

Scotland's Devolved Settlement and the Role of the Courts

The Inaugural Dover House Lecture, London

Lord Reed, Deputy President of the Supreme Court

27 February 2019

It is a great pleasure for me to deliver this inaugural Dover House Lecture at the invitation of the Advocate General for Scotland. Dover House has meant something to me since my childhood, as my father worked here from time to time when I was growing up. It also has its place in history, not least as the home of the future Prime Minister Lord Melbourne and his wayward wife, Lady Caroline Lamb, and the place where from time to time she entertained her lover Lord Byron. I have a dim recollection of being told that there was competition among the Scottish ministers as to who would sleep in Lady Caroline's bedroom, possibly in the hope that Lady Caroline would appear, preferably while they were there. I don't doubt that in my father's time there were some alarming things that appeared in Dover House, but sadly the ghost of Lady Caroline Lamb was not amongst them.

Dover House has been the London base of the Scottish Office, now re-named the Scotland Office, since 1885. The Scottish law officers used to have their own separate base in Carlton Gardens, where I worked myself from time to time when I was at the Bar, and which I happily remember under the name by which we knew it, Sleepy Valley. The Scottish law officers unfortunately lost it as a consequence of devolution, but the Advocate General has more palatial premises here at Dover House, even if he does have to share them with the Secretary of State. But it is other consequences of devolution that I am going to speak about this evening.

The United Kingdom is not an old country – in its present form it dates only from 1922 – but it is composed of three ancient nations, and part of a fourth. Each of those nations has its own distinct culture and history. Each of them entered into union with others under very different circumstances, and with varying degrees of willingness or opposition. The union of these nations did not eradicate the differences between them, and those differences have long meant that the problems which one of them experienced might be different from those experienced by another, and that the solution which was best for one of them might not be best for the others.

This led long ago to the adoption of separate governmental arrangements for Scotland and Ireland, and more recently for Northern Ireland and for Wales. But not for England: there has never been a Secretary of State for England, or an English Office. With 84 per cent of the UK's population, and 82 per cent of the MPs in the House of Commons, England has not felt the same need as the smaller nations to have its own separate institutions in order to arrive at the solutions which are best for it. At the opposite extreme, the problems in Ireland were such that Home Rule – that is to say, the establishment of an Irish legislature, or of separate legislatures for the north and the south – caused political controversy for 50 years, splitting the governing party, and bringing about the fall of the government, riots on the streets, and the abolition of the veto power of the House of Lords. Those of you dealing with current political problems may perhaps find some solace in the reflection that your Victorian and Edwardian predecessors had their own cross to bear. The eventual result of the Home Rule debate was the secession of southern Ireland from the United Kingdom, and the establishment at Stormont of the UK's first devolved Parliament, under legislation which made provision for the determination by the courts of questions as to whether laws made by the Parliament were within its powers,¹ and also provision for references to the Judicial Committee of the Privy Council (the JCPC) of questions

¹ Government of Ireland Act 1920, s 50. The final court of appeal was the House of Lords: s 53.

as to whether Bills before the Parliament were within its powers.² Those provisions gave rise to very few cases before the courts, but were remembered when devolution reached the top of the political agenda again in 1997, and the recently elected Government sought to establish a new basis on which to maintain the union.

I was working at that time in Crown Office, the headquarters of the Lord Advocate and the prosecution service in Scotland, as an Advocate Depute, taking prosecution decisions on behalf of the Lord Advocate and conducting trials and appeals in his name. When the General Election brought the Blair Government to power, the incoming Lord Advocate, Lord Hardie, took me off criminal work and re-assigned me to work on the Scotland Bill, sharing an office and working with the Head of Policy, Elish Angiolini, later herself Lord Advocate. It was my first experience of the legislative process since I had heard about it over the family dinner table as a boy, and it lived up to expectations: the rush to produce our contribution towards the drafting instructions for Parliamentary counsel, the minutes and memos requiring an immediate response, generally the need to produce high quality work within the tightest of timescales, the disagreements between the lead department and the others – for literally every department was involved and had its own interests to protect – the keen anticipation of the minutes of the Cabinet committee meetings at which the disagreements were meant to be resolved, and the subsequent assessment of what Shakespeare calls stratagems and spoils.³ The enduring truth of Bismarck's remark that laws are like sausages, it is better not to see them being made, was vividly demonstrated. The experience left me with a lasting respect for the ability and dedication of civil servants.

² Government of Ireland Act 1920, s 51.

³ *The Merchant of Venice*, V, i, 85.

As enacted, the Scotland Act 1998 sought to reconcile two political objectives: maintaining the integrity of the United Kingdom and the sovereignty of Parliament, and accommodating demands for self-government. Section 28 of the Act spelled out the meaning of devolution. It proclaimed in one breath that the Scottish Parliament “may make laws, to be known as Acts of the Scottish Parliament”, then said in the next breath that “this section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland”. From a legal perspective, reconciling those two propositions does not present any difficulty, but they are liable to be less easily reconciled as a matter of political reality.

Section 29 of the Act set out the limitations on the Scottish Parliament’s powers. Broadly speaking, it was given power in relation to public services such as education, health, transport and justice, but Westminster reserved the areas which were crucial to the integrity of the UK, such as taxation, social security, defence, foreign affairs, and matters necessary to ensure that there is a single market within the UK for the free movement of goods and services. Devolved powers have been extended in some respects by later legislation,⁴ and they may be altered again in the future, but the legal architecture of Scottish devolution remains as it was enacted in 1998. The Scottish Parliament cannot enact legislation which relates to reserved matters; it cannot enact legislation which modifies specified enactments; and it cannot enact legislation which is incompatible with EU law or with Convention rights, that is to say the rights enshrined in the European Convention on Human Rights (the ECHR) and given domestic effect by the Human Rights Act 1998.

⁴ Notably the Scotland Act 2012 and the Scotland Act 2016.

The Welsh and Northern Irish devolution settlements were different, reflecting the different histories and political realities of Wales and Northern Ireland. The Northern Irish settlement has a number of distinctive features, partly because it is underpinned by a multi-party peace agreement, the 1998 Belfast Agreement. In Wales, devolution has been re-modelled a number of times, as it has progressed from the devolution of power to make subordinate legislation on a devolved powers model to the establishment of a legislature with power to make primary legislation on a reserved powers model, as in Scotland and Northern Ireland. Nevertheless, despite these differences, there is what was called in the *Miller* case “a relevant commonality in the devolution settlements in Northern Ireland, Scotland and Wales”.⁵ As matters now stand, all three settlements share similar structures. Each involves the establishment of a democratically-elected legislature.⁶ Each confers on the legislature the power to “make laws to be known as Acts”.⁷ Each sets limits to that legislative power by reference to particular subjects and, more generally and regardless of subject-matter, to compliance with EU law and Convention rights. Accordingly, all are now based on a reserved powers model:⁸ that is to say, the legislature is given a general power to make laws, subject to specified limits and to compliance with EU law and Convention rights. Any provision which goes beyond the limits or which is incompatible with EU law or Convention rights “is not law”.⁹

As with all legislation, the function of interpreting and applying the devolution legislation lies with the courts, which therefore have the function, in the last resort, of policing the boundaries

⁵ *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, para 128.

⁶ The original Welsh settlement, under the Government of Wales Act 1998, established a body which was executive rather than legislative. The Government of Wales Act 2006 provided for the National Assembly for Wales to acquire legislative powers following a referendum. The Wales Act 2017 converted the devolved powers model of the earlier legislation into a reserved powers model.

⁷ Scotland Act 1998, s 28(1); Government of Wales Act 2006, s 107(1); and Northern Ireland Act 1998, s 5.

⁸ Scotland Act 1998, ss 28 and 29(2)(b); Government of Wales Act 2006, s 108A(2)(c); and Northern Ireland Act 1998, s 6.

⁹ Scotland Act 1998, s 29(2); Government of Wales Act 2006, s 108A(1); and Northern Ireland Act 1998, s 6.

of the devolved bodies' powers. It could reasonably be expected that disagreements between the devolved administrations and the UK Government about whether legislation by the devolved legislatures or actions by the devolved administrations were within their powers would usually be resolved by discussion and political negotiation. However, where significant disputes could not be resolved in that way, the legislation made it possible to refer them, through a fast-track procedure, to the JCPC. In addition, disputes about the validity of devolved legislation could also be raised in ordinary court proceedings, with the final appeal lying to the JCPC. Later, when the Supreme Court was established, it inherited the jurisdiction of the JCPC in devolution cases, and also that of the House of Lords, whose jurisdiction included issues arising more widely under EU law or the Human Rights Act 1998.

This has proved to be particularly valuable in the context of devolution, for two reasons. First, it has enabled human rights issues arising in Scottish criminal proceedings to be dealt with in the same way, with a final appeal lying to the Supreme Court, whether they concern an act of the prosecution - which in law, is an act of the devolved administration - or an act of the judge, which is not. So the Scotland Act 2012 introduced the concept of the "compatibility issue",¹⁰ which covers both of those, whereas previously under the Scotland Act 1998 the act of the prosecution, but not the act of the judge, might raise a "devolution issue"¹¹ falling within the ambit of the JCPC, necessitating the drawing of rather contrived distinctions. Secondly, the Supreme Court has achieved a higher public profile than the JCPC, with the consequence that important devolution cases are now being decided by a body which is, I think, better known and better understood. In particular, in cases where Holyrood and Westminster have conflicting

¹⁰ Criminal Procedure (Scotland) Act 1995, s 288ZA.

¹¹ Scotland Act 1998, Sched 6, para 1.

interests, it is, I would suggest, better understood that the final court of appeal is independent of both of them. That is a point to which I shall return.

The terms of the Scotland Act were, of course, only part of the story. The possibilities of recourse to the courts which it provided were there if required, but there were also political and institutional arrangements which were likely to be of greater significance on a day to day basis, including the inter-governmental arrangements designed to encourage co-operation and resolve differences, the role of the Presiding Officer of the Scottish Parliament and his or her officials in scrutinising Bills, the role of the Law Officers in advising the UK and Scottish Governments, and the role of government lawyers in advising ministers and departments. Government lawyers, north and south of the border, have been much more important on a day to day basis than the courts, although the judgments of the courts have also been of great importance in clarifying how the law should be interpreted.

In the event, the early cases in the courts concerning Scottish devolution were virtually all concerned with aspects of Scottish criminal procedure which were incompatible with Convention rights. I do not intend to say much about these. The exposure of Scottish criminal procedure to scrutiny against the standards set by the ECHR revealed a number of respects in which it had failed to keep in step with more widely prevailing ideas about a fair trial. Two problems were particularly serious. One was the growing use in the Sheriff Court of judges who lacked security of tenure. They held temporary appointments and in many cases were effectively dependent on the continuing goodwill of the government for their employment and income. That was a lamentable situation, which was stopped as the result of an early challenge under the

Scotland Act.¹² The other problem was the practice of detaining suspects for police questioning without access to a lawyer, introduced in 1980 in the hope that, without legal advice, the suspect would be more likely to incriminate himself. By the 21st century this was out of step with accepted standards not only elsewhere in the United Kingdom but throughout most of Europe. That too was stopped as a result of a challenge under the Scotland Act.¹³

Although the process of auditing Scottish criminal procedure for compliance with Convention rights was difficult at times, with the benefit of hindsight I think most people would agree that the changes to the Scottish criminal justice system which resulted from the devolution cases were beneficial and perhaps overdue. That stream of cases to the Supreme Court effectively came to an end in about 2013, partly because most if not all of the skeletons in the cupboard had been discovered by then, and also because the court made it clear that it was unlikely to grant permission to appeal in a criminal case unless there was an arguable question as to whether the courts in Scotland had applied the correct legal test to the issue before them, as distinct from a question as to whether settled law had been applied correctly to the facts.¹⁴

What I would like to spend more time on is the case law concerning the constitutional aspects of devolution. The first significant case came from Northern Ireland, but affected the later Scottish cases because of the confusion to which, for a time, it gave rise. The case, *Robinson v Secretary of State for Northern Ireland*,¹⁵ concerned the first elections to the Northern Ireland Assembly, which had produced a power-sharing agreement. Unfortunately, the elections had not been carried out in accordance with the procedure laid down in the Northern Ireland Act 1998, and so the

¹² *Starrs v Ruxton* 2000 JC 208.

¹³ *Cadder v HM Advocate* [2010] UKSC 43.

¹⁴ *McInnes v HM Advocate* [2010] UKSC 7; *Macklin v HM Advocate* [2015] UKSC 77.

¹⁵ [2002] UKHL 32.

question was raised whether the result was valid or whether there would have to be fresh elections, which might not produce the conditions for power-sharing. By the narrowest of majorities, the House of Lords held that the election result was valid. Lord Bingham and Lord Hoffmann, who were in the majority, justified their decision on the basis that the Northern Ireland Act was “in effect a constitution” rather than an ordinary statute, which should therefore be interpreted “generously and purposively” rather than in accordance with ordinary principles of statutory interpretation.¹⁶ In later cases, it was understandably argued on behalf of the Scottish Ministers that the Scotland Act was likewise a constitution which should be interpreted generously in favour of the Scottish Parliament and Government. Both the Court of Session and the Supreme Court rejected that approach. *Robinson* is perhaps best understood as a decision concerned with its own specific circumstances.

The first significant Scottish case to raise constitutional issues, and to my mind the most important of all the courts’ decisions in relation to devolution, was *AXA General Insurance v Lord Advocate*,¹⁷ decided by the Supreme Court in 2011: a case in which both the First Minister of Wales and the Attorney General of Northern Ireland intervened. Much of the reasoning in the case was concerned with other issues - the protection of property rights under the ECHR, and the circumstances in which private parties could challenge the lawfulness of the actions of public authorities - but the case also raised a fundamental question as to the status of the Scottish Parliament and, by implication, of the other devolved legislatures. That question arose because AXA challenged the validity of the relevant Act of the Scottish Parliament (ASP) not only on the basis that it infringed the limits on legislative power set out in the Scotland Act, but also on the basis that it was unreasonable or irrational, that being a common law ground of judicial review

¹⁶ Para 11.

¹⁷ [2011] UKSC 46.

which applies to other public bodies, such as local authorities. So the case raised the question whether the Scottish Parliament was subject to judicial review on the same basis as any other statutory body, as dicta in an earlier decision of the Court of Session, in *Whaley v Watson*,¹⁸ had been thought to suggest. The Supreme Court decided that an ASP could not be challenged as if it were a decision of an ordinary public body. The ordinary grounds of judicial review did not apply, although a common law challenge could be brought if an ASP violated fundamental principles of the rule of law.

In reaching that conclusion, both Lord Hope and I based our reasoning on the constitutional nature of the Scottish Parliament and of ASPs. Lord Hope emphasised the similarity between the devolved legislatures and the UK Parliament, saying that although only the UK Parliament was sovereign, it shared with the devolved legislatures the advantages that flow from the depth and width of the experience of its elected members and the mandate that has been given to them by the electorate.¹⁹ He concluded that, except to the extent that the courts were authorised to do so by section 29 of the Scotland Act, or required to do so in order to protect fundamental rights or the rule of law, it would be wrong for the judges to substitute their views for the considered judgment of a democratically elected legislature.²⁰

I added some further reasons which focused on the nature and width of the powers conferred on the Scottish Parliament. I noted that it had plenary powers, within the limits set by section 29. In the absence of any specific purposes which were to guide it in its law-making, or any specific matters to which it was to have regard, common law grounds of review based on having an

¹⁸ 2000 SC 340.

¹⁹ Para 49.

²⁰ Para 52.

improper purpose or taking account of irrelevant considerations could not be applied. Review on the basis of irrationality was constitutionally inappropriate, since law-making by a democratically elected legislature was the paradigm of a political activity, and the review of political judgments by a legislature did not fall within the constitutional remit of the courts.²¹ On the other hand, the principle of legality, explained by the House of Lords in previous decisions, meant that the Westminster Parliament could not be taken to have intended, when it established the Scottish Parliament, to create a body which was free to abrogate fundamental rights or to violate the rule of law.²²

So the conclusion was reached that the Scottish Parliament, and also by implication the other devolved legislatures, was not an ordinary public body, but a democratically elected legislature with plenary powers, whose legislation could not be judicially reviewed on ordinary common law grounds, but only for a breach of the statutory limits on its powers, or in exceptional circumstances for a violation of fundamental rights or the rule of law.²³ That conclusion is of fundamental importance to devolution in the United Kingdom, and makes *AXA* a landmark case.

The emphasis placed in *AXA* on the status of the Scottish Parliament as a democratic legislature does not, however, detract from the fact that its powers are subject to limitations. In the case of *Imperial Tobacco*,²⁴ decided by the Supreme Court in 2012, it was argued on behalf of the Scottish Ministers, on the basis of the decision in the Northern Irish case of *Robinson* which I mentioned

²¹ Paras 146-148.

²² Paras 149-153.

²³ In practice, those values might be more likely to affect how the courts interpreted legislation than to lead to its being held to be invalid

²⁴ [2012] UKSC 61.

earlier, that the Scotland Act too was a constitution which should be interpreted generously in favour of the Scottish Parliament, so that the legislation which it enacted should be presumed to be valid. That argument was rejected. The question whether an enactment was within the powers of the Parliament must, said Lord Hope, be determined in each case according to the particular rules contained in the devolution legislation. Those rules must be interpreted in the same way as any other rules that are found in a UK statute. The devolution legislation was designed to create a system that was coherent, stable and workable. The best way of ensuring this was to adopt an approach to interpretation that was constant and predictable. The description of the Scotland Act as a constitutional statute could not be taken, in itself, as a guide to its interpretation. It was intended to be a generous grant of legislative authority, within carefully defined limits. In deciding whether an ASP had exceeded those limits, there was no presumption one way or the other.²⁵

That straightforward approach to the interpretation of the Scotland Act, and the other devolution statutes, has been followed in the later case law. It is important partly because it helps to make the courts' interpretation of the legislation more predictable. It is also important because the adoption of an entirely neutral and straightforward approach to the interpretation of the devolution statutes, with no predisposition in favour of either party, helps to ensure that the courts are, and are seen to be, completely impartial between Westminster and Holyrood, between Whitehall and St Andrew's House.

Until very recently, the subsequent Scottish case law originated, as in the cases of *AXA* and *Imperial Tobacco*, in challenges to devolved legislation brought by private parties. My impression is

²⁵ [2012] UKSC 61, paras 13-15.

that there was a reluctance to refer potential problems to the JCPC or the Supreme Court for clarification before legislation was enacted. I can understand why, from a political perspective, the making of a reference might be a sensitive matter, but it is notable that there has been a greater readiness to make references in relation to Wales and Northern Ireland, as I shall explain in a moment.

The difficulties which can arise from leaving it to private parties to bring a challenge are illustrated by what happened in Scotland in relation to the reform of the law relating to agricultural holdings. The Scottish Parliament passed legislation in 2003. It was challenged several years later, when it became applicable to a particular farm on the expiry of the lease. The owner made an application under the legislation to the Scottish Land Court, which decided the case against him. He then appealed to the Court of Session, which held in 2012, in the case of *Salvesen v Riddell*, that the relevant provision violated his Convention rights and was therefore “not law”.²⁶ That decision was upheld by the Supreme Court in 2013.²⁷ The Scottish Government then had to devise amending legislation to resolve the problem identified by the courts. Because the defective legislation had already been in force for ten years, they also had to address the problems arising from the fact that many people had acted on the assumption that it was valid. The amending legislation was made in 2014. Claims for damages were then brought against the Scottish Ministers by persons who had relied on the validity of the original legislation. The Court of Session has decided that claims can lie for losses incurred through such reliance,²⁸ and a number of claims are currently proceeding before the Court of Session for quantification, 16 years after the defective legislation was enacted.

²⁶ *Salvesen v Riddell* [2012] CSIH 26.

²⁷ *Salvesen v Riddell* [2013] UKSC 22.

²⁸ *McMaster v Scottish Ministers* [2018] CSIH 40.

This must have been a difficult problem for the Ministers and officials involved, and even more so for the members of the public who were affected. The difficulties might have been avoided if the problem had been identified and referred to the JCPC at the outset. The possibility of similar problems was avoided in the cases of the *Scotch Whisky Association*²⁹ and the *Christian Institute*³⁰ by waiting until the challenge had been decided before bringing the legislation into force, but that will not always be a possible solution. There will be cases where a challenge to the legislation is not brought until someone is affected by it.³¹

There have been several references to the Supreme Court from Northern Ireland, made by the Attorney General for Northern Ireland and by the Court of Appeal,³² and three cases where Bills passed by the Welsh Assembly have been referred to the Supreme Court.³³ In the first two Welsh cases the reference was made by the UK Government, and the validity of the legislation was upheld. The judgments made it clear that “the essential nature of the legislatures that the devolution statutes have created [for Scotland, Wales and Northern Ireland] in each case is the same”,³⁴ although it was also necessary to bear in mind that the statutes were different and that one must therefore be wary of assuming that the same words have precisely the same effect.³⁵ In the third case, the reference was made by the Counsel General for Wales, and the UK Government was not involved. The Counsel General made the reference because he knew that

²⁹ *Scotch Whisky Association v Lord Advocate* [2017] UKSC 76.

³⁰ *Christian Institute v Lord Advocate* [2016] UKSC 51.

³¹ See, for example, *AB v HM Advocate* [2017] UKSC 25.

³² A reference of legislation similar to that with which the AXA case was concerned was withdrawn shortly before the hearing of the AXA appeal in the Supreme Court. Two references were heard with *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5. Another was heard with *Re Northern Ireland Human Rights Commission’s Application for Judicial Review* [2018] UKSC 27, and another with *Lee v Ashers Baking Co Ltd* [2018] UKSC 49. Another was adjourned, to enable the issue to be raised in proceedings *inter partes*, in *Re Attorney General for Northern Ireland’s Reference* [2019] UKSC 1.

³³ *Local Government Byelaws (Wales) Bill 2012 Reference* [2012] UKSC 53; *Agricultural Sector (Wales) Bill Reference* [2014] UKSC 43; and *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill Reference* [2015] UKSC 3.

³⁴ *Local Government Byelaws (Wales) Bill 2012 Reference* [2012] UKSC 53, para 81 per Lord Hope.

³⁵ Para 50 per Lord Neuberger.

the validity of the legislation would be challenged by insurance companies if it was brought into force. Rather than spend years litigating the matter through the judicial system, he decided to refer the matter directly to the Supreme Court for a ruling before the legislation was brought into force. In the event, the Bill was held to be invalid.

The reasoning of the majority in that case, the *Recovery of Medical Costs for Asbestos Diseases Reference*, was set out in a judgment given by Lord Mance. It can be contrasted with the reasoning of the minority, set out in a judgment given by Lord Thomas. The Bill in question made employers liable to the Welsh Ministers for the costs incurred by the Welsh NHS in treating their employees for asbestos-related diseases, where the exposure to asbestos had occurred during the course of their employment. This was challenged as an interference with the employers' Convention rights. The critical question was whether the interference was proportionate: a similar question to the one which arose in *AXA*.

In his judgment, Lord Mance said that the court should give “weight” to the judgment of the Welsh Assembly,³⁶ as distinct from “great weight”, as Lord Thomas had said. Lord Mance also suggested that, in the light of article 9 of the Bill of Rights, there was “perhaps ... a relevant distinction between cases concerning primary legislation by the United Kingdom Parliament and other legislative and executive decisions”.³⁷

In his minority judgment, with which Lady Hale agreed, Lord Thomas concluded that whether liability for medical costs should be imposed on the employer was “in every respect pre-

³⁶ Para 67.

³⁷ Para 56.

eminently a political judgment on which it is for the legislative branch of the State to reach a judgment”.³⁸ He cited what Lord Hope and I had said in *AXA*, and said that he would accord great weight to the Welsh Assembly’s judgment, not simply weight as Lord Mance stated, particularly where the judgment was made on matters of social and economic policy.³⁹ He added that he could not see why in principle the United Kingdom Parliament in making legislative choices in relation to England was to be accorded a status which commanded greater weight than would be accorded to the devolved legislatures in relation to Scotland, Northern Ireland and Wales. As each democratically elected body must be entitled to form its own judgment about matters of social and economic policy within a field where, under the structure of devolution, it had primary legislative competence, there was, he said, no logical justification for treating the views of one such body in a different way from the others.⁴⁰

Some of the more recent cases concerning devolution have concerned Brexit, and have been particularly sensitive from a political perspective. The case of *Miller v Secretary of State for Exiting the European Union*⁴¹ raised, among other issues, the question whether the Sewel convention was legally enforceable. The answer, applying long-established law, was that the courts cannot give rulings on the operation of a political convention: that is a matter which can only be determined within the world of politics.⁴² Even when the convention is recognised in statute, as the Sewel convention is in the Scotland Act as the result of an amendment made in 2016,⁴³ it remains politically binding rather than a judicially enforceable rule of law.

³⁸ *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill Reference* [2015] UKSC 3, para 108.

³⁹ Para 118.

⁴⁰ Para 122.

⁴¹ [2017] UKSC 5.

⁴² Paras 141ff.

⁴³ Section 28(8) inserted by section 2 of the Scotland Act 2016.

Last year, the court decided what was to my mind the most significant case on devolution, from a legal perspective, since *AXA*. It was the first time that there had been a reference of a Bill passed by the Scottish Parliament. The Bill in question concerned the legal consequences of Brexit, and in particular the treatment of powers repatriated from Brussels.⁴⁴

The case was important legally because it required the court to analyse the structure of the limitations on the Scottish Parliament's powers more closely than it had done in the past, and to decide a number of important questions as to their interpretation. I will not attempt to summarise all our conclusions, but I will mention two which are perhaps especially significant. The first was that the question whether an ASP would be outside the Scottish Parliament's powers had to be determined as at the time when the court made its decision, rather than as at the time when the Bill was passed. That was in fact accepted by the Lord Advocate, and was of crucial importance on the facts of the case, because the Scotland Act had been amended since the Bill was passed so as to render it outside the Scottish Parliament's powers in a number of respects. The consequence is that it is legally possible for the UK Government to react to the passage of a Bill in the Scottish Parliament by making a reference and then persuading the UK Parliament to amend the Scotland Act so as to render the Bill invalid. Secondly, in relation to one of the limitations on the Scottish Parliament's powers – that an ASP must not modify provisions which have been listed in a Schedule to the Scotland Act as being protected against modification – we clarified what “modification” meant, rejecting the wide interpretation for which the Advocate General had argued and adopting the more natural interpretation of the word for which the Lord Advocate had contended.

What conclusions can be drawn from this survey of the devolution case law? First, the generally prevailing judicial approach has not been the minimalist one which *Whaley v Watson* was

⁴⁴ *The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill Reference* [2018] UKSC 64.

thought to indicate, although the reasoning of the majority in the Welsh *Medical Costs for Asbestos Reference* might be contrasted with that of the minority. Nor has the generally prevailing approach been as wide as that adopted by the majority in the Northern Irish case of *Robinson*. Instead, the Scottish cases from *AXA* to the *EU Withdrawal Bill Reference*, and the Welsh *Local Government Byelaws Reference* and *Agricultural Wages Reference* have adopted what I would describe as a balanced approach, accepting that the devolution legislation has established democratic legislatures with very wide powers, whose judgment should be treated by the courts with great respect, and also that those powers are subject to limits, both in terms of subject matter and in terms of human rights and EU law, which it is the responsibility of the courts to enforce, when called on to do so, with complete impartiality.

Secondly, there are a number of important constitutional principles which the case law has established.⁴⁵ I would summarise them in this way:

1. Devolution is not simply a matter of concern to Scotland, Northern Ireland and Wales. It is a crucial aspect of the governance arrangements of the UK as a whole. It is intended to sustain the integrity of the UK as well as to meet the desire for self-government in three of its constituent nations.
2. While there are some important differences between the three devolution regimes, nevertheless I am inclined to think that they are best understood from a legal perspective as a single body of constitutional reform for the UK, giving rise to a single body of case law.
3. The powers of the devolved legislatures, like those of other legislatures in most constitutional democracies, are delimited by law. The Scottish Parliament is a democratically elected legislature with a mandate to make laws for people in

⁴⁵ Summarised in the *EU Withdrawal Bill Reference*, para 12.

Scotland. It has plenary powers within the limits of its legislative competence. It is not akin to a local authority, and it is not subject to the same legal constraints. But it does not enjoy the sovereignty of the Crown in Parliament: rules delimiting its legislative competence are found in section 29 of the Scotland Act, to which the courts must give effect. And the UK Parliament also has power to make laws for Scotland, a power which the legislation of the Scottish Parliament cannot diminish: section 28(7) of the Scotland Act.

4. As a consequence, it appears to me that the UK has to be understood as having four legislatures that enact primary legislation.
5. The Scotland Act must be interpreted in the same way as any other statute. The courts have regard to its aim to achieve a constitutional settlement and therefore recognise the importance of giving it a consistent and predictable interpretation, so that the Scottish Parliament has a coherent, stable and workable system within which to exercise its legislative power. This is achieved by interpreting the rules as to competence in the Scotland Act according to the ordinary meaning of the words used.

My third conclusion is that the Supreme Court has responded institutionally to the sensitivity of the devolution issues which it has had to decide. The most sensitive cases in which the UK Government has been in dispute with a devolved government, or in which flagship devolved legislation has been challenged by private parties, have usually been heard by enlarged panels.⁴⁶

⁴⁶ That is true of *AXA* (where the court was however also being asked to depart from a decision of the House of Lords), the *Scotch Whisky* case (concerned with minimum alcohol pricing), the *Moohan* case (concerned with the legislation under which the referendum on Scottish independence was held), *Miller*, the *Northern Ireland Abortion* case, and the *EU Withdrawal Bill Reference*. Panels of five justices were on the other hand used for the cases of *Imperial Tobacco* and the *Christian Institute*, for the *AB* case (concerned with a detailed aspect of legislation dealing with under-age sex), for the Welsh references, and for *Lee v Ashers*.

Both the President and the Deputy President of the court have usually sat.⁴⁷ The panel usually includes justices with links to Scotland and Northern Ireland, and in Welsh cases we have been able to include in the panel a senior judge with links to Wales.⁴⁸

Fourthly, although most disputes between the devolved governments and the UK government have been resolved at official level, and there is also the possibility of a reference to the Joint Ministerial Committee's disputes panel,⁴⁹ it is inevitable that the Supreme Court will have to act as an arbiter when political solutions cannot be found. The court's success in performing that role depends on public and political confidence in the court's complete impartiality: something which both the court and the political institutions involved have a responsibility to maintain and support.

In that regard, the Supreme Court is very conscious of its role as a UK court. It is in fact the only court which unites the UK's three jurisdictions, and draws judges from each of them.⁵⁰ It understands the importance of close liaison with the judges and lawyers of all three jurisdictions, and has invited the Lord President and the Lord Chief Justice of Northern Ireland, and other Scottish and Northern Irish judges, to sit on the court (and on the JCPC) from time to time. It attaches the greatest importance to its being understood to be a court for the whole of the UK. That is reflected in many of its activities, including for example its work with schools in Scotland,

⁴⁷ In *Scotch Whisky*, *Moohan*, the *EU Withdrawal Bill Reference*, all three Welsh references, *Miller*, the *Northern Ireland Abortion* case and *Lee v Ashers*. Only the Deputy President sat in *AXA* and *Imperial Tobacco*, which were heard before Lord Neuberger's appointment as President. Lord Kerr presided in *AB v HM Advocate*.

⁴⁸ Both Scottish justices have sat in every Scottish case except *Imperial Tobacco* (where I was unable to sit, having been party to the decision appealed against), and at least one has sat in the Welsh and Northern Irish cases. A Northern Irish Justice has sat in every case from Scotland or Northern Ireland. Now that there is a justice with a Welsh background, he has sat in the Welsh and Scottish cases heard since his appointment. Previously, the Lord Chief Justice, Lord Thomas, sat in Welsh cases as an Acting Judge.

⁴⁹ Established under the Memorandum of Understanding and Supplementary Agreements, the current version of which was published in October 2013.

⁵⁰ There are also some tribunals which have a UK-wide jurisdiction.

Northern Ireland and Wales, but is perhaps reflected most clearly in its decision to sit outside London, so as to make a direct connection with the people of the different nations of the UK. Among Supreme Courts in the common law world, the High Court of Australia is the only other one to do this, as far as I am aware.

Finally, it is also important that the court should be, and be seen to be, wholly independent of Parliament and Whitehall, and also of the devolved institutions, if it is to perform its function as an impartial judge of devolution disputes. Before the Supreme Court was established, devolution issues were decided by the JCPD, which was located at 9 Downing Street. Some questions might also come before the House of Lords, which was of course part of Parliament. Can one imagine how it would have looked to ordinary members of the public if the *Miller* case, which turned on where the boundary lay between the powers of the Government and the powers of Parliament, had been heard in a committee room in the Palace of Westminster? Can one imagine how it would have looked if the *EU Withdrawal Bill Reference*, a dispute between the Scottish Government and the UK Government, had been decided in Downing Street? Today, ten years on from the opening of the Supreme Court in 2009, we can reflect on the wisdom of those who decided that the role of the UK's highest court, not least in deciding disputes arising under the UK's devolved constitutional structure, called for the establishment of a new and independent body: a Supreme Court.