

Devolution, Brexit, and the Sewel Convention

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Message from the Author

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Introduction

Brexit has given rise to a number of pressing constitutional challenges, not least how to involve the devolved institutions in the process of implementing EU withdrawal. At the level of negotiations with the EU, devolved engagement has been facilitated through the Joint Ministerial Committee on EU Negotiations – though the Committee has been criticised as insufficiently proactive and lacking in partnership (and that is to say nothing about the fact that Northern Ireland is not presently represented at meetings given the absence of devolved government there).¹ As the parallel process of legislating for withdrawal continues in Westminster – primarily through the European Union (Withdrawal) Bill – there is also the creeping possibility of a constitutional crisis in the UK. It is a possibility that has its origins in the different “national” votes at the time of the EU referendum and which may take form in the withholding of devolved consent for the European Union (Withdrawal) Bill.

In terms of the different “national” votes, the detail here is very familiar: England and Wales both voted “leave”, whereas Northern Ireland and Scotland voted “remain” (and by some margins).² In the months since the vote, the political landscape has been further complicated by developments that have

included negotiations about the Irish border. While that issue has not yet been resolved, the existing EU-UK proposals envisage a very flexible approach to the border, including maintaining Custom Union and Single Market rules for Northern Ireland. That possibility has led both the Scottish and the Welsh governments to argue that similar flexibility should be given to their territories – in other words, that they, too, should have the option of retaining economic ties with the EU. The point, certainly as regards Scotland, is that this would be the least damaging outcome given that a clear majority voted in favour of remain.

In terms of the legislative process, the potential for a crisis centres upon the so-called “Sewel Convention” whereby the UK Parliament “will not normally legislate” for devolved matters without the consent of the devolved institutions. Although the convention is not legally enforceable – this is one result of the Supreme Court’s ruling in the *Miller* case³ – it has been given a position of prominence by the UK government’s commitment to seek devolved consent for those features of the European Union (Withdrawal) Bill that relate to devolved policy areas and institutions.⁴ While it is not (of course) certain that consent will ultimately be withheld, the Scottish government has indicated that it cannot presently recommend support for the Bill, and both it and the Welsh government have since introduced their

1 ‘UK urged to step up dialogue with Scotland ahead of Brexit talks’ *The Scotsman*, 20 Jan 2018, available at <https://www.scotsman.com/news/uk-urged-to-step-up-dialogue-with-scotland-ahead-of-brexit-talks-1-4667112>.

2 The relevant figures are available at http://www.bbc.co.uk/news/politics/eu_referendum/results.

3 *R (Miller) v Secretary of State for Exiting the European Union; In re McCord; In re Agnew* [2017] UKSC 5, [2018] AC 61, paras 136-152. For commentary see C McCrudden and D Halberstam, ‘Miller and Northern Ireland: A Critical Constitutional Response’ (2017) 8 *UK Supreme Court Yearbook* 1.

4 See paragraphs 71-72 of the Explanatory Notes to the EU (Withdrawal) Bill as brought from the House of Commons to the House of Lords on 18 January 2018 (HL Bill 79), available at <https://publications.parliament.uk/pa/bills/lbill/2017-2019/0079/18079en.pdf>.

own “devolved” Withdrawal Bills.⁵ There is therefore more than a notional prospect that consent will not be forthcoming and that the Westminster Parliament will have to decide whether to override the preferences of one or more of the devolved institutions.

This paper provides a short commentary on the Sewel Convention and the crisis it may cause. It does so across three sections. The first section describes the nature and scope of the convention and how, pre-Brexit, it had become linked to a narrative about more diffuse understandings of sovereignty in the UK. That narrative had emphasised the importance and legitimacy of the devolved institutions and it corresponded with the convention being placed on a statutory footing as regards Scotland and Wales. However, the second section discusses how that narrative has since been challenged by Brexit and by the Supreme Court’s approach to the legal status of the convention in *Miller*. That case had raised the question of whether there was a legal requirement to observe the convention before Westminster legislation could authorise the giving of notice under Article 50 TEU – the Supreme Court held that there was no such requirement and that disputes about the convention are to be resolved “within the political world”. The third section considers some of the criticisms that have been made of the European Union (Withdrawal) Bill’s provisions on devolution – primarily that it represents a “power grab” at the expense of the devolved institutions – and how Scottish and Welsh opposition to the Bill might ultimately cause a crisis born of withheld consent.

The paper concludes with some final comments on the Sewel Convention’s position within the constitution.

What is the Sewel Convention and why is it important?

The fundamental purpose of the Sewel Convention is to ensure that devolution works in a manner that respects the roles of the UK Parliament and the devolved legislatures. The convention takes its name from a statement that was made by Lord Sewel during a Parliamentary debate about (what became) the Scotland Act 1998, when he said: “as happened in Northern Ireland earlier in the century, we would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish parliament”.⁶ The convention was subsequently written into a Memorandum of Understanding on intergovernmental relations in terms that make it clear that, “The United Kingdom Parliament retains authority to legislate on any issue, whether devolved or not. It is ultimately for Parliament to decide what use to make of that power”.⁷ However, the Memorandum of Understanding also acknowledges that “Parliament’s decision to devolve certain matters [means] that Parliament itself will in future be more restricted in its field of operation”.⁸ The convention thus operates most obviously when an Act of the UK Parliament will have effects in a policy area that has been devolved to one or more of the devolved

5 See C McCorkindale and A McHarg, ‘Continuity and Confusion: Legislating for Brexit in Scotland and Wales (Parts I & II)’, U.K. Const. L Blog (6th and 7th Mar. 2018) (available at <https://ukconstitutionallaw.org/>).

6 HL Debates, vol no 592, part no 191, col 791 (21 July 1998).

7 Memorandum, para 14, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/316157/MoU_between_the_UK_and_the_Devolved_Administrations.pdf.

8 Ibid, para 15.

legislatures, as the UK government is at that stage expected to raise the issue of consent with its devolved counterpart(s). Devolution guidance notes now also accept that the convention should operate when an Act of the UK Parliament will either expand or diminish legislative and/or executive powers at the devolved level.⁹ In contrast, it is generally accepted that the convention does not operate in relation to delegated legislation – though it has since been noted that that exception may be “strained” by Brexit, where the European Union (Withdrawal) Bill envisages wide use of delegated legislation to amend the statute book in areas of overlapping devolved and central government competence.¹⁰

The prospect of a crisis centred upon the Sewel Convention and Brexit is ultimately a consequence of how sovereignty is understood within the UK constitution. Clearly, the Memorandum’s statement about the authority of the UK Parliament is consistent with Diceyan orthodoxy, and the various devolution Acts also include provisions that expressly reassert the UK Parliament’s sovereign authority.¹¹ Viewed in this way, the absence of consent for the European Union (Withdrawal) Bill would be something that might be regretted but not more, as the UK Parliament would still be able to legislate for Brexit on its own preferred terms. However, the difficulty with such an approach is that it starts to set at nought the idea that devolution is about more than just a delegation of power within the UK, but rather is about enlivening democracy

away from Westminster. Indeed, on one reading, the original devolution settlement was about returning power to historical contexts that have long had competing views about sovereignty, where Northern Ireland had the added dimension of the Belfast Agreement and “peace process”. Devolution might therefore be said to link the Sewel Convention to democratic processes that can only ever challenge, rather than confirm, Diceyan orthodoxy.

It has already been noted above a “counter-narrative” about sovereignty had been gaining traction prior to the Brexit vote. This was notably true in some of the case law of the courts, which had indicated that a more nuanced approach to sovereignty and devolution might be needed. The most influential judicial statement was made by Lord Steyn in *Jackson*, where his Lordship noted that the UK Parliament’s powers had been limited by the demands of EU law and said: “The settlement contained in the Scotland Act 1998 also points to a divided sovereignty [within the UK] ... The classic account ... of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern [UK]”.¹² Other cases also suggested that there was something of a paradigm shift ongoing in UK law – the Northern Ireland Act 1998 was thus described as a “constitution” that should be interpreted “generously and purposively, bearing in mind the values which the constitutional provisions are intended to embody”;¹³ the Scotland Act 1998 and

9 See Devolution Guidance Notes 8-10, available at <https://www.gov.uk/government/publications/devolution-guidance-notes>.

10 See further *The Great Repeal Bill' and Delegated Powers, House of Lords Committee on the Constitution*, 9th Report of 2016-2017, HL Paper 123, paras 115-122, available at <https://publications.parliament.uk/pa/ld201617/ldselect/ldconst/123/12302.htm>.

11 Northern Ireland Act 1998, s 5(6); Scotland Act 1998, s 28(7); Government of Wales Act 2006, s 107(5).

12 *Jackson v Attorney-General* [2005] UKHL 56, [2006] 1 AC 262, 302, para [102].

13 *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32, [2002] NI 390, 398, para 11. See also Lord Hoffmann’s comments at [2002] NI 390, 402, para 25. Compare the less expansive approach to the interpretation of devolution statutes in subsequent cases such as *Attorney General v National Assembly for Wales Commission* [2012] UKSC 53, [2013] 1 AC 792; *Imperial Tobacco Ltd v Lord Advocate* [2012] UKSC 61, (2013) SC (UKSC) 153; and *Re Agriculture Sector (Wales) Bill* [2014] UKSC 43, [2014] 1 WLR 2622.

the Government of Wales Act 1998 were said to be “constitutional statutes” that could be repealed only through the use of express words by the UK Parliament;¹⁴ and the Scottish Parliament was recognised as a “self-standing democratically elected legislature” that, while not legally sovereign, was to be accorded a wide margin of appreciation when making legislative choices within the framework of the Scotland Act 1998.¹⁵

Important statements about the nature of devolution were also made in the Supreme Court’s ruling in *Re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill*.¹⁶ The issue here was whether a Bill that sought to recover NHS related medical costs from private insurers was within the powers of the Welsh Assembly. This raised the question of how closely the Court should scrutinise a legislative choice of the Welsh Assembly and whether comparisons might be made with legislative choices of the UK Parliament. Lord Mance, for the majority, accepted that he should give “weight” to the Welsh Assembly’s public interest choice but stated that he need not form a view on the “difficult” question of whether “there is a relevant distinction between cases concerning primary legislation by the United Kingdom Parliament and other legislative and executive decisions”.¹⁷ However, Lord Thomas considered that question in some detail and pointed towards an equivalence between some such legislative choices. Having said that he would give “great weight” to a choice of the Welsh Assembly, he added that he: “would find it difficult to make any logical distinction in the context of the United

Kingdom’s devolved constitutional structure between [the devolved] legislatures and the United Kingdom Parliament in according weight to the evaluation of the different choices and interests in respect of matters which are within the primary competence of the legislatures”. He concluded that he could not: “see why in principle the United Kingdom Parliament in making legislative choices in relation to England (in relation to matters such as the funding of the NHS in England) is to be accorded a status which commands greater weight than would be accorded to the Scottish Parliament and the Northern Ireland and Welsh Assemblies in relation respectively to Scotland, Northern Ireland and Wales”.¹⁸

Of course, the need for a counter-narrative was also driven by political realities at the devolved level, where developments ultimately led to the Sewel Convention being placed on a statutory footing. While Northern Ireland, Scotland and Wales each have their own story of devolution, the general trend, at least as regards Scotland and Wales, has been one of increased centrifugalism and a further devolution of powers (Northern Ireland’s experience has been much more stop-start in nature). The Scottish independence referendum was inevitably the defining moment in much of this, where the “no” vote coincided with political commitments about a further devolution of powers within an evolving – but not federal – UK constitution. The report of the Smith Commission subsequently recommended there should be statutory recognition both of the permanence of the Scottish institutions

14 *Thoburn v Sunderland CC* [2003] QB 151, 189.

15 *Axa v Lord Advocate* [2012] 1 AC 868, 911, para 46, Lord Hope, and [2012] 1 AC 868, 944, para 146, Lord Reed.

16 [2015] UKSC 3, [2015] AC 1016.

17 [2015] UKSC 3, [2015] AC 1016, 1041, paras 56-67.

18 [2015] UKSC 3, [2015] AC 1016, 1059-1060, paras 118-119 and 122.

and of the Sewel Convention, and this was acted upon by the UK Parliament. The Scotland Act 1998 thus now provides that the Scottish Parliament and government can “not to be abolished except on the basis of a decision of the people of Scotland voting in a referendum”¹⁹ and that “the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament”.²⁰ Similar provisions have since also been added to the devolution legislation for Wales, but not Northern Ireland.²¹

The Sewel Convention in the Supreme Court

It was against this backdrop that the legal status of the Sewel Convention fell to be considered in *Miller*, which was heard in the Supreme Court alongside two references from Northern Ireland. The central issue in *Miller* was (now famously) whether the UK government could rely upon the prerogative treaty-making powers to trigger Article 50 TEU in the light of the EU referendum, or whether an Act of the UK Parliament was required to authorise notification of withdrawal. Having held that an Act of Parliament was required, the Supreme Court considered whether the Sewel Convention meant that devolved consent was needed for such an Act, for the reason that EU withdrawal would have implications not just for devolved policy areas but also for the powers of the devolved institutions (i.e. withdrawal would remove EU law as a bind on their competences). In

a formal sense, the question before the Court was about the legal enforceability of a constitutional convention – one of those “rules of constitutional behaviour which are observed by the Queen, ministers, members of Parliament, judges and civil servants”.²² However, at a more fundamental level, it was a question about the nature of the devolved settlement and the relevance of earlier case law on that settlement. The question also had a novel dimension in so far as conventions have historically not been codified in law whereas the Sewel Convention had, by the time of the hearing, been written into the Scotland Act 1998.

The Court began its ruling on this issue by noting that, on its original terms, the Sewel Convention means that the UK Parliament will “not normally legislate with regard to devolved matters without the agreement of the [relevant] devolved legislature”.²³ When doing so, it noted that the convention had previously been observed not just when Acts of the UK Parliament would have effects in policy areas that have been devolved, but also when Acts had extended the powers of the devolved institutions (albeit not when Acts of the UK Parliament had affected powers as a result of implementing changes to the competences of EU institutions).²⁴ However, this was as far as the ruling went in terms of analysing the convention’s wider purposes, as the remainder of the Court’s ruling focused on the political nature of the convention and its non-enforceability in law. In making that point, the Court acknowledged that judges could

19 Section 63A.

20 Section 28(8).

21 Wales Act 2017, sections 1-2.

22 A Bradley, K Ewing, and C Knight, *Constitutional and Administrative Law* (16th ed, 2015), p 18.

23 *Miller* at para [138], citing the *Memorandum of Understanding*.

24 *Miller* at para [140], referencing, among others, the European Communities (Amendment) Act 2008, the Wales Act 2014, and the Scotland Act 2016.

“recognise the operation of a political convention in the context of deciding a legal question” and that the Sewel Convention “has an important role in facilitating harmonious relations between the UK Parliament and the devolved legislatures”.²⁵ Nevertheless, the Court concluded that, “Judges ... are neither the parents nor the guardians of political conventions” and they “cannot give legal rulings on [their] operation or scope, because those matters are determined within the political world”.²⁶ This was so notwithstanding that the convention had been written into legislation – the Court said that the legislation simply recognised “the convention for what it is, namely a political convention ... the purpose of the legislative recognition of the convention was to entrench it as a convention”.²⁷

The Supreme Court’s ruling has attracted a large body of commentary, some of which has criticised its “strikingly narrow view of the proper extent of judicial engagement with conventions”.²⁸ Of course, one consequence of that view was that the Supreme Court implicitly rejected any suggestion that there is presently a “divided sovereignty” within the UK and that the Sewel Convention might be understood in that light. While it may well be that the Supreme Court’s earlier finding on the prerogative closed-off any deeper consideration of sovereignty – the Court would otherwise have safeguarded Parliamentary sovereignty in relation to the prerogative but then moved to limit it in relation to devolved powers – the ruling clearly envisaged only a subordinate constitutional role for the devolved legislatures. The result was that the European Union (Notification

of Withdrawal) Act 2017 was enacted without any legislative consent motion(s) having been passed and notification of withdrawal on foot of that Act was given to the European Council on 29 March 2017.

Sewel, the European Union (Withdrawal) Bill, and crisis (?)

What, then, of the European Union (Withdrawal) Bill? As noted above, the government is to seek consent for those features of the Bill that have implications for areas of devolved policy and institutional competences. However, with the Scottish government having indicated that it could not presently support the Bill – and with it and the Welsh government having introduced parallel Withdrawal Bills in their devolved legislatures – different approaches to the mechanics of withdrawal are becoming very apparent. Of course, it is those different approaches that now position a potential constitutional crisis, where the legality of the Scottish and Welsh governments’ Withdrawal Bills can be reviewed by the courts, but not any failure to observe the Sewel Convention. *Per* Dicey and *Miller*, there are limits to the powers of the devolved, but not those of the “devolver”.

Turning to Scottish and Welsh concerns about the European Union (Withdrawal) Bill, it is well-known that these centre upon the manner in which the Bill proposes to retain much of EU law (“retained EU law”) after “exit day”.²⁹ Here, the Bill provides for

25 *Miller* at paras [146] and [151].

26 *Miller* at para [146].

27 *Miller* at paras [148]-[149].

28 M Elliott, ‘The Supreme Court’ judgment in *Miller*: in search of constitutional principle’ (2017) 76 *Cambridge Law Journal* 257, at 276. See also McCrudden and Halberstam, n 3 above.

29 The leading commentary on the devolutionary aspects of the Bill is R Rawlings, ‘Brexit and the Territorial Constitution: Devolution, Reregulation and Inter-governmental Relations’, published by the Constitution Society at <https://consoc.org.uk/wp-content/uploads/2017/10/Brexit-and-devolution-final-2.pdf>.

the repeal of the European Communities Act 1972 in circumstances where a large corpus of EU law will initially remain in force and, among other things, continue to bind the devolved legislatures (EU law presently binds the devolved legislatures in areas of competence that include agriculture and the environment). In broad terms, this has been linked to the need to maintain common frameworks within the UK on exit day and “to provide a functioning statute book ... it will then be for Parliament and, where appropriate, the devolved legislatures to make any changes”.³⁰ However, it is in the detail about how any such changes are to be made that the Bill has attracted criticism, both more generally and as relates to devolution in particular. The more general criticisms of the Bill have focused on the extent to which subordinate legislation can be used to make changes to retained EU law (including, through Henry VIII powers, to that in primary legislation), as this has been said to concentrate too much power in the hands of Ministers.³¹ And those criticisms that have been made from a devolved perspective have emphasised how the Bill adopts a restrictive reading of devolution that can only slow centrifugalism within the constitution. The point here is that devolved powers are taken by the Bill to stand very much where they are – hence retained EU law continuing to constrain the devolved institutions – and that any post-Brexit increase in powers will

be closely aligned to, if not controlled by, central government decision-making.³² It is for this reason that the Scottish government has previously spoken of the Bill representing a “power-grab” that it could not support within the Scottish Parliament.

The withdrawal Bills that were introduced by the Scottish and Welsh governments – respectively titled the “UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill” and the “Law Derived from the European Union (Wales) Bill” – provide alternative, devolution-centric models for retaining and amending EU law in areas of devolved competence.³³ As the Scottish Parliament and Welsh Assembly can legislate only within the parameters of their constitutive Acts, it is already known that legal challenges to the Bills will be brought and, moreover, that there are very different views about their *vires*.³⁴ Of course, in the “political world” of *Miller*, the Bills are plainly intended to generate pressure for amendment of the European Union (Withdrawal) Bill, and it can be presumed that amendment of that Bill would see the Scottish and Welsh Bills fall away. However, if the European Union (Withdrawal) Bill is not amended to the satisfaction of the Scottish and Welsh governments, the legal status of their own Bills may well become the key to any emerging constitutional crisis. For instance, if the courts rule that the Bills are not

30 European Union (Withdrawal) Bill (Explanatory Notes) at para 10. On the UK government’s view of the requisite common frameworks see *Frameworks Analysis: Breakdown of areas of EU law that intersect with devolved competence in Scotland, Wales and Northern Ireland*, 9 March 2018, available at <https://www.gov.uk/government/publications/frameworks-analysis>.

31 See, as regards UK government Ministers, European Union (Withdrawal) Bill clauses 7-9; and, as regards Ministers in the devolved administrations, clause 10 and Schedule 2. For cautionary comments see, eg, “European Union (Withdrawal) Bill: interim report, House of Lords Select Committee on the Constitution, 3rd Report of Session 2017-2019”, available at <https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/19/19.pdf>.

32 European Union (Withdrawal) Bill, clauses 10-11 & Sch 2.

33 They are available at [http://www.parliament.scot/UK%20Withdrawal%20from%20the%20European%20Union%20\(Legal%20Continuity\)%20\(Scotland\)%20Bill/SPBill285052018.pdf](http://www.parliament.scot/UK%20Withdrawal%20from%20the%20European%20Union%20(Legal%20Continuity)%20(Scotland)%20Bill/SPBill285052018.pdf) and <http://senedd.assembly.wales/mgIssueHistoryHome.aspx?lId=21280>.

34 For commentary see McCorkindale and McHarg, n 5 above.

within devolved competence, the Scottish and Welsh governments would be left with only the option of recommending that their respective legislatures should withhold consent for the European Union (Withdrawal) Bill, thereby tasking the UK Parliament with overriding the Sewel Convention. However, in the contrary event that the Scottish and Welsh Bills are deemed to be within competence, this would present a very different context within which to assess the significance of withheld consent. To put the point bluntly, the UK Parliament would at that stage have to decide not only whether to legislate contrary to the Sewel Convention but also whether to do so in a way that would expressly override Scottish and Welsh legislation.

It is impossible to know quite how crises of this kind might develop in reality, albeit the second scenario would inevitably be (much) more damaging in terms of inter-governmental relations. While an override of Sewel in the first scenario would provoke controversy, *Miller* had, in effect, already provided for a proxy override in the context of notification under Article 50 TEU, thereby setting something of a precedent. However, the suggestion that the UK Parliament might wish to override not just the Sewel Convention but also legislation that has been enacted at the devolved levels could only move a crisis to a different level. To take the example of Scotland, an override of a withheld consent as well as legislation lawfully enacted by the Scottish Parliament could easily be presented as a further diminution of the “national” preference that was expressed at the time of the EU referendum. For those inclined towards independence, such a crisis may prove to be very opportune indeed.

One further point concerns the role of the silent partner in this – Northern Ireland. As was noted at the outset, there is currently no sitting Executive or Assembly in Northern Ireland, and talks aimed at restoring devolved government recently ended without agreement. In terms of the Sewel Convention, this obviously means that consent for the European Union (Withdrawal) Bill could neither be formally given nor withheld by the Northern Ireland Assembly – though, were it to consider the Bill, the “petition of concern” mechanism might prove to be a complicating factor given that it allows Unionists or Nationalists to veto matters that are before the Assembly.³⁵ However, the absence of devolved institutions does not necessarily mean that Northern Ireland will be irrelevant to any crisis, as the Irish border is central to negotiations about a final EU-UK Withdrawal Agreement. As things stand, both the EU and UK government are committed to finding imaginative solutions to the border question, where proposals have included regulatory flexibility in terms of the Customs Union and Single Market. While the Democratic Unionist Party has indicated its firm opposition to any Withdrawal Agreement that would differentiate Northern Ireland’s position within the UK – an opposition that carries additional weight given the DUP’s “confidence and supply” deal with the UK government – joint efforts to resolve the border issue are continuing. Should those efforts ultimately fasten upon flexibility for Northern Ireland, the Scottish and Welsh governments have indicated that they, too, would wish to benefit from access to the Customs Union and Single Market. In the event that they would be denied such access, that may provide their institutions with yet another reason to withhold consent for the European

35 Northern Ireland Act 1998, s 42, discussed in G Anthony, ‘Britain Alone: A View from Northern Ireland’ in A Biondi and P Birkinshaw (eds), *Britain Alone! The Implications and Consequences and UK Exit from the EU* (Wolters/Kluwer, 2016), p 57, pp 62-63.

Union (Withdrawal) Bill or any other Bill that will implement a Withdrawal Agreement.³⁶

Conclusion

All of the above is, of course, speculation for the moment and it is true that a crisis may not materialise. Clearly, there is much sequencing still to be done with Brexit, and that may result in significant amendment of the European Union (Withdrawal) Bill and even a decision that the UK as a whole should remain within (or leave) the Customs Union. However, what this short paper has attempted to illustrate is how far the UK constitution has been moved towards a crisis point by the combination of Brexit and the nature of the devolution settlement. While there would inevitably be a pronounced party-political dimension to any crisis, difficulties would also – perhaps even mostly – be driven by competing visions of the constitution. In short, the “Diceyan” understanding of the Sewel Convention is one that has the potential to become very different from that of the “devolved”, where the addition of local Withdrawal Bills has emphasised how far power under the constitution is regarded as diffuse. This is thus the tension that may well now define the constitution, and it is one that must be resolved.

³⁶ See ‘EU (Withdrawal) Bill: clauses 9, 8 and 17’ available at <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8170>.

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