

Essential ingredients of any system of autonomous government are the extent of the powers conferred, and the degree to which these powers are placed within the exclusive competence of the autonomous authorities. Also important may be the manner of the definition of these powers and thus, in the case of dispute, the way in which the limits of powers will be interpreted. The Scotland Act confers broad legislative powers on the Scottish Parliament which may, within the same range of competence, confer executive powers on the Scottish Government. In addition,

⁵³ Under s 58 of the Scotland Act.

⁵⁴ *Ibid* s 104.

⁵⁵ *Ibid.* ss. 88-90. See p 25 below.

executive powers previously exercised by UK government ministers within the same range⁵⁶ were transferred at the time of devolution to the Scottish Government.

The legislative competence of the Parliament is conferred as a general power to make laws subject to the exception of matters reserved to the Westminster Parliament.⁵⁷ The list of reserved matters is contained in Sched 5 to the Act and includes a series of ‘General Reservations’ in respect of the constitution, foreign affairs, defence, the civil service and some others and then a much longer list of ‘Specific Reservations’ which cover very broad ranges of financial matters (including fiscal and monetary policy), home affairs (including powers on drugs, elections, immigration, nationality and national security), trade and industry, energy, much of transport policy, social security, employment and others. These leave the Scottish Parliament free to legislate in a wide range of domestic policy areas relevant to Scotland including education (including universities), the health service, local government, police, prisons and (in most aspects) the judiciary and legal system. An important feature of the powers of the Scottish Parliament, however, is that they are formally unentrenched and, therefore, subject to modification by the Westminster Parliament.⁵⁸ The Scotland Act itself can be amended. In addition, however, the principle of the legislative supremacy of the Westminster Parliament ensures that the devolution of certain powers to the Scottish Parliament leaves Westminster formally free to legislate in those devolved areas as well. The way in which this formal vulnerability of the Scottish Parliament works in practice is considered below.⁵⁹

As mentioned, the devolution of powers to the Scottish Government broadly tracks the powers of the Parliament but with some extensions into areas not legislatively devolved. An important distinction between the two sets of powers, however, is that, in contrast with the Scottish Parliament’s powers which inevitably remain ‘shared’ with those of the Westminster Parliament, the Scottish Government’s powers are, save where there is specific provision to the contrary, exclusively conferred.⁶⁰

⁵⁶ Together with some others beyond the range of devolved competence, transferred by Order in Council (ministerial order) under s 63 of the Act.

⁵⁷ Ss 28-29.

⁵⁸ The Scotland Act itself makes provision for modification by Order in Council of the list of reserved matters with the consent of both Parliaments. See s 30(2).

⁵⁹ P 33.

⁶⁰ Certain powers *are* shared by virtue of s 56 of the Act and Orders made under s 63.

An overarching feature of the devolution of competences under the Scotland Act is the UK's membership of the European Union. This has two principal effects. The first is that, within their devolved areas, the *implementation* of EU law is a matter within the competence of the Scottish Parliament and, under powers conferred by the European Communities Act 1972 (as amended), the Scottish Government—in the latter case, a competence expressly shared with UK ministers.⁶¹ The second effect, however, derives from the reservation of international (including EU) relations to the UK Parliament and thus the negotiation of the content of new EU law, *including* law in areas devolved to the Scottish Parliament. Thus, subject to processes of consultation more informally established,⁶² this has the consequence of 'hollowing out' the Parliament's devolved powers in fields such as sea fishing, agriculture and the environment which are strongly regulated by Europe.

Participation in UK-level government

Aspects of the ways in which the Scottish institutions share in processes of government conducted at UK level have already been considered and there is further treatment (on eg 'devolved' legislation at Westminster and shared public bodies) in the next section. One feature which has been particularly contentious in the asymmetric pattern of British devolution is the issue neatly captured by the question posed originally by Tam Dalyell MP (formerly member for the Scottish West Lothian constituency) at the time of the debate leading to the Scotland Act 1978,⁶³ but which has a continuing relevance. As he put it, it was a question about why he, as a Westminster MP for a Scottish constituency, could legitimately be expected to participate in, or vote on, business in relation to Blackburn in Lancashire (England) but not in relation to Blackburn in West Lothian because that business would, for Scotland, be devolved (and has now been devolved by SA 1998) to the Scottish Parliament. Dalyell viewed this as a fatal flaw in any system of devolution constructed on an asymmetrical basis. Forcing the Westminster Parliament to be both a United Kingdom Parliament dealing with 'reserved' matters across the whole country and also an English (and Welsh) Parliament in relation to the matters

⁶¹ Scotland Act, s 57(1).

⁶² See p 00 below.

⁶³ T Dalyell, *Devolution: The End of Britain* (1977) pp 245-251.

devolved to Scotland (and Northern Ireland) created inevitable and unacceptable tensions—in particular the possible use by a United Kingdom government to secure legislation for England of a Commons majority dependent upon Scottish MPs. That was a position exacerbated by the ‘overrepresentation’ of Scotland in the House of Commons, a matter since addressed by legislation to reduce the number of Scottish constituencies from 72 to 58. Other ‘answers’ to the West Lothian Question have been proposed in terms of the adoption by Scottish MPs of a self-denying ordinance disabling them from voting on English matters or a more structured creation of a sort of ‘English Parliament’ within the Commons as a device to exclude Scottish MPs. Both would have been fraught with difficulties in the removal from UK Labour Governments prior to 2010 (a completely separate ‘English Government’ would be unthinkable within the overall Westminster model) of the Commons majority upon which their power and authority depended. Different considerations arise for the current Coalition Government but, more credibly, an ‘answer’ can be sought by regarding the ‘question’ as one which is a transient inconvenience on the road to a more fully developed, and perhaps less asymmetrical, system of devolution in which English regions play a much fuller part. In the meantime, any distress caused to Scottish MPs and any annoyance of English MPs can be assuaged by the recognition that an answer in terms of English regionalism could be made available to those who wish to take it up.

THE METHODS OF AUTONOMY⁶⁴

It has already been made clear that the formal rules of the Scotland Act 1998 which create the institutions of devolution and confer their powers tell only a part of the story of Scotland’s new autonomy. For a fuller understanding, we have to take account of some further rules provided by or under the Scotland Act itself together with the emerging practices of co-operation between the UK and Scottish institutions. In considering these, we have to keep in mind the longer-standing tradition of Scottish autonomy since 1707 within what has been a highly centralised UK state which has

⁶⁴ For an early review of intergovernmental relationships, see ‘Devolution: Inter-Institutional Relations in the United Kingdom’ *Report of the House of Lords Select Committee on the Constitution* (HL Paper 28 (2002-03) (hereafter *Inter-Institutional Relations*). The Calman Report contained an important further review. See also the 4th Report of the (House of Commons) Scottish Affairs Committee HC 256 (2010-11).

only recently launched its new programme of asymmetric devolution. UK-Scotland relations are accommodated within a pattern of other central/regional relationships, in which the continuing domination of the UK (and, within that, England whose population of 60m far exceeds that of Scotland (5m), Wales (2.9m) and Northern Ireland (1.7m) combined) looms large. And of the highest importance so far has been the patterns of political organisation and control across the United Kingdom. With the exception of Northern Ireland, the nationally organised parties (Labour, Conservative and Liberal Democrat) dominate politics in all parts of the country, with supplementation in Scotland and Wales by nationalist parties—the Scottish National Party and Plaid Cymru respectively. Furthermore, for the early years (up to 2007) of the devolution experiment, the Labour Party held power at the UK level and (in Scotland in coalition with the Liberal Democrats and in Wales in coalition for much of the time) also in the devolved administrations. In the emergence of inter-governmental relationships sought to be based on ‘partnerships’, these party political cohesions were of undoubted significance and it was one of the most clichéd speculations of the early years of devolution to wonder what would become of devolution if at some point the political consensus broke down and the possibility of a series of rather more contentious relationships arose. In the event, when the SNP Government was installed in Edinburgh from 2007, its own minority status combined with an unwillingness to rock the boat but instead a wish to appear diplomatic and effective meant that apparently civil working relations endured. The period of majority SNP Government from 2011 may perhaps bring more turbulent conditions.

The following aspects of the working of autonomy will be considered:

1. The financing of Scottish devolution
2. A shared civil service
3. Shared public bodies
4. Dispute resolution
5. Relations between Parliaments and Governments: The Memorandum of Understanding and Concordats
6. Legislation at Westminster on devolved matters and the Sewel Convention
7. Devolution and the autonomy of Scotland’s legal system

8. Relations between Scottish devolved institutions and others in the United Kingdom and the European Union
9. Outcomes: Has devolution made a difference?

1. The financing of Scottish devolution

In the analysis of all systems of decentralised government great weight is unavoidably attached to financial relationships and of importance to the understanding of the practice of devolved government in Scotland has been the near-complete financial dependence of the Scottish Government on the UK Government. There is a potential for limited flexibility deriving from the Scottish Parliament's (and Government's) control over the *local* taxation system⁶⁵ producing the possibility of shifting some of the Government's financial burden on to the local taxpayer. There is also the limited opportunity for charging for services provided. But, otherwise, the Scottish Government has been almost entirely dependent upon grants from the UK government. The Secretary of State is empowered by the Scotland Act to make such payments into the Scottish Consolidated Fund as he may determine.⁶⁶ In the absence of any general power of taxation (because all legislative power in relation to taxation, with the exception of legislation as to local taxation just mentioned, is reserved to Westminster) the Scottish Parliament has enjoyed virtually no financial autonomy. The reservation of energy resources means that Scotland is not the exclusive beneficiary of the undersea oil which (for a while at least) lies under Scottish waters off the United Kingdom. Another constraint has been that the Scottish Government has no general power to borrow.

It is true that the Parliament has had available a 'tax-varying power' which would enable it to vary—up or down—the basic rate of income tax payable by Scottish taxpayers by as much as 3p and which, as an accountability safety valve, is of some constitutional significance. It has been, however, of no practical significance because successive governments in Scotland have committed themselves to refraining from its use. This the Coalition Governments did in their partnership agreements of 1999 and

⁶⁵ *Ibid.* Sched. 5, Pt II, S.A1.

⁶⁶ S 64(2).

2003 and, after 2007, the SNP Government also wished to avoid imposing higher taxes and maintained the same stance.⁶⁷

The effects of the resulting dependence on UK government grants have been moderated by the system of distribution based on the ‘Barnett formula’ which regulated the funding of Scotland, Wales and Northern Ireland by reference to spending levels in England, since the late 1970s. The formula has been important both for the relative stability which it provided and also the relative generosity with which Scotland was treated.⁶⁸ It has also to be noted that, in contrast with some devolved governments elsewhere, the Scottish Government does receive a ‘block’ grant, without specification of particular levels of expenditure on the different services it provides. The lack of transparency and impartiality in the determination of amounts of grant payable to Scotland and the other territories has, however, been questioned. One change which might have been introduced at the time of devolution was some form of independent board or commission to oversee the process of grant distribution.⁶⁹ In a constitutional environment which has become similar to that in federal countries, there would be an advantage in having such an independent body to make recommendations for grant distribution according to relatively objective economic criteria rather than leaving distribution to the hidden judgment of politicians. Disputes between different parts of the United Kingdom might be lessened as a result.

It is also true that, whether or not because of the lack of an independent grants commission, disputes have arisen.⁷⁰ On the one hand, it is argued by some in Scotland that the distribution formula which once favoured Scotland because it deliberately recognised its greater funding needs now discriminates against Scotland because the formula for *amending* levels of expenditure operates, as was intended (or was, at least, wholly predictable), to reduce differentials between territories and thus to leave Scotland without the advantage it once had. There is a ‘Barnett squeeze’ on Scottish

⁶⁷ There was an interesting squabble in Nov 2010 over whether the Government had, in fact, allowed the opportunity ever to impose the marginally higher level of tax in Scotland to lapse because of a failure to fund the Treasury mechanism to enable its imposition. Following criticism for the Scottish Parliament’s Finance Committee, the Treasury was asked to revive the mechanism in Feb 2011.

⁶⁸ See *Himsworth and O’Neill*, ch 10.

⁶⁹ See Constitution Unit *Scotland’s Parliament: Fundamentals for a New Scotland Act* (1996), ch 5; and *Inter-Institutional Relations* paras 102 and 107.

⁷⁰ Nicely documented in the memorandum by I MacLean published as evidence to the HL Committee on the Constitution (*Inter-Institutional Relations*).

expenditure which arguably should be remedied by a new needs assessment which would find in favour of a greater allocation to Scotland in future. There has been, on the other hand, an argument mainly associated with London and the north-east of England to the effect that some at least of the English regions are already being *underfunded* in comparison with Scotland. Poignant comparisons have been drawn between the funding of schools in Northumbria and the Scottish Borders.⁷¹ There have similar complaints from Wales about the unfair ways in which the Barnett formula can work.⁷²

In the light of both the complaints about the current system of funding and the core relevance of funding generally to the operation of devolution, it is not surprising that these issues have recently loomed large in the discussion and report of the Calman Commission and are now at the heart of the debate about the Scotland Bill currently before the UK Parliament. In brief, Calman (with the help of an independent expert group) articulated a group of principles which should inform the funding of devolved government (identifying these as equity, autonomy, accountability, stability/predictability, simplicity/transparency and efficiency) and then, having considered various available options including a review of overseas models, made a number of recommendations. The principal proposal was to replace the Scottish Parliament's power to make marginal variations in the rate of income tax with a new power to determine a Scottish rate of income tax. To enable that to happen, the general (UK determined) rate of income tax should be reduced by 10 pence in the pound and the block grant would be reduced by an equivalent amount. In addition to transferring that enhanced tax-raising decision-making to the Scottish Government and Parliament, a number of other taxes should be transferred, including stamp duty land tax, the aggregates levy and the landfill tax. There should also be a strengthening of inter-governmental arrangements for dealing with finance and additional borrowing powers should be created.

In very large measure, the Calman recommendations were adopted by the UK Government and have been incorporated into the current Scotland Bill. The financial provisions in the Bill were, however, a principal focus for the Committee of the

⁷¹ *Inter-Institutional Relations* para 3.2.

⁷² See the report of the Independent Commission on Funding and Finance for Wales (Holtham) 2010.

Scottish Parliament which scrutinised the Bill⁷³ and it provided a forum for a bitter dispute between the SNP Government seeking much greater fiscal autonomy and the unionist majority on the Committee. But now, since the Scottish general election of May 2011, the financial debate has taken on a different tone. The new majority SNP Government has increased its demands for greater financial powers and is seeking, in particular, a power to determine the rate of corporation tax in Scotland and increased borrowing powers.⁷⁴

2. A shared civil service

The report of the (Kilbrandon) Royal Commission on the Constitution in 1973 expressed the view that the only way in which Scottish devolved government could operate autonomously would be, as had happened during the period of the devolved Northern Ireland Parliament at Stormont (1922-72),⁷⁵ with its own, separate civil service.⁷⁶ This might indeed appear to be a desirable feature of a devolved government where the loyalty of its own civil service to its own ministers and confidentiality of operation within that service would be necessary to protect its interests, especially in circumstances of antagonistic relations with the London Government. At all events, a separate civil service was denied by the Scotland Act which provides that the civil service is a reserved matter and that civil servants in the Scottish Administration are members of the general UK home civil service.⁷⁷ The general rules of the UK civil service,⁷⁸ including the *Civil Service Management Code* and the *Civil Service Code*,⁷⁹ therefore extend to the staff of the Scottish Administration, but the appointment function is delegated to the Scottish Ministers,

⁷³ See below (p00) for the Sewel Convention. See too the report on the Bill by the Scottish Affairs Committee of the House of Commons – 4th Report (HC775, 2010-11).

⁷⁴ See the First Minister's speech to the Scottish Parliament on 26 May 2011.

⁷⁵ There has indeed continued to be a separate civil service in Northern Ireland (a successor to the pre-1922 Irish civil service) since 1972.

⁷⁶ Cmnd 5460 (1973) paras. 807 and 1146.

⁷⁷ Scotland Act, Sched 5 Pt I para 8 and s. 51.

⁷⁸ Until recently, these were largely non statutory but Ch 1 of the Constitutional Reform and Governance Act 2010 has placed the government of the civil service on a statutory basis.

⁷⁹ Both reissued in November 2010 to reflect their new statutory status and, as before, in slightly different Scottish editions.

and they also exercise many management functions, as UK departments do.⁸⁰ It was the view of the House of Lords Select Committee on the Constitution that, despite the single framework for the civil service, the Scottish Government had ‘considerable room for manoeuvre in developing staffing policies and arrangements that are appropriate to their local needs’.⁸¹ This was a position broadly confirmed by John Elvidge, Permanent Secretary in the Scottish Government, in written evidence to the Finance Committee of the Scottish Parliament where he wrote of the Scottish Government having ‘considerable autonomy within a broad framework of values and systems covering the UK civil service as a whole. This autonomy is formally vested in the First Minister in accordance with the Civil Service (Management Functions) Act 1992 as extended by section 51 (4) of the Scotland Act 1998. This enables me and my senior colleagues, working with the First Minister and his Ministerial colleagues, to shape a distinctive civil service culture and set of behaviours which match the ethos of devolution.’⁸²

Whilst the autonomy of the Scottish Government (both ministers and officials) to mould its own ‘distinctive civil service culture’ is doubtless of importance, another civil service consideration is the impact of the retained combined civil service across Great Britain on intergovernmental relations.⁸³ This arrangement may itself contribute *inter alia* to the maintenance of a guarantee of civil service impartiality, recruitment from a broader internal pool, opportunities for staff exchanges and linkages and a common ‘brand’ recognised within and beyond the services. These were all benefits recognised by the House of Lords Constitution Committee and these were seen to contribute to the possibility of close working and flows of information between civil servants at the devolved and UK levels. All of this suits the ‘partnership’ and ‘joint working’ models of intergovernmental relations under the devolution settlement and it is unsurprising that the Calman Commission favoured this approach and recommended the continued operation of a combined civil service, with limited additional autonomy for the Scottish civil service and improved training in the

⁸⁰ SA 1998, s 51(1) and (5), extending powers under the Civil Service (Management Functions) Act 1992.

⁸¹ 2nd Report (2002-03) (HL Paper 28) para 151.

⁸² Evidence to the Finance Committee meeting of 25 January 2005. Examples of the autonomy claimed by the Government included differential pay grading structures, promotion arrangements, tackling low pay and external recruitment.

⁸³ See generally at pp 00 below.

working of devolution for UK civil servants.⁸⁴ It appears that the combined service has accommodated the arrival of the SNP Government in 2007 but there must now be a question about how well it will perform if a higher degree of Scottish Government autonomy comes to be asserted by the new majority SNP administration and if conditions of political antagonism between the two levels of government develop.

3. Shared public bodies

As in many other states, it has for many years been a characteristic of governmental arrangements in the United Kingdom that much executive authority (and also many advisory functions) have not been exercised directly by the ministers and civil servants of the central departments but have been in the hands of arms-length non-departmental public bodies (NDPBs) or quangos and the handling of these NDPBs under the devolution settlement created, from the start, some of the more acute borderline issues. And these have continued. The questions involved do not necessarily have the high political profile of those affecting ministerial powers, but are nevertheless illustrative of the impact of devolution on the rich texture of public administration as a whole.

As one would expect, the broad policy aim of the Scotland Act was to distinguish between public authorities which had, at the time of devolution, any responsibilities for Scottish matters along the same general lines adopted by the Act for distinguishing devolved from reserved matters. Some bodies required no special attention under the Act because they fell entirely on the devolved side of the line. The legislation under which they had been created⁸⁵ would be entirely at the disposal of the Scottish Parliament to amend or repeal. Similarly, any administrative powers formerly exercised by the Secretary of State in relation to such bodies were transferred to the Scottish Ministers. Since 1999, the Scottish Parliament has created new bodies (such as national park authorities;⁸⁶ the Scottish Commission for the Regulation of Care⁸⁷)

⁸⁴ Paras 4.38-4.41; recommendations 4.201-203.

⁸⁵ Some public bodies are non-statutory in origin.

⁸⁶ National Parks (Scotland) Act 2000.

⁸⁷ Regulation of Care (Scotland) Act 2001. From 2011, that Commission has been replaced by Social Care and Social Work Improvement Scotland and Healthcare Improvement Scotland – both products of the Public Services Reform (Scotland) Act 2010 which also prepared the way for many further reforms.

and terminated others (such as Scottish Homes⁸⁸) within this completely devolved domain.⁸⁹ At the other end of the scale, it was clear that the reservations under Schedule 5 to the Act left some public bodies with Scottish responsibilities entirely beyond the legislative competence of the Scottish Parliament. One example here is the Commission for Equality and Human Rights which has replaced⁹⁰ the Equal Opportunities Commission and the Commission for Racial Equality.⁹¹

This apparently simple dichotomy could not, however, be maintained. It had to be qualified in three principal ways:

1. In the first place, there was the need for a category of authorities whose responsibilities were confined to Scotland but which had ‘mixed functions’. These were bodies which one might have supposed to be within the devolved sector but which included among their portfolios functions for which legislative responsibility was reserved to Westminster. The most prominent examples were Scottish local authorities. There is, of course, no general reservation of local government by the Scotland Act but local authorities do have some powers in relation to, for example, consumer protection which are outside the competence of the Scottish Parliament. Although local authorities become defined as bodies with mixed responsibilities, they fall almost entirely within the competence of the Scottish Parliament and the Scottish Ministers except that the Scotland Act places restrictions on the Parliament’s power to confer or remove local authority functions which relate to reserved matters.⁹²
2. In relation to the ‘reserved’ public bodies, whilst legislative power remains at Westminster, it has been possible for certain executive powers to be transferred to the Scottish Ministers or to be made exercisable subject to consultation with the Scottish Ministers by Orders in Council under s 63 of the Scotland Act—for instance appointments to the Equality Commission (above).

⁸⁸ Housing (Scotland) Act 2001.

⁸⁹ See also the recent creation of the Electoral Management Board for Scotland and the Housing Regulator.

⁹⁰ Equality Act 2006.

⁹¹ These are reservations reinforced by Part III, para 3 of Sched. 5.

⁹² Sched 5, Pt III, para 1.

3. Most prominently, the Scotland Act also created the ‘cross-border public authority’ (CBPA). The point here was to make special provision for those bodies which could be identified as crossing the devolved/reserved divide *either* because they exercised powers both in Scotland and (in a territorial ‘cross-border’ sense) in other parts of Great Britain or the United Kingdom *or* because, whilst confined to Scotland, they exercised powers which were both devolved and reserved *or* because they had both these ‘cross-border’ characteristics. In relation to all these bodies, the legislative competence of the Scottish Parliament in respect of their operations which are both Scottish and within the non-reserved sectors remains entirely in place. This is specifically acknowledged in the Act, quite apart from the general provisions which determine the competence of the Parliament, in s 90 which provides for the consequential transfer of property and liabilities if the Parliament legislates for the functions of a CBPA to be no longer exercisable in respect of Scotland. In the meantime, however, the designation of CBPAs was intended to recognise that the responsibilities of ministers (for instance, in relation to appointments to the authorities, their funding and the issue of policy directions) and also the rights of the Parliaments (to receive reports on their functioning) have to be shared in a rational manner. This is achieved partly in the terms of the Scotland Act itself and partly in designation orders and adaptation orders made by the Secretary of State.⁹³ Such provision has been made (both to designate the bodies and to adapt functions) across a wide range of public bodies.

Against this background, it is possible to consider the ways in which subsequent statutory provision at Westminster has affected and may continue to affect the position of shared public bodies—not only in relation to Scotland but also in relation to other parts of the United Kingdom.⁹⁴ Although it may be necessary for some purposes to take full account of the extent to which provision for a new public body impinges on the competence of devolved bodies (above all, perhaps, to determine the

⁹³ Ss 88, 89. Such orders require approval by affirmative resolution both at Westminster and at Holyrood.

⁹⁴ A special category of public bodies affected by devolution is that of the administrative tribunal. See below note 00.

appropriate extent of a Sewel motion⁹⁵) and this will be a guide in framing the substantive terms of a Bill, the considerations to be taken into account in the setting up of a new public body will be common to most types of body with a multi-territorial jurisdiction, regardless of their status on the reserved/devolved scale. These considerations may be fairly simply stated although, in ways which will be touched on below, the provision of answers has been one of the most problematic areas of post-devolution legislation. The issues for consideration include the territorial scope of the new body, its powers and any continuing rights and liabilities, rules as to appointments including required consultation of interests, and arrangements for scrutiny by auditors, ombudsmen and parliaments.

The parliamentary handling of Bills establishing new cross-border bodies, as well as technical aspects of the Bills themselves, have been of some interest. Most prominent has been the Bill which became the Health Protection Agency Act 2004 which established the new Agency with powers exercisable across the United Kingdom.⁹⁶ Its functions can be divided broadly into two groups: health functions in relation to protection from infectious diseases, and radiation protection functions. Because this produces a combination of both functions mainly devolved to the territorial administrations and reserved functions, special provision has to be made in various respects. Appointments to the Agency are shared between the devolved administrations in Scotland, Wales and Northern Ireland and the Secretary of State.⁹⁷ The Agency is to be a CBPA under the Scotland Act,⁹⁸ but only for the purposes of two provisions of that Act.⁹⁹ The three devolved administrations may make payments (as they think appropriate) to the Agency, as may the Secretary of State (who must

⁹⁵ See p 33 below.

⁹⁶ The Health and Social Care (Community Health and Standards) Act 2003 also raised similar questions in its establishment of the Commission for Healthcare, Audit and Inspection (CHAI) and the Commission for Social Care Inspection (CSCI), although these are mainly confined to England and Wales. It has been announced that the Health Protection Agency is to close down shortly. The Agency remains, however, a nice illustration of the complexity of devolved practice.

⁹⁷ Sched 1, para 1.

⁹⁸ *Ibid* para 6.

⁹⁹ S 23(2)(b) (Scottish Parliament requiring persons to give evidence); and s 70(6) (Scottish Parliament not to require preparation of accounts).

take account of payments made by the other governments).¹⁰⁰ And the accountability of the Agency to ombudsmen and to auditors has had to be redistributed.¹⁰¹

The Bill which led to the Children Act 2004 raised a range of different issues in the proposals it contained for the creation of a new Children's Commissioner. With Commissioners already in place in Wales, Scotland and Northern Ireland, the principal question was how far the new Commissioner should be a Children's Commissioner for England or a Commissioner for the United Kingdom. Should the new Commissioner simply join those in the devolved areas, with a similar jurisdiction for the 'devolved' interests of children in England, as they have elsewhere? Or should the Commissioner combine those responsibilities for England with responsibilities in the 'non-devolved' fields across the United Kingdom as a whole? This principal question was further complicated in debate about what should be the proper field of competence of the Commissioner. The Government's preference was for a UK Commissioner with a largely strategic policy role whilst many parliamentarians favoured a much more 'rights-based' approach with a focus on the investigation of individual complaints. That latter question can be put on one side, however, as one which does not directly raise an issue of legislation for devolution, although it should be noted in passing that the existence and operation in practice of rights-based Commissioners in the devolved territories, especially Wales, made it easier to oppose the Government's proposals.

4. Dispute resolution

This is probably the area in which the conditions of relative political harmony between the two levels of government have most affected working relationships. As mentioned below,¹⁰² emphasis has been placed on achieving a relationship designed to prevent significant public disagreement or disputes. A combination of a wish to avoid conflict and procedures to achieve this has meant that there has been no devolution-related hostile litigation between governments. If the situation does ever arise in

¹⁰⁰ *Ibid* para 19. cf controversy at report stage in the House of Lords in relation to these provisions: HL Debs 6 April 2004 col 1737.

¹⁰¹ *Ibid* Sched 3, paras 1, 18; Sched 1, para 23.

¹⁰² P 31.

which the UK government needs to challenge directly¹⁰³ the validity of an ASP or of an act or decision of the Scottish Government, it may be assumed that this issue would be raised in judicial review proceedings in the ordinary courts. The same would apply if the Scottish Government wished to challenge the validity of hostile action taken or threatened by a UK minister.

Although these options for judicial challenge are not directly addressed by the Scotland Act itself, what the Act does provide is special procedures applicable to what the Act defines as ‘devolution issues’. These include questions raised in any legal proceedings as to whether an ASP is within the legislative competence of the Parliament or whether acts and decisions of the Scottish Ministers are within devolved competence.¹⁰⁴ A devolution issue must be brought to the attention of relevant law officers, enabling them to participate in the proceedings. Separately, a law officer (eg the (UK) Attorney General) may initiate proceedings for the determination of a devolution issue, including a power to direct it straight to the UK Supreme Court.

It has been a feature of the operation of devolution so far that, although there have been many ‘devolution issues’ raised in the context of human rights challenges in criminal trials (because of the involvement of the Lord Advocate—a member of the Scottish Government—as prosecutor¹⁰⁵) and a handful of other challenges on Convention rights and EU grounds to Scottish Government decisions and ASPs,¹⁰⁶ there has been very little activity at all on the reserved/devolved borderline.¹⁰⁷ Most prominent has been *Martin v HMA*¹⁰⁸ which raised, in the context of road traffic legislation, very complex issues about the relationship between Schedules 4 and 5 to the SA 1998. It was a case which found the two Scottish judges in the Supreme Court bitterly opposed on the validity of the ASP at issue.¹⁰⁹ There is a continuing uncertainty, however, as to the general interpretative approach to be taken by courts

¹⁰³ The UK Government has already intervened in proceedings initiated by others. See eg *Martin v HMA* 2010 SC(UKSC) 40; *AXA General Insurance Ltd, Petitioners* 2011 SLT 439.

¹⁰⁴ Scotland Act s 98 and Sched 6.

¹⁰⁵ See p 00 below.

¹⁰⁶ ASP challenges have included, most prominently, cases involving anti-hunting legislation. See eg *Adams v Scottish Ministers* 2004 SC 665.

¹⁰⁷ In *Al Fayed v. Lord Advocate* 2004 S.C. 568; 2004 SLT 319 one of the reasons for the rejection of the petition seeking a fatal accident inquiry was that an inquiry into a foreign death was not within the competence of the Lord Advocate but was a reserved matter. See paras. 29-30.

¹⁰⁸ 2010 SC (UKSC) 40. See also *Imperial Tobacco Ltd, Petitioner* 2010 SLT 1203.

¹⁰⁹ See C. Himsworth, ‘Nothing Special about That’ (2010) 14 Edin LR 487. And see p 00 below.

where measures taken by the Scottish Parliament or Government appear to straddle the reserved/devolved borderline. Section 29(3) of the Act places some emphasis on a test of ‘purpose’ but the *Martin* case has left doubts about how that test should be applied. There are also continuing questions as to how far the courts will tend, where possible, to defer to the judgment on *vires* of the Parliament or Government. What presumptions of legality will they bring to the exercise? In the case of the Parliament, how far it is to be treated differently, because of its parliamentary status, or on the other hand, in the same way as other statutorily created bodies? To an extent, the courts may be assisted by s 101 of the Scotland Act which requires that where an ASP (or subordinate legislation) *could* be read as outside competence it should nevertheless be ‘read as narrowly as is required for it to be within competence, if such a reading is possible’! A revealing area has been the extent to which the courts regard the Scottish Parliament as reviewable on the ordinary ‘common law’ grounds such as ‘irrationality’. Initially, it seemed that such review should not, in principle, be available¹¹⁰ but then that position was reversed¹¹¹ only to be followed by a more restrictive view on appeal to the Inner House of the Court of Session.¹¹² The view of the UK Supreme Court is awaited.¹¹³

5. Relations between Parliaments and Governments: the Memorandum of Understanding and Concordats¹¹⁴

It has been an important feature of the operation of the UK arrangements for regional autonomy that, alongside the mechanisms put in place for the formal resolution of disputes, especially over competence issues, there has also been a reliance on informal methods. Thus, whilst the court-based features just described may be the principal formal determinants of the relationship between the Scottish and UK governments, a significant investment has also been placed by the UK government in the creation of departmental ‘concordats’ under an overarching ‘Memorandum of Understanding’.¹¹⁵

¹¹⁰ *Adams v Scottish Ministers* 2003 SLT 366.

¹¹¹ *AXA General Insurance Ltd, Petitioners* 2010 SLT 179.

¹¹² *AXA General Insurance Ltd, Petitioners* 2011 SLT 439.

¹¹³ *AXA* was heard by the Supreme Court on 13-15 June 2011.

¹¹⁴ Part 4 of the Calman report placed great emphasis on the need for the strengthening of cooperation between the Scottish and UK Governments and Parliaments.

¹¹⁵ Cm 4444 (1999), subsequently reissued as Cm 4806 (2000) and Cm 5240 (2001).

The Memorandum of Understanding contained the main principles of cooperation and the general arrangements. A series of supplementary agreements established a Joint Ministerial Committee¹¹⁶ and formulated a general concordat on European Union Policy Issues and others on financial assistance to industry, on international relations and on the shared use of statistics. These are joined by bilateral agreements between the Scottish Government (and the other devolved administrations) and the different UK departments, designed to ensure that, on matters of mutual concern—for instance proposed legislation in common areas of interest—there will be consultation and a degree of confidentiality of communication. The concordats are expressly stated to be not binding in law but in honour only. At a meeting in March 2010 a meeting of the Joint Ministerial Committee adopted a Protocol for Avoidance and Resolution of Disputes.

The concordats have been supplemented by a number of Devolution Guidance Notes (issued successively by the Office of the Deputy Prime Minister, the Department for Constitutional Affairs, the Ministry of Justice and now the Cabinet Office) which contain procedural guidelines on the handling of many aspects of the devolutionary relationships. Different views have been expressed on the overall constitutional and political significance of the concordats.¹¹⁷ Whilst acknowledging that there might be a case for giving the concordats a more formal status, especially if they are to withstand the greater pressures of a markedly different political complexion of the parties at some future point, the House of Lords Constitution Committee has also had to take account of the view that the process of their making in the first place was more important than their operation in practice.¹¹⁸ Despite the rhetoric of the desirability of harmonious relations, it is certainly true that one effect of the concordats between ‘partners’ of such differing power and influence may be to constrain further the autonomy of the weaker (devolved) party. What the concordat regime does, at least, reflect is the overall political character of the relationship between the two tiers of government and it will be particularly interesting to see what the effect will be upon

¹¹⁶ For a time, the Committee was dormant. See A Trench, ‘Devolution: the withering away of the Joint Ministerial Committee?’ [2004] PL 513. Latterly, however, activity has been revived and a number of meetings have been held. A significant wide-ranging meeting was held on 8 June 2010, with a re-commitment to a ‘respect’ agenda and to future meetings.

¹¹⁷ See *Himsworth and O’Neill*, pp. 188-193.

¹¹⁸ *Devolution: Inter-Institutional Relations in the United Kingdom* (2002-03) HL Paper 28, para. 40.

the concordats of an earlier era of the SNP majority Government in Edinburgh. The underpinning assumptions of cooperation may cease to apply.

6. Legislation at Westminster on devolved matters and the Sewel Convention

It was earlier noted, as one of the formal rules of the devolution settlement, that one of the consequences of the continuing legislative supremacy of the Westminster Parliament is that that Parliament remains wholly competent to enact legislation for Scotland not only in relation to the reserved matters for which it retains exclusive jurisdiction but also in relation to those matters devolved to the Scottish Parliament. The UK Government was not prepared, at the time the Scotland Bill of 1997/98 was under consideration, to modify this formal position, and indeed defended the view that some UK-wide legislation would continue to be useful in the devolved areas in the interests of certainty and efficiency where there was a broad consensus that uniformity of regulation was desirable. What the Government did concede, however, was that such legislation should be enacted at Westminster only with the prior consent of the Scottish Parliament. This undertaking was given by Lord Sewel, a Scottish Officer minister, and he has given his name to the ‘Sewel convention’ which encapsulates the need for consent to be sought and to ‘Sewel motions’ (subsequently ‘legislative consent motions’) which initiate the resolutions in the Scottish Parliament to indicate its consent. The arrangements have been documented in one of the Devolution Guidance Notes.¹¹⁹

In the practice of devolution so far, there has been quite frequent use of Sewel motions¹²⁰ and the criticism is often made by political opponents of the Scottish Government that consent has too often been given for legislation to be undertaken at Westminster on matters devolved to Scotland. The dozen or so Sewel motions per year have not authorised a big *quantity* of legislation, in comparison, for instance, with the volume of legislation passed at Holyrood, and many Sewels have had a largely technical aspect to them. It has also to be remembered that the Scottish

¹¹⁹ P 32 above.

¹²⁰ For a full account, see A Page and A Batey, ‘Scotland’s Other Parliament’ [2002] PL 501. See also *Himsworth and O’Neill* pp 195-199 and B Winetrobe ‘A Partnership of Parliaments?’ in R Hazell and R Rawlings (eds), *Devolution, Law Making and the Constitution* (2005).

Parliament's consent to Westminster legislating on a particular issue does not remove the Parliament's future competence to legislate on the same issue. Most controversial have been the instances where the Scottish Government and Parliament have used the Sewel route to pass a political hot potato (eg the Bill which became the Civil Partnerships Act 2004) to Westminster. Such political controversy apart, some serious attention has been given to the procedural improvements that may be necessary at both Holyrood and Westminster to ensure that Scottish law passed in the devolved areas is subjected to adequate scrutiny and control.¹²¹ Interesting phenomena in recent years have been (a) the continuing prevalence of legislative consent motions under the SNP Governments which appear to have shown no particular reluctance to permit (in a general spirit of cooperation) Westminster legislation in devolved areas; and (b) the acknowledgement by the incoming UK Coalition Government in 2010 of the obligations of the Sewel Convention – again as an aspect of a continuing spirit of cooperation enduring despite political change.

On the other hand, the case of the Scotland Bill 2010-11 has provided a revealing illustration of the Convention under some strain. Even before the Scottish elections of May 2011, the Bill was special. It had attracted a committee of its own in the Scottish Parliament to scrutinise the Bill prior to the formulation of a legislative consent motion¹²² and that motion was itself the product not of the Scottish (SNP) Government (the exclusive originator of such motions up to that point) but rather of the (unionist) majority of the Parliament itself.¹²³ The motion gave the Parliament's consent to the UK Government's Bill but did anticipate the need for further scrutiny of the Bill and a further motion to take account of developments during the legislative process at Westminster. Since the Scottish elections, however, it must now be uncertain how far the Scottish Parliament will bring itself to approve of a Bill whose terms (whether on financial or other matters) may not be wholly to the Scottish Government's liking.

¹²¹ There was a major review of the Sewel Convention by the Procedures Committee of the Scottish Parliament – see SP Paper 428 (2005). On Westminster, see eg CMG Himsworth, Appendix to HL Paper 192 (2003-04) 'Devolution: Its Effect on the Practice of Legislation at Westminster'.

¹²² See also p 00 above.

¹²³ SPOR, 10 March 2011.

7. Devolution and the autonomy of Scotland's legal system

Although the separateness of the Scottish legal system and especially its differentiation as a mixed/civilian system from the English common law is a phenomenon which derives from the pre-devolution phase of Scotland's autonomy, it has not been unaffected by the new devolution arrangements. There have been three principal features:

- (a) The accommodation of the Scottish legal system within the legislative competence of the Scottish Parliament

It was one of the defining characteristics of the campaign for devolution in Scotland that a Scottish Parliament would provide a Scotland-based legislature not just to make better provision for the distinctive aspects of Scottish government and administration already mentioned but also to make better provision for the legal system itself—the system which ‘mixes’ the Anglo-American common law and the civil law, as applied in the distinctive system of courts, headed, apart from civil appeals to the House of Lords (and now the UK Supreme Court), by the Court of Session and the High Court of Justiciary sitting in Edinburgh. That legislative devolution to Scotland would entail a special competence in relation to the legal system was acknowledged in the (Kilbrandon) Royal Commission report of 1973¹²⁴ and in the proposals which followed in both the 1970s¹²⁵ and again in the 1990s.¹²⁶

In the Scotland Act 1998, the need to accommodate the Scottish Parliament's responsibility for the special character of Scots law has led to some of the Act's most sophisticated and complex provisions.¹²⁷ The Act has to recognise two demands. One is the need for the Parliament to respect the reserved/devolved borderline it generally lays down. Secondly it has also to enable the Parliament to make general provision for the civil and criminal law of Scotland, the point being that such general provision may inevitably affect the law on both sides of the reserved/devolved divide. A ‘legal

¹²⁴ Report of the Royal Commission on the Constitution (Cmnd 5460, 1973) paras 772, 1132, 1150.

¹²⁵ *Our Changing Democracy: Devolution to Scotland and Wales* (Cmnd 6348, 1975) paras 144-151.

¹²⁶ *Scotland's Parliament* (Cm 3658, 1997) para 2.4.

¹²⁷ *Himsworth and O'Neill* p. 134; CMG Himsworth and CR Munro *The Scotland Act 1998* (Edinburgh, Greens, 2nd Ed, 2000). See also C Himsworth ‘Devolution and the Mixed Legal Systems of Scotland’ 2002 JR 115.

system' competence, since it is based on quite different criteria from those which apportion competences on a functional basis, cuts across the initial divide in uncomfortable ways. The general rules of criminal procedure affect the prosecution of offences related to both reserved and devolved subject matter. The general rules of contract and delict similarly cut across the subject divide and may, for instance, reach into the reserved areas of consumer protection or employment as well as the areas devolved to the Scottish Parliament. Judicial review procedures can plainly affect both devolved and reserved matters.¹²⁸

The principal device for policing these cross-cutting competences is contained in s 29(4) of the Act which expressly permits the Parliament to modify Scots private law or Scots criminal law even where those modifications may relate to reserved matters, provided that 'the purpose of the provision is to make the law in question apply consistently to reserved matters and otherwise'. In other words, the legal system provisions have this necessary across-the-board characteristic. Additional, and more complex rules, are contained in Sched 4 to the Act and, until recently, these provisions appeared to have operated in a trouble-free way. There had, at least, been no public challenge to a Bill or Act drafted in reliance upon them it should also be noted that there had been no challenge in the courts at all on the grounds that the Scottish Parliament has illicitly trespassed into the territory of reserved matters. In the case of *Martin v HMA*,¹²⁹ however, the ambiguities of Sched 4 were sharply revealed.

In the meantime, the reform of the law of Scotland – especially in the field of property law – has been a prominent part of the work-load of the Scottish Parliament since 1999, in quite large part attending to what had become a growing back log of recommendations of the Scottish Law Commission. We have had, for instance, the Abolition of Feudal Tenure etc (Scotland) Act 2000 and the Land Reform (Scotland) Act 2003 which have radically reformed the property law of Scotland.

(b) The appointment and dismissal of Scottish judges

¹²⁸ Interestingly, judicial review, as an aspect of 'the law of actions', is defined by the Scotland Act s 126(4) as part of Scots private law.

¹²⁹ 2010 SC (UKSC) 40 and see above p 00.

An important indicator of the strength of the legislative powers conferred on the Scottish Parliament¹³⁰ and, consequentially, the powers of the Scottish Government has been the inclusion within their competences of not only the general body of Scots law but also the Scottish judiciary.¹³¹ This is significant in that there is entrusted to the Scottish judicial system, subject to appeal to the Supreme Court in civil matters, the resolution of legal issues which arise in Scotland, whether in the devolved or reserved sector.

Except for the specific reservation to Westminster of lawmaking on the ‘continued existence’ of the Scottish Court of Session and High Court of the Justiciary on the remuneration of judges¹³² the structure of the system of courts in Scotland and appointments to those courts are devolved. The only exception to the general rule on appointments¹³³ is that the two top judicial posts in Scotland—the Lord President of the Court of Session and the Lord Justice Clerk—are to be made on the recommendation of the UK Prime Minister, on the nomination of the First Minister. The First Minister directly recommends appointments of other Court of Session judges and of sheriffs. The opportunity of devolution has been taken to supplement the framework of the Scotland Act with a package of statutory rules on the operation of the Scottish judiciary at all levels and to introduce measures broadly protective of judicial independence. The Judiciary and Courts (Scotland) Act 2008 created a new judicial appointments board and made further provision in relation to judicial dismissals and much else.

(c) New powers for the UK Supreme Court

¹³⁰ In contrast with the weaker version under the unimplemented Scotland Act 1978.

¹³¹ And also the system of (administrative) tribunals but only so far as these are within the devolved sector. For detailed consideration, see ch 11 ‘Devolution’ in *Tribunals for Users – One System, One Service* (Report of the Review of Tribunals by Sir Andrew Leggatt, 2001). Devolved tribunals were excluded from the coverage of the Tribunals, Courts and Enforcement Act 2007 but steps are now being taken in the direction of an integrated (devolved) courts and tribunals service for Scotland.

¹³² Scotland Act 1998, Sched 5, Pt II, S. L.

¹³³ *Ibid* s 95.

The new role for the Judicial Committee of the Privy Council and then, with effect from October 2009, the new UK Supreme Court in dispute resolution under the devolution settlement has already been mentioned. One feature of this arrangement that did not go unnoticed in Scotland was that, for the first time since 1707, it enabled not only civil cases but also criminal cases to pass to a London-based court for decision. This, combined with the broader possibility that human rights cases, with the capacity to reach into all aspects of a legal system, might bring a greater tendency towards a convergence of Scottish and English rules, presented a new challenge to the autonomy of the Scottish system. In addition, the debate leading to the establishment of the Supreme Court itself (as a general successor to the House of Lords) provoked further controversy. Although that new court would not be given a wholly new status as a ‘constitutional court’ but would instead largely take over the appellate functions of the House of Lords, its creation was a matter of very great sensitivity in Scotland.

There have been two further developments. In the first place, some quite measured steps have been taken by the SNP in the direction of a modification of the current arrangements for the handling of final appeals in Scotland. At the time of the pre-2007 Coalition Government a Bill was introduced into the Scottish Parliament designed to abolish appeals from Scotland to the (then) House of Lords. That Bill made no progress but, after the SNP minority Government was elected in 2007, it appointed Professor Neil Walker to consider the area more systematically. His report offered a number of options for the reform of Scotland’s appellate jurisdiction.¹³⁴ The second, more traumatic, development has been the furore raised by one particular category of appeals. An interpretation placed by the courts on particular provisions of the Scotland Act has produced a situation in which, because of the involvement of the Lord Advocate (a member of the Scottish Government) as prosecutor in all criminal trials, many trials can be held to raise ‘devolution issues’ with resulting complications and delays which had prompted the UK Government to propose the introduction of amendments to the current Scotland Bill. Much more prominently, certain cases have been taken to the UK Supreme Court and that Court has controversially overturned the decisions of the (Edinburgh-based) courts below. In particular, *Cadder v HMA*¹³⁵

¹³⁴ Final Appellate Jurisdiction in the Scottish Legal System (2010).

¹³⁵ 2010 SLT 1125.

produced the need for emergency legislation in the Scottish Parliament¹³⁶ to amend the law on police questioning and then *Fraser v HMA*¹³⁷ reversed the Edinburgh High Court to annul a very high-profile conviction. These cases have prompted concern on the part of the SNP Government, especially since its elevation to majority status in May 2011, that Scots criminal law is losing its identity, under the influence of a court staffed in the main by English lawyers.¹³⁸ Most recently the Scottish Government has insisted, amidst much rancour, that all criminal appeals to the Supreme Court should be abolished but has established its own panel of experts to consider the matter.¹³⁹

8. Relations between Scottish devolved institutions and others in the United Kingdom and the European Union

There is little doubt that, as devolution gathers pace in other parts of the United Kingdom, the position of individual devolved governments (and parliaments) vis-à-vis the UK institutions will be greatly strengthened by the strengthening of mechanisms of cooperation and solidarity between the devolved governments themselves. If the Joint Ministerial Committee acquires a stronger role, this would be one such mechanism and others might well emerge, whether at the political or official level. Already there are many signs of cooperation and collaboration especially between officials, and these will doubtless expand now that Welsh devolution has strengthened and the Northern Ireland institutions have become fully operational. In addition to those meetings which include UK representation, First Ministerial meetings are also held to which UK ministers are not invited and matters of common concern to the devolved governments can be discussed.¹⁴⁰

¹³⁶ Although not a criminal case of this sort, *Somerville v Scottish Ministers* 2008 SC (HL) 45 had also required much-resented emergency legislation. On that case and on human rights issues generally, see C Himsworth, 'Human Rights at the Interface of State and Sub-state: the Case of Scotland' in T Campbell et al (eds), *The Legal Protection of Human Rights: Sceptical Essays* (2011).

¹³⁷ 2011 SLT 515.

¹³⁸ Although, in both *Cadder* and *Fraser*, the Supreme Court judgments were primarily the work of the Scottish judges on the Court.

¹³⁹ Scottish Government press release 5 June 2011.

¹⁴⁰ Following one such meeting in Edinburgh on 31 May 2011, it was said that a shared agenda across financial, constitutional and policy reforms was discussed. Separately, the British Irish Council (which also includes representatives of Guernsey, Jersey and the Isle of Man) meets to discuss matters of common concern. Its secretariat is in Edinburgh.

Sub-state solidarity of another sort is currently being established through Scotland's participation in conferences of European regions with legislative powers.¹⁴¹ Added to Scotland's maintenance of a permanent base in Brussels, these external relationships must tend to strengthen the Scottish Parliament and Government's internal relationship with the UK institutions. The conduct of European Union business has been a frequent point of discussion at Joint Ministerial meetings and after the Scottish general election of 2011 it was an early demand of First Minister Salmond that Scotland should have more influence over European policy.¹⁴²

9. Outcomes: Has devolution made a difference?¹⁴³

This sub-heading invites a full chapter to itself! Multiple interpretations of the question would be followed by multiple answers. And, because it is still early days in the evolution of devolved government, those answers would be highly provisional. In brief and too crudely, two strands might be identified:

(a) As to what might be broadly characterised as political and constitutional change, there can be no doubt at all that the creation and subsequent operation of the institutions of devolved government have had a substantial impact. The profile of government has been raised by the new forms of exercise of executive power and the public forum provided by the Parliament. As it has turned out, the profile of the SNP, in particular, has been very substantially raised. Whether devolution has advanced the cause of Scottish independence or, alternatively, strengthened the Union cannot yet be ascertained. Perhaps, paradoxically, both have made progress. It may be that a compromise, much looser Union is in prospect, as a fairly direct consequence of the experience of devolution.

(b) As to more immediate policy consequences, it was mentioned earlier¹⁴⁴ that the creation of the Scottish Parliament has enabled more law-making to be done – even if

¹⁴¹ A network of some 73 regions across 8 EU states.

¹⁴² SPOR, 26 May 2011.

¹⁴³ See A Trench (ed), *Has Devolution Made a Difference?* (2004). See also M Keating, *The Independence of Scotland: Self-government and the Shifting Politics of Union* (2009) and *The Government of Scotland: Public Policy Making after Devolution* (2010).

¹⁴⁴ See p 00.

there have also been disappointments about progress made. A constant complaint before devolution was that many legislative recommendations from the Scottish Law Commission were left unaddressed by the UK Government and Parliament and it was assumed that the creation of the Scottish Parliament would rectify the situation. It has, therefore, been a surprise to have the Commission still complaining. Although things are said to have improved since, it was reported in 2009 that the number of Commission reports that remained unimplemented had risen significantly *since* devolution.¹⁴⁵ Rather separately, on the assumption that devolution provides the opportunity for difference, the monitoring of policy outcomes, how these are achieved and how they are subsequently handled over time become important to the monitoring of devolution as a whole. High profile issues have included the funding of personal care for the elderly, the funding of students at universities, free medical prescriptions, and the management of hospitals within the National Health Service, in all of which areas there have been quite sharp divergences from English policies—in part, at least, because of the different political configurations in the Scottish Parliament and Government. Such developments will need careful scrutiny over time. Bearing in mind the opportunities for difference prior to devolution, it is, as yet, far from clear whether devolution will lead to greater divergence or whether this will be restrained to an extent by the pressures towards convergence which may come from financial limitations,¹⁴⁶ popular expectations of ‘uniform’ (more equal) service provision, the problem of disengaging ‘devolved’ differences from ‘reserved’ uniform provision, and legal challenges.

CONCLUSIONS

From an international perspective, the best known symbol of the autonomy of Scotland – the twin autonomies of Scotland – has been the release from prison on 20 August 2009 of Abdelbaset al-Megrahi, the only person to be convicted so far of the bombing of the Pan Am aircraft over Lockerbie in December 1998. Megrahi was released not on the authority of a UK minister but on the decision of Kenny

¹⁴⁵ The Commission’s Annual Report for 2008 SCOT LAW COM 214 (2009). For a more general assessment of the Parliament’s contribution, see EE Sutherland et al (eds), *Law Making and the Scottish Parliament* (2011).

¹⁴⁶ There have, for instance, been signs that Scottish free personal care for the elderly is under financial pressure.

MacAskill MSP, Cabinet Secretary for Justice in the devolved Government of Scotland and under the laws of Scotland. The substance of the decision caused different degrees of admiration and outrage worldwide but there was no doubting its iconic status in the unfolding of the devolution story.

But, as I hope has been revealed in the earlier content of this chapter, there is a broader and richer tale to be told of the ways in which, under the peculiar conditions of the United Kingdom's unwritten constitution, the operation of devolved government in Scotland as a model of non-federal asymmetric devolution has developed since 1998. Three features have been prominent. First, the period of devolution has provided another chapter in a much longer story of Scottish autonomy. Secondly, it has taken place in a very complex and sophisticated governmental and administrative environment. Scotland's overall autonomous condition has been meticulously carved out of but, at the same time, left integrated within the web of the United Kingdom's patterns of parliamentary, governmental and judicial institutions and procedures. And thirdly, Scottish devolution has, throughout, remained politically contested. If it has ever represented a 'settled will' of the people of Scotland, that 'settled will' has been to retain a continuing uncertainty as to ultimate constitutional destinations. The political battle for hearts and minds, although conducted under ordered conditions of peace and civility, throws up conflicts – some, such as the arrangements for funding and for top courts, very high profile; others to be found in the interstices of day-to-day administrative relationships – which are framed by different visions of Scotland's constitutional future.

Whether or not those visions are destined to converge over time to produce, for Scotland, a settlement based on a stronger version of home rule and a looser relationship with a continuing but changing United Kingdom and European Union,¹⁴⁷ the greatest contribution of the autonomy years from 1998 may have been the provision both of the conditions under which a new settlement could be negotiated and, in the meantime, the continuation of an acceptable, if complicated, quality of transitional governance.

¹⁴⁷ There is nothing new about this vision. For a particularly lucid account, see N. MacCormick, 'Independence and Constitutional Change' in N. MacCormick (ed), *The Scottish Debate* (1970).