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# THE SMITH COMMISSION AND THE SCOTLAND ACT 2016**

**Abstract [It]**: Alla vigilia del referendum sull'indipendenza scozzese, i tre principali partiti britannici si sono impegnati per concedere alla Scozia maggiori poteri in caso di vittoria del No all'indipendenza. Il 19 settembre 2014, David Cameron ha annunciato l'istituzione della *Smith Commission* con il compito di esaminare le nuove competenze dell'Assemblea di Holyrood. Il rapporto della Commissione Smith è stato pubblicato il 27 novembre 2014 e le proposte sono state recepite dallo *Scotland Act 2016*. La legge ha attribuito al Parlamento di Holyrood maggiori poteri in diversi settori, compreso quello fiscale, ha definito "permanenti" le istituzioni scozzesi e ha formalizzato la mozione del consenso legislativo. Lo *Scotland Act* del 2016 non ha tuttavia limitato il potere del Parlamento di Westminster di approvare leggi per la Scozia, con o senza il consenso di Holyrood. La formalizzazione della convenzione sul consenso legislativo ha introdotto un mero riconoscimento legislativo di una convenzione e non ha attribuito alle Corti il potere di intervenire in caso di violazione di detta convenzione.

**Abstract [En]**: In the eve of the Scottish independence referendum the three main UK parties committed to further devolution of powers to the Scottish Parliament. On 19 September 2014, David Cameron announced the establishment of the Smith Commission tasked with discussing the new powers of the Holyrood Assembly. The Report of the Smith Commission for further devolution of power to the Scottish Parliament was published on 27 November 2014 and the proposals were incorporated in the Scotland Act 2016. The Act gave the Holyrood Parliament more powers in many areas, including the income tax-raising powers; it defined the Scottish institutions as "permanent" and it formalised the legislative consent motion. The Scotland Act 2016 in no way impaired the power of the Westminster Parliament to pass laws for Scotland, with or without the consent of Holyrood. The inclusion of the legislative consent convention merely introduced a legislative recognition of a political convention and did not give the Courts the right to intervene in the event of a hypothetical breach of the convention.

**Parole chiave**: Scotland Act 2016; Devolution; Convenzione sul consenso legislativo; Corte suprema.

**Keywords**: Scotland Act 2016; Devolution; Legislative Consent Convention; Supreme Court.

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## 1. The Scottish independence referendum and the parties' responses to further devolution

The Scotland Act 2016 is one of the most significant milestones in the recent history of Scottish devolution which stemmed from the Scotland Act 1998 and has seen a steady increase in the transfer of powers. Even if some years have passed since then, it's still interesting to examine the context that led to its approval and to evaluate its concrete application and consequences over time.

As a matter of fact, the contents of the Scotland Act 2016 are best understood through the lens of the Scottish independence referendum of 18 September 2014 and, more specifically, the 'vow' made by David Cameron, the Prime Minister, Nick Clegg, the deputy Prime Minister, and Ed Miliband, the leader of the opposition, at that time. On 7 September 2014, the Yes camp edged ahead in the opinion polls for the first time. Rallying to the defence of the union, therefore, the three main national parties responded, just two days ahead of the referendum, by making it clear that a No vote was not a vote for the status quo, because Scotland would nonetheless be given additional devolved powers that were compatible with the maintaining of the integrity of the union. Two days before the vote took place, they published on the front page of The Daily Record this statement:

> «The people of Scotland want to know that all three parties will deliver change for Scotland. We are agreed that; The Scottish Parliament is permanent and extensive new powers for the Parliament will be delivered by the process and to the timetable agreed and announced by our three parties, starting on 19th September. And it is our hope that the people of Scotland will be engaged directly as each party works to improve the way we are governed in the UK in the years ahead. We agree that the UK exists to ensure opportunity and security for all by sharing our resources equitably across all four nations to secure the defence, prosperity and welfare of every citizen. And because of the continuation of the Barnett allocation for resources, and the powers of the Scottish Parliament to raise revenue, we can state categorically that the final say on how much is spent on the NHS will be a matter for the Scottish Parliament. We believe that the arguments that so powerfully make the case for staying together in the UK should underpin our future as a country. We will honour those principles and values not only before the referendum but after. People want to see change. A No vote will deliver faster, safer and better change than separation. David Cameron Ed Miliband Nick Clegg»[1].

Above all, it was said, a win for the No camp would make the Scottish institutions 'permanent'.

[1] D. CAMERON, E. MILIBAND, N. CLEGG, *The Vow*, in *The Daily Record*, 16 Sept. 2014, 1; K. CAMPBELL, *The 2014 Scottish independence referendum in a wider constitutional context*, in *Diritto pubblico*, n. 3/2014, 783.

On 19 September 2014, therefore, in keeping with his commitment, David Cameron announced the establishment of the Smith Commission chaired by Lord Smith of Kelvin and made up of two members of each party represented in the Scottish Parliament, plus a number of experts, tasked with discussing the new powers of the Holyrood Assembly and submitting a draft proposal to Parliament by the end of January 2015. However, when announcing the establishment of the commission, Mr Cameron also announced that the governing party wanted the transfer of additional powers to Scotland to be tied to the resolution of other issues, starting with the long-standing "English Question" and the anomaly under which the 59 MPs elected to Westminster from Scottish constituencies still had the right to vote on matters relating exclusively to England. In the intentions of the Conservative Party, the offer of further devolution and additional powers to Scotland was immediately placed within a broader framework of devolution reforms that would involve both England and Wales. In fact, Mr Cameron also announced the establishment of a new Cabinet committee, known as the Cabinet Committee for Devolved Power, chaired by William Hague. Its task was to examine the allocation of «devolved powers for England, Wales and Northern Ireland alongside new powers for Scotland».

There was nothing new about Mr Cameron's proposal for England, but the Prime minister and his party's decision to tie it to greater devolution for Scotland reopened the divide between the parties, which, until a few days earlier, had been united in the Better Together campaign and joined in the common endeavour of transferring greater powers to Edinburgh. The Labour party was particularly opposed to the "English Votes for English Laws" proposal, not least because, at the time, 40 of the 59 MPs elected from Scottish constituencies were Labour members, and taking away Scottish MPs' voting rights could prove damaging for a potential future Labour executive. As we know, the proposal for England led to a reform of the standing orders of the House of Commons where, in October 2015, the EVEL procedure was introduced. This reform was then repealed in July 2021, because – in a post-Brexit world that differed completely from the context of 2015 – it was deemed to be an inappropriate solution to the English Question and detrimental to UK unity. The Conservative Party presented its repeal as being consistent with the strengthening of the Union that Brexit had helped bring about. As for Wales, a new Wales Act was passed at the end of 2014, giving the National Assembly for Wales tax-raising powers for the first time. As we shall see, in the wake of the Scotland Act 2016, Westminster passed the Wales Act 2017, which made the Welsh institutions permanent too.

Before examining the contents of the Smith Commission's proposal, it is important to specify that, in the years running up to the referendum, a number of alternatives to independence were proposed, the best-known of which were "devo plus" or "devo max", under which Holyrood would be granted greater or exclusive tax-related powers. More specifically, these alternatives involved giving Scotland the full array of state powers, with the exception of foreign and defence policy, monetary policy and financial services regulation. The terms "devo plus" and "devo max" were often used synonymously in the debate over the Scottish referendum. As Adam Tomkins points out, however, strictly

speaking "devo max" involves the devolution of «everything that is possible within a single state», whereas "devo plus" is a smaller-scale transfer of powers, a «devolution beyond that which is legislated for in the Scotland Acts 1998 and 2012, but short of "devo max"»[2]. Prior to the referendum, furthermore, the three main national parties had all presented their own plans for the future of Scotland, to be implemented in the event of a win for the No camp. The Liberal Democrats were the first to unveil their plans. These were based on the findings of the Lib Dem Home Rule and Community Rule Commission, led by Menzies Campbell, which published its first report, entitled "Federalism: The Best Future for Scotland", in October 2012. The Campbell Commission's basic idea was to grant "full Home Rule" for Scotland, with full tax-related powers, leaving Westminster responsible only for pensions, welfare, defence, foreign affairs and the management of natural resources, including oil. In March 2014, the commission then published "Campbell II", its second report, which emphasised that a No vote was not a vote for the status quo, but would open the doors «to change across the whole of the United Kingdom»[3]. The Lib Dem's plan was not confined to Scotland alone, therefore, but extended to the UK as a whole, which – in the party's view – should become a federal state.

Also in March 2014, meanwhile, the Scottish Labour Party published a report by the Scottish Labour Devolution Commission called "Powers for a Purpose – Strengthening Accountability and Empowering People"[4]. The report described the UK as a "sharing union", in which economic, social and political risks and benefits should be shared by all citizens. Structured around various points, the Labour plan envisaged greater distribution of powers between the two assemblies, with London retaining responsibility for the defence, security and well-being of the four nations, Holyrood gaining additional powers in relation to employment, health, transport and certain pension-related aspects of welfare, and both Westminster and Holyrood devolving more powers to local communities. On the tax front, the plan also envisaged a more substantial increase in tax-varying powers than the one introduced by the *Scotland Act* 2012. A particular point of interest is that the Labour plan included the proposal the Scottish Parliament should be made permanent, by decoupling its existence from the will of Westminster. On this point, the report states: «We believe the Scottish Parliament should become permanently entrenched in the constitution and indissoluble». As we shall see, this provision was introduced into the Scotland Act 2016.

Although traditionally more hostile to devolution and only sparsely represented in Scotland at the time, the Conservative Party also published a plan for the future of Scotland, in June 2014, drawn up by the Strathclyde Commission and presented by Ruth Davidson, leader of the Scottish Conservatives. The Tory plan involved transferring "real accountability" to the Scottish Parliament, by putting it in charge of 40% of the country's

[2] A. TOMKINS, *Scotland's Choice, Britain's Future*, in *Law Quarterly Review*, 2014, 222, note 32.

[3] SCOTTISH LIBERAL DEMOCRATS, *Federalism: The Best Future for Scotland. The report of the Home Rule and Community Rule Commission of the Scottish Liberal Democrats*, Edinburgh, 2012; SCOTTISH LIBERAL DEMOCRATS, *Campbell II, The Second Report of the Home Rule and Community Rule Commission*, 2014.

[4] SCOTTISH LABOUR DEVOLUTION COMMISSION, *Powers for a Purpose - Strengthening Accountability and Empowering People, Executive Summary of the Final Report*, Mar. 2014.

expenditure. Amongst other things, the report proposed the devolution of income tax and other minor taxes[5].

Alternative arrangements to independence were not only formulated by the political parties, however, but also emerged from other sources. The conclusions of the Conservative plan, for example, were inspired by a proposal included in the IPPR's Devo More Project, by Alan Trench, which suggested increasing devolution not only for Scotland, but for the other regions too, within a framework of respect for the Union and its traditions[6]. In November 2012, the Devo Plus Group then published its third report entitled *A New Union*, which proposed a "new union" to be implemented by 2020, for the purpose of strengthening Scotland to form a New Union, but union nevertheless[7].

After the referendum, Alistair Carmichael, the Minister for Scotland, presented a command paper in October 2014, entitled "The parties' published proposals on further devolution for Scotland"[8].

## 2. The Report of the Smith Commission for further devolution of power to the Scottish Parliament

As far as the work of the Smith Commission is concerned, it is worth emphasising that, despite the different positions taken by the main parties, the Commission – that can be described as a fully independent body to facilitate talks on the devolution of further powers to the Scottish Parliament - started work straight after the referendum and, although many political commentators voiced concerns about its ability to adhere to the tight timetable set for the task, it succeeded in publishing its *Report of the Smith Commission for further devolution of power to the Scottish Parliament* on 27 November 2014[9]. Needless to say, the undue haste with which the report was approved adversely affected the extent of public participation, even though a large number of proposals were made, not only by the national parties – namely the Conservatives, Labour and the Liberal Democrats, who supported the No camp, and the Scottish parties in favour of independence – but also by civil society organisations, trade unions and business and employers' associations.

The recommendations made in the report were included in the command paper entitled *Scotland in the United Kingdom: An Enduring Settlement* presented to Parliament by the secretary of state for Scotland on 22 January 2015, at the same time as the draft Scotland Clauses[10].

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[5] SCOTTISH CONSERVATIVES, COMMISSION ON THE FUTURE GOVERNANCE OF SCOTLAND, *Report*, 2014.

[6] A. TRENCH, *Funding Devo More, Fiscal Options for Strengthening the Union*, London, IPPR Report, 2013; A. TRENCH, *Devolution and the Future of the Union*, in G. LODGE - G. GOTTFRIED (eds.), *Democracy in Britain. Essays in Honour of James Cornford*, London, IPPR, 2014, 119-131; G. LODGE - A. TRENCH, *Devo More and Welfare Devolving Benefits and Policy for a Stronger Union*, London, IPPR, 2014.

[7] DEVO PLUS GROUP, *A New Union. Third Report of the Devo Plus Group*, 2012.

[8] HM GOVERNMENT, *The parties' published proposals on further devolution for Scotland*, *Presented to Parliament by the Secretary of State for Scotland by Command of Her Majesty,* Oct. 2014, Cm 8946.

[9] SMITH COMMISSION, *Report of the Smith Commission for Further Devolution of Power to the Scottish Parliament*, 2014.

[10] P. BOWERS, *Draft Scotland Clauses*, House of Commons Library, 20 Feb. 2015.

The Smith Commission Agreement only covered Scotland and did not take into account the rest of the UK, in line with common practice in devolution, which has always involved sector-based reforms. The agreement was based on three pillars: 1) "providing a durable but responsive constitutional settlement for the governance of Scotland"; 2) "delivering prosperity, a healthy economy, jobs, and social justice"; 3) "strengthening the financial responsibility of the Scottish Parliament". According to Lord Smith, the agreement – which stemmed from a compromise between the respective positions of the parties – would make it possible to give the Scottish Parliament more powers, responsibility and autonomy. On the basis of the first pillar, the agreement envisaged making the Scottish Parliament permanent, formalising conventional relations between the national executive and legislature and their Scottish counterparts, devolving additional powers over electoral matters, and giving Scotland a larger role in relations with Europe. Furthermore, Scotland was given powers over Crown Estate and a "formal consultative role" in the process of amending the BBC Charter. The agreement also envisaged the devolution of further powers in relation to transport and renewable energy.

The second pillar of the agreement covered various sectors, including the devolution of powers relating to welfare, the administration of tribunals, the management of oil extraction and the use of Scottish natural resources. Lastly, the aim of the third pillar – Strengthening the financial responsibility of the Scottish Parliament – was to increase Scotland's fiscal autonomy, with particular reference to the management of direct and indirect taxation. The Commission also proposed devolving a share of VAT to Scotland.

Although welcomed by the national Government, the Smith Commission's recommendations got only a lukewarm reception from the Scottish Government and were incorporated into the draft Scotland Clauses.

The Parliamentary debate on the draft clauses stemming from the Smith Commission's recommendations was not confined to the increased devolution of powers to Holyrood. It also covered broader issues relating to devolution, such as the centrality of the Westminster Parliament as a decision-making body and its sovereignty as a cornerstone of the British Constitution. These issues remain extremely topical even today, despite the fact that the background situation has changed considerably since 2014.

The presentation of the draft Scotland clauses incorporating the Smith Commission's recommendations drew criticism[11], mainly in relation to the undue speed at which the Government obliged the Commission to work, in order to submit its conclusions in time for them to be presented to Parliament before its dissolution in 2015. Approving a change of this magnitude in haste risked giving rise to a fragile and incomplete reform[12]. Such a complex issue, which had various consequences including the effects that increased devolution for Scotland would have on the other nations of the UK, the centrality of Parliament as a decision-making body and, last but not least, the constitutional principle of

[11] HOUSE OF COMMONS POLITICAL AND CONSTITUTIONAL REFORM COMMITTEE, *Constitutional Implications of the Government's Draft Scotland Clauses*, Ninth Report of Session 2014–15, HC 1022, 22 Mar. 2015; HOUSE OF LORDS CONSTITUTION COMMITTEE, *Proposals for the Devolution of Further Powers to Scotland*, HL Paper 145, 24 Mar. 2015.

[12] C. HIMSWORTH, *Legislating for Permanence and a Statutory Footing*, in *Edinburgh Law Review*, n. 3/2016, 361.

the sovereignty of Parliament, warranted all due consideration and greater involvement of the Parliamentary assemblies and public opinion. One of the main criticisms levelled at devolution in recent years, in fact, is that it has been pushed forward through single reforms that have failed to consider the consequences on the territorial structure of the UK as a whole[13].

It is important to remember that the national political landscape changed in the wake of the elections held on 7 May 2015, because the Tories gained a majority in the House of Commons, and David Cameron formed a new Government exclusively from the ranks of his own party. The Scottish National Party caused considerable surprise in the 2015-2017 legislature by becoming the third largest party by number of seats, having won 56 of the 59 Scottish constituencies, thus taking 50 more seats than it did in the 2010 elections. Labour, by contrast, suffered a devastating defeat in Scotland, which had been an unfailing stronghold for the party since 2015 (Labour lost 40 of the 41 Scottish seats it had held in the previous legislature). There can be no doubt that the election result was affected by the long wave of the independence referendum, bearing in mind that the SNP managed to strengthen its identity and boost its ability to meet the real needs of voters in the immediate aftermath of the referendum[14].

## 3. The Scotland Act 2016

After the general election, the Cameron Government fulfilled its commitment to present the Scotland Bill in order to implement the proposals set down in the agreement reached by the Smith Commission in late 2014. The bill took account of the observations made during the Parliamentary debate on the draft Scotland clauses. The presentation of the bill, however, failed to resolve many of the problems and sticking points that had been highlighted during the previous legislature. The bill was also criticised by Scotland's first minister, Nicola Sturgeon, who denounced the lack of provisions on welfare powers. The numerical strength of the Scottish National Party in Westminster raised the temperature of the debate on the text of the bill, making it particularly lively. The Scottish National Party tried to make amendments to the text, but most were rejected by the Conservative party.

Scrutiny of the bill thus went on for almost a year and involved difficult negotiations between the Scottish and British Governments, particularly with regard to the sensitive matter of the fiscal framework, which was one of the key features of the Smith Commission recommendations. The negotiations grounded to a halt several times and were not fully coaxed back into motion until February 2016, when the parties reached an agreement on the fiscal framework, on the basis of the "no detriment" principle established by the Smith

[13] HOUSE OF COMMONS POLITICAL AND CONSTITUTIONAL REFORM COMMITTEE, *The Future of Devolution after the Scottish Referendum*, 11th Report of Session 2014-15, 29 Mar. 2015, available online <https://publications.parliament.uk/pa/cm201415/cmselect/cmpolcon/700/70005.htm>.

[14] E. MASSETTI, *La questione scozzese tra due elezioni e due referendum,* in G. BALDINI (a cura di), *La Gran Bretagna dopo la Brexit,* Bologna, Il Mulino, 2016, 187.

Commission, under which there was to be no financial loss to either the Scottish or the national economy as a result of any increase in fiscal powers. The fiscal framework of the Scottish Government's future financial arrangements is extremely important, bearing in mind that under the Scotland Act 2016, for the first time, over half of Scotland's budget is financed by Scottish taxes. The Barnett formula has nonetheless been retained.

In accordance with the Sewel Convention, final approval of the text was preceded by the vote of a special legislative consent motion with which the Holyrood Parliament approved the bill. It is worth noting that the threat of a denial of consent by the Assembly prompted the British Government to agree to the Scottish Government's demands, so as to avoid passing such a far-reaching law without Holyrood's consent. The opposition also supported the motion, thereby expressing their appreciation of the work done by the Government. Westminster therefore passed the Scotland Act 2016, which received Royal assent on 23 March 2016. A number of provisions came into force on Royal Assent and two months after Royal assent. Other provisions came into force in later years, until February 2019, in accordance with the fiscal framework agreement.

As pointed out by the Secretary of State for Scotland, David Mundell, with the Scotland Act 2016, the Scottish Parliament had come of age. This claim is justified not only because the act was approved exactly 18 years after the Scotland Act 1998, which established the Holyrood Assembly, but also, and above all, because of the significant responsibilities transferred to Holyrood and for the establishment of an enduring constitutional settlement for Scotland within the UK. «The powers devolved under the Scotland Act 2012 and 2016 make the Scottish Parliament one of the most powerful devolved legislatures in the world»[15]. The act thus represented a compromise between the two alternatives offered in the referendum, namely Yes or No to independence. It gave the Holyrood Parliament more powers in many areas, including «the Scottish Parliament's income tax-raising powers. Since April 2017, the Scottish Parliament has had the power to set the income tax rates and bands applicable to Scottish taxpayers on their non-savings and nondividend income»[16]. It also devolved powers over Air Passenger Duty and the Aggregates Levy, although the matter was deferred. «The Act also makes provision for the assignment of VAT receipts. The Scotland Act 2016 provides the Scottish Government with additional borrowing powers», other than 2012[17]. The act also introduced changes relating to welfare, electoral arrangements, natural resource exploitation, road traffic, consumer rights, railway

[15] *Fifth Annual Report on the Implementation of the Scotland Act 2016 Presented to Parliament by the Secretary of State for Scotland by Command of Her Majesty*, Mar. 2021, 1.

[16] The rates and bands will be set each year in the Scottish Rate Resolution. The Scottish block grant will be adjusted to reflect the change in funding stream in the manner set out in the fiscal framework agreement between the UK and Scottish Governments in February 2016.

[17] This extensive list of powers includes the power to set rates and bands of income tax, create new benefits in devolved areas and to legislate on a variety of new areas such as equalities in the public sector, onshore oil and gas licensing, and the management of the Crown Estate. In addition to the circumstances set out in the Scotland Act 2012, the provisions in the Scotland Act 2016 enable Scottish ministers to borrow for the following two purposes: to meet current expenditure because of an excess of welfare payments over forecast welfare payments, and to meet current expenditure because of a Scotland-specific negative economic shock.

franchises, Crown Estate management, police powers and Ofcom, the communications regulator.

Holyrood was also given the power to repeal – in certain circumstances and by a supermajority of two thirds – the provisions of the Scotland Act 1998 in relation to electoral matters. These are the provisions relating to protected subject-matter, which were introduced in the Scotland Act 1998, section 31A. «The Parliament has been vested with the power to determine its own composition, the composition of its electorate, and the conduct and regulation of its elections»[18]. These additional powers gave the Scottish Parliament increased autonomy in relation to the operation of the elections in Scotland. The latter represented a significant new departure, given that the Scotland Act 1998 had not established any means for its repeal by Holyrood, but only by Westminster, on the basis that London enjoyed sole sovereignty. This provision was applied for the first time in February 2020, when Holyrood passed the Scottish Elections (Franchise and Representation) Act 2020, which extended the right to vote for Scottish local elections to foreigners living in Scotland and convicted criminals serving custodial sentences for a term not exceeding 12 months. This latter provision sets Scotland apart from the rest of the UK. The act was passed by 92 votes (thus exceeding the required majority of 86). Furthermore, a Scotland Act 2016 Implementation Board was established to oversee the implementation of the project. The board meets twice a year and is chaired by the deputy director for constitutional policy and legislation at the Office of the secretary of state for Scotland, in which British ministers from the sectors involved also participate.

In addition to the transfer of greater powers, which appears to be consistent with the pattern of continuous progress of devolution that had been going on since 1998, it is highly significant that the act defined the Scottish institutions as "permanent" and formalised the legislative consent motion.

### 3.1. The permanence of the institutions

Section 1 of the 2016 *Scotland Act* stated that: «The Scottish Parliament and the Scottish Government are a permanent part of the United Kingdom's constitutional arrangements». The "permanence" of the Scottish institutions – as mentioned – had already been the subject of extensive doctrinal and political debate at the draft clauses stage. And even in the course of debate of the bill, this provision raised doubts in many quarters in view of the possible revolutionary consequences on the principle of the sovereignty of Parliament, because it introduced a breach of the rule preventing the Parliament from binding itself and limited the traditional principle of the sovereignty of Westminster. In the debate and hearings of experts both at the draft clauses stage and on presentation of the Scotland bill, questions were raised as to whether these provisions should be interpreted as merely political and symbolic, and whether they could be regarded simply as a commitment by the

[18] P. REID, *Elections and Super-Majorities: Simply Another Staging Post?*, in *Edinburgh Law Review*, n. 3/2016, 367.

Westminster Parliament to recognise the Scottish institutions as permanent and, therefore, not abolish them. Considerable investigative effort was expended on determining whether the "permanence" of the Scottish institutions was compatible with the principle of sovereignty of the Westminster Parliament. As the House of Lords Constitution Committee put it, there was a risk that this new wording would give rise to uncertainty over the «absolute nature of Parliamentary sovereignty where there should be none»[19].

In light of the considerations that emerged from the political and doctrinal debate, the text of the *Scotland Act* 2016 specified that «the purpose of this section is, with due regard to the other provisions of this Act, to signify the commitment of the Parliament and Government of the United Kingdom to the Scottish Parliament and the Scottish Government».

Formalisation of the permanence of the institutions is a commitment that cannot be regarded as binding on Westminster forever and limiting – at least formally – its sovereignty. The permanence of the Scottish Parliament can have only «a political claim rather than a legal one»[20]. The Scottish Parliament and the Scottish Government were recognised as permanent, only in the sense that they are regarded as permanent by Westminster. This recognition did not take away Westminster's power to abolish them, although such a decision is politically unlikely, hard to imagine, and would have devastating consequences on the integrity of the Union[21]. The act states that this power cannot be exercised without approval by referendum: «In view of that commitment», the text of the Act continues, «it is declared that the Scottish Parliament and the Scottish Government are not to be abolished except on the basis of a decision of the people of Scotland voting in a referendum».

The legislator has therefore chosen a compromise solution that formally respects Parliament's sovereignty, but makes the exercise of that sovereignty subject to a popular vote. It has been observed that this provision represents «a valid exercise of the (still legally unlimited) law-making power of the UK Parliament»: Westminster did not, in fact, bind the next Parliament by depriving it of the right to abolish the Scottish institutions, it merely exercised its law-making power by choosing to change the «manner and form by which laws are passed»[22].

This was not the first time that Westminster had introduced a referendum clause into a law: other examples include Section 1 of the Northern Ireland Act 1998, which states that Northern Ireland is an integral part of the United Kingdom, while giving the citizens the power to choose whether to remain a part thereof, by referendum; and the European Union Act 2011, which established that any amendment of the European Treaties could only be introduced upon approval by referendum.

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[19] HOUSE OF LORDS CONSTITUTION COMMITTEE, *Scotland Bill,* 6th Report of Session 2015–16, HL paper 59, 23 Nov. 2015.

[20] C. HIMSWORTH, *Legislating for Permanence*, cit., 361.

[21] S. TIERNEY, *The Territorial Constitution and the Brexit Process*, in *Current Legal Problems*, 2019, 59.

[22] M. GORDON, *The Permanence of Devolution: Parliamentary Sovereignty and Referendum Requirements*, available online, <www.scottishconstitutionalfutures.org>; M. GORDON, *Parliamentary Sovereignty in the UK Constitution. Process, Politics and Democracy*, Oxford - Portland - Oregon, Hart, 2015.

The permanence of the institutions established in the Scotland Act 2016 is therefore eminently political in nature, with the result that devolution can be seen as a «political fact that cannot be ended unilaterally by Parliamentary fiat»[23]. The question of what the importance and significance of this provision might be, however, is still to be explored «in a constitutional order that does not, and cannot, entrench anything»[24].

Whereas, until 2016, the potential abolition of the Scottish Parliament by Westminster cast a shadow over the constitutional reality of the Scottish Parliament's position, the new provision has a strongly symbolic character, which also helps define relations between the Parliaments more effectively. The British Parliament could repeal the *Scotland Act* 2016 and the *Wales Act* 2017, thus removing the requirement for a referendum, but by passing these acts, Westminster signed up to a kind of moral obligation to respect the will of the people, as expressed in a referendum, that it would struggle to retract[25].

### 3.2. The legislative consent convention

Section 2 of the *Scotland Act* 2016 formalised the legislative consent convention, which requires the express consent of Holyrood in the event that the British Parliament decides to legislate on devolved matters. Section 2 of the Act supplemented Section 28 (7) of the Scotland Act 1998 (stating that «This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland») with a new provision that states: «it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament»[26]. This provision, in certain respects, replicates the provisions of the Statute of Westminster 1931, in which Parliament specified that it did not pass laws for the «self-governing dominions of the British Empire without their consent»[27].

The Parliamentary debate focused in particular on the use of the expression "normally", which is undoubtedly atypical in a legal context. According to the Devolution Committee's interim report, this expression could potentially weaken «the intention of the Smith Commission's recommendation»[28]. The Government defended the use of that expression, however, as it was based on statements made by Lord Sewel, the Scottish Office minister, in the course of scrutiny of the Scotland Bill in the House of Lords in 1998[29]. The Parliamentary debate also noted that the text omitted to mention the practice that had

[23] M. LOUGHLIN - S. TIERNEY, *The Shibboleth of Sovereignty*, in *The Modern Law Review*, n. 6/2018, 1014.

[24] J. E. KHUSHAL MURKENS, *Preservative or Transformative? Theorizing the U.K. Constitution Using Comparative Method*, in *The American Journal of Comparative Law*, n. 2/2020, 420.

[25] S. G. WHITE, *The Referendum in the UK's Constitution: From Parliamentary to Popular Sovereignty?*, in *Parliamentary Affairs*, n. 2/2020, 263.

[26] C. HIMSWORTH, *Legislating for Permanence*, cit., 361.

[27] M. LOUGHLIN - S. TIERNEY, *The Shibboleth of Sovereignty*, cit., 1014.

[28] DEVOLUTION (FURTHER POWERS) COMMITTEE, *New Powers for Scotland: An Interim Report on the Smith Commission and the UK Government's Proposals*, 14 May 2015; DEVOLUTION (FURTHER POWERS) COMMITTEE, *New Powers for Scotland: Final Report on the Scotland Bill*, 11 Mar. 2016, 146.

[29] C. HIMSWORTH, *Legislating for Permanence*, cit., 361.

developed over the years, according to which voting on a legislative consent motion was not confined to draft laws «affecting devolved matters», but also extended to bills that «alter the legislative competence of the Parliament or the executive competence of the Scottish Ministers»[30].

Questions were raised about the consequences of translating this convention into law, and whether the convention would benefit from the status of the new source as a result: in other words, whether Parliamentary recognition of the existence of a convention could change the nature of that convention. According to orthodox constitutional theory[31], introducing the convention into the 2016 law could not limit the principle of the sovereignty of Parliament, and should therefore be seen as merely recognising the existence of a convention, as a "declaratory statement of intent". This is not just a theoretical issue, it is a problem of considerable practical substance, connected with the different values attributed to the two sources: unlike the law, the convention cannot be invoked before the Courts to petition for its application, since any breach thereof can only be sanctioned at the political level. The debate on these issues did not end with the vote on the 2016 text, and resumed during the process of approving the *Wales Act* 2017, which included a similar provision[32].

As widely reported, it was the Miller case of 24 January 2017 that provided a definitive answer to these questions and clarified how the Courts should interpret the introduction of the legislative consent convention into the 2016 and 2017 acts[33].

The judges in the Miller case voted unanimously to reject the interpretation under which the «statutory form of the Sewel convention that was inserted in the Scotland Act 2016 and in the Government of Wales Act 2017 have granted the Courts jurisdiction over it». The Supreme Court specified that the convention is merely «statement of political intent [that does] not create legal obligations. So the only purpose of recognising the convention in statutory form was give it greater political weight, as a convention»[34]. According to the ruling, therefore, the Scotland Act 2016 merely introduced "legislative recognition" of a "political convention"[35]: a recognition of purely political and symbolic value by which Westminster also wished to highlight the «co-operative relationships between the UK Parliament and the devolved institutions, where there were overlapping legislative competences». The inclusion of the legislative consent convention in the Scotland Act 2016 did not give the Courts the right to intervene in the event of a hypothetical breach of the convention, on the grounds that the latter's application and operation «does not lie within the constitutional remit of the judiciary».

Like the Scotland Act 1998, therefore, the Scotland Act 2016 in no way impaired the power of the Westminster Parliament to pass laws for Scotland, with or without the consent

[30] CABINET OFFICE, *Post-Devolution Primary Legislation affecting Scotland*, 2011, Para 4 (III).

[31] N. BARRY - N. MIRAGLIOTTA - Z. NWOKORA, *The Dynamics of Constitutional Conventions in Westminster Democracies*, in *Parliamentary Affairs*, n. 3/2019, 664.

[32] S. G WHITE, *The Referendum in the UK's Constitution*, cit., 263.

[33] M. KEATING, *State and Nation in the United Kingdom. The Fractured Union*, Oxford, Oxford University Press, 2021.

[34] J. MURKENS, *Mixed Messages in Bottles: the European Union, Devolution, and the Future of the Constitution*, in *The Modern Law Review*, 2017, 685; K. CAMPBELL, *The 2014 Scottish independence referendum*, cit., 785.

[35] S. TIERNEY, *The Territorial Constitution and the Brexit Process*, cit., 59.

of Holyrood. It merely specified the practice generally followed by Westminster, without changing its status as a convention. Although the legislative consent convention expresses the principle under which the Scottish Parliament is expected to legislate for Scotland on matters within its competence, there have been several cases in which Westminster has passed laws covering the whole of the United Kingdom that fell within the scope of devolved matters, even simply for "good practical reasons"[36]. According to studies by the Institute for Government, «in the first 20 years of devolution, 220 Acts were passed at Westminster which required the consent of a devolved administration».

Until 2018, voting on the legislative consent motion did not give rise to any particular problems in Scotland. Many motions related to technical matters and were preceded by agreements between the Governments (only one was rejected). In the Miller ruling, the Court specified that the convention has «practical benefits of achieving harmony between legislatures in areas of competing competence, of avoiding duplication of effort, of enabling the UK Parliament to make UK-wide legislation where appropriate […] and of avoiding any risk of legal challenge to the vires of the devolved legislatures». The standing orders of the Scottish Parliament have governed the procedure to be followed. «Consideration of Legislative Consent Memoranda has, in practice, formed quite a significant element in the legislative work of the Scottish Parliament»[37].

Things started to change in 2018, however, largely due to the introduction of a number of controversial bills designed to implement Brexit, which were opposed by the Scottish Assembly. Its opposition did not prevent the laws from being passed, however, thus confirming the purely conventional status of the legislative consent convention. An example of the above was the *European Union (Withdrawal) Act* 2018, on which, despite repeated attempts to mediate, it proved impossible to reach any agreement or compromise between the positions of the Scottish and British Governments. Westminster therefore passed the law without the consent of the Scottish Parliament, but with the consent of the Welsh Assembly. As for the *European Union Withdrawal Agreement Act* 2020, by contrast, Westminster passed the law without the consent of any of the three devolved legislatures. Once again, the rejection by the devolved assemblies was devoid of legal consequences, but there is no doubt that it was highly symbolic and, above all, emblematic of the complex political relations between the United Kingdom's constituent nations. Similarly, on the *Internal Market Act* 2020, the Scottish and Welsh Parliaments both rejected the motion, and "although no formal legislative consent motion was lodged in the Northern Ireland Assembly", while the Belfast Assembly approved a motion opposing the bill[38]. The

[36] DEVOLUTION (FURTHER POWERS) COMMITTEE, *New Powers for Scotland: Final Report on the Scotland Bill*, available online, <https://archive2021.parliament.scot/parliamentarybusiness/currentcommittees/97413.aspx>, 2016, 146.

[37] J. WOLFFE, *The Renton Lecture 2020: Devolution and the Statute Book,* in *Statute Law Review,* n. 2, 2021, 121*;* J. WOLFFE*, Miller and Scotland: the Importance of the Legislative Consent Convention in the Devolution Settlement*, in *UK Supreme Court Yearbook*, vol. 8, 2017, 344.

[38] A. PAUN - K. SHUTTLEWORTH, *Legislating by consent: How to Revive the Sewel Convention*, IPPR, Sept. 2020, available online<www.instituteforgovernment.org.uk/sites/default/files/publications/legislating-by-consent-sewel-convention.pdf>.

devolved Parliaments also opposed the approval of the Subsidy Control Act 2022, the Retained EU Law (Revocation and Reform) Act 2023 and the Illegal Migration Act 2023.

The opposing votes of the Scottish, Welsh and Northern Irish assemblies cannot limit the exercise of sovereignty by Westminster, whose formal power has remained unchanged. From a political point of view, however, introducing the convention into law appears to have amplified the resonance of the conflict whenever there is a split between Scotland (and Wales) and the United Kingdom, and whenever the British Government opts to abandon the search for compromise and pass a law regardless[39].

## 4. Supreme Court and devolution

The Scotland Act 1998 Act confirmed the principle of the sovereignty of the British Parliament, and reiterated that Scotland (like Wales and Northern Ireland) remained an integral part of the United Kingdom and that its Parliament was a "devolved body", whose powers were delegated by the London Assembly, in relation to which it was considered «a constitutionally subordinate Parliament»[40]. The 1998 act did not involve any transfer of sovereignty, but merely a delegation of administrative, legislative and executive powers. In 1998, the Westminster Assembly thus retained its role as the UK's sovereign Parliament, and remained «the sun around which the planets revolve»[41]. The devolved assemblies' dependence on the London Parliament was also evident in certain expressions used by academics, who described them as "creatures of Westminster". After 1998, Scottish devolution made further progress, and in 2012 and 2016 the Westminster Parliament passed laws that extended Scotland's powers, while formally keeping the principle of its own sovereignty intact. As we have seen, the new powers granted to Holyrood under the 2016 act are substantial, the symbolic significance of the permanence of the institutions is revolutionary, and the introduction of the legislative consent motion to echo the voice of Scotland is significant.

While respecting the equilibrium of the subtle distinction between political and legal, the *Scotland Act* 2016 appears to have introduced *de facto* changes that could be profound and that, in essence, have cast a different light on the traditional concept of the sovereignty of Parliament, triggering concerted reflection on this principle and its various interpretations. Although the Supreme Court's ruling on the Miller case expressed a concept of sovereignty «that traces back to Blackstone and Dicey»[42] and is thus more closely aligned with tradition,

[39] K. EWING, *Brexit and Parliamentary Sovereignty*, in *The Modern Law Review*, n. 4/2017, 711; A. PERRY - A. TUCKER, *Top-Down Constitutional Conventions*, in *The Modern Law Review*, n. 5/2018, 765.

[40] V. BOGDANOR, *Devolution: Decentralisation or Disintegration?*, in *The Political Quarterly*, n. 2/1999, 185; V. BOGDANOR, *Devolution: The Constitutional Aspects*, in J. BEATSON (ed.), *Constitutional Reform in the United Kingdom: Practice and Principles*, Cambridge, Hart Publishing, The University of Cambridge Centre for Public Law, 1998, 9-19; A. BRADLEY, *Constitutional Reform, the Sovereignty of Parliament and Devolution*, in BEATSON (ed), *Constitutional Reform in the United Kingdom*, cit., 33.

[41] V. BOGDANOR, *Devolution: The Constitutional Aspects*, cit., 9.

[42] J. MURKENS, *Mixed Messages in Bottles*, cit., 685.

there is no denying the fact that, from a political point of view – over which the Court holds no sway – the institution of the devolved assemblies has affected the traditional principle of the sovereignty of Parliament on which the British order is based[43].

From a formal point of view, all the laws of devolution show that Westminster is always the only Parliament that can introduce limits on its own power, by means of law. As some analysts point out, however, from a substantive point of view, the progress of devolution could gradually lead to a new interpretation of sovereignty, which would thus cease to be the monopoly of Westminster and instead be shared with the other assemblies under a *de facto* "shared sovereignty" [44]. «Soverignty can no longer be considered an unquestioned foundational principle, which cannot be shared or divided»[45]. As J. Murkens pointed out: «The devolution arrangements have changed the UK's constitutional settlement. The old Westminster axis of power has become diffuse through power-sharing agreements with Edinburgh, Cardiff, and Belfast. People who voted Leave may 'want their country back', but their country has transformed over the last twenty years»[46]. Scotland Act 2016 could have led to a «self-managed erosion of Parliament's purported omni-competence», an erosion that «highlights the degree to which the absolutist legal doctrine has been qualified by political developments»[47].

It is worth noting that the rulings of the Supreme Court in recent years have helped define and clarify the essence of devolution and set the boundaries of the national assemblies' powers[48]. The Court's case-law has set the criteria for evaluating devolved laws, and these criteria appear to be similar to those used by the Courts in the federal states, and to the «pith and substance test» applied by the Judicial Committee of the Privy Council between the 19th and 20th centuries[49]. The act of defining these criteria has made it possible to specify and delimit the relations between the multi-level legislatures, from a formal and substantive point of view. In its case-law, the Court has recognised that only the Westminster Assembly can be considered sovereign and that the laws of the devolved assemblies must adhere to the rule of law if they are to be deemed valid. In the case of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill

[43] A.V. DICEY, *Introduction to the Study of the Law of the Constitution*, London, Macmillan, 1897, V ed.; G. MARSHALL, *What is Parliament? The Changing Concept of Parliamentary Sovereignty*, in *Political Studies*, 1954, 193; G. MARSHALL - G.C. MOODIE, *Some Problems of the Constitution*, London, Hutchinson, 1959; H. WADE, *The Basis of Legal Sovereignty*, in *Cambridge Law Journal*, 1969, 172; G. WINTERTON, *The British Grundnorm: Parliamentary Sovereignty Rexamined*, in *Law Quarterly Review*, vol. 92, 1976, 591; A. W. BRADLEY, *The Sovereignty of Parliament - in Perpetuity?*, in J. JOWELL - D. OLIVER (eds.), *The Changing Constitution*, Oxford, Clarendon Press, 1989, 25; N. MACCORMICK, *Sovereignty: Myth and Reality*, in *Scottish Affairs*, n. 11, 1995, 1; I. LOVELAND, *Constitutional Law. A Critical Introduction,* London, Butterworths, 1996; A.H. BIRCH, *The British System of Government*, London, Routledge, 1998; B.K. WINETROBE, *The Autonomy of Parliament*, in D. OLIVER - G. DREWRY (eds.), *The Law and Parliament*, London, Butterworths, 1998, 30.

[44] M. KEATING, *State and Nation in the United Kingdom. The Fractured Union*, Oxford, Oxford University Press, 2021, 70.

[45] M. KEATING, *State and Nation*, cit., 71.

[46] J. MURKENS, *Brexit: The Devolution Dimension*, in *U.K. Const. L. Blog*, 28th June 2016, available online, <https://ukconstitutionallaw.org/2016/06/28/jo-murkens-brexit-the-devolution-dimension/>.

[47] M. LOUGHLIN, S. TIERNEY, *The Shibboleth of Sovereignty*, cit., 1016.

[48] *Martin and Miller v. Lord Advocate*, [2010] UKSC 10.

[49] A. TRENCH, *The UK Supreme Court and the Legal Line between Devolved and Non-Devolved Matters*, 11 Aug. 2010, available online, <devolutionmatters.wordpress.com>.

Reference of October 2021, the Court ruled that certain provisions fell outside the competence of the Holyrood Assembly because they were contrary to Section 28 (7) of the Scotland Act 1998 and reiterated that Westminster's power to enact laws for Scotland must be deemed "unqualified". In the Court's view, while the Scottish Parliament, in certain circumstances, can repeal Westminster's laws falling within its own spheres of competence, as established in the Scotland Act 2016, it does not have the power to authorise the Courts to declare that «unrepealed Acts of Parliament have ceased to be law».

The Court's case-law also establishes, however, that the exclusive nature of Westminster's sovereignty does not mean, for example, that devolved laws can be equated to administrative acts of the British executive and that the common-law principles established in judicial review can be used for their interpretation[50]. Although the Court must confine its rulings to formal aspects, without entering into political or substantive matters, it is clear that the Court has also shown respect and deference on certain occasions for another kind of sovereignty, namely popular sovereignty, as expressed by the devolved assemblies elected by the people[51]. For example, the Supreme Court specified this concept in Axa General Insurance Company Ltd v. Lord Advocate 2012 SC (UKSC) 122, para. 49W[52] affirming that «The dominant characteristic of the Scottish Parliament is its firm rooting in the traditions of a universal democracy. It draws its strength from the electorate. First, it is plenary in character… leaves it to the Scottish Parliament itself, as a democratically elected legislature, to determine its own policy goals. It has to decide for itself the purposes for which its legislative powers should be used, and the political and other considerations which are relevant to its exercise of those powers». Similarly in 2013, in the first case in which the Court ruled that a law passed by the Scottish Parliament was "not law", because it was *ultra vires*[53], the Supreme Court suspended the effect of its decision for 12 months in order to give the Scottish Parliament an opportunity to remedy the human rights breach, while calling upon the Scottish Parliament to pass a new law, within the confines of its powers, by the end of that period. As pointed out by Docherty and Kennedy, the decision highlights the «judicial deference to the Scottish Parliament in suspending its judgement»[54] and confirms the British Courts' respect for the will of the legislative assemblies – a respect that is not confined to Westminster, as the holder of Parliamentary sovereignty, but extends to the devolved assemblies, which are seen as the holders of popular sovereignty. In the Continuity bill case of 2018, furthermore, the Court accepted an interpretation of Parliamentary sovereignty that is more in line with the modern constitutional practice that has developed in recent years, insofar as it ruled that Westminster – the only Parliament that holds sovereignty – must nonetheless adapt to the

[50] *Axa Gen. Ins. Ltd. v. Lord Advocate*, [2011] UKSC 46, [2012] 1 A.C. 868.
[51] G. CARAVALE, *Family of Nations. Asimmetrie territoriali nel Regno Unito tra devolution e Brexit*, Napoli, Jovene, 2017.
[52] J. WOLFFE, *The Renton Lecture 2020: Devolution and the Statute Book*, in *Statute Law Review*, n. 2, 2021, 121.
[53] *Salvesen v Riddell*, [2013] UKSC 22.
[54] C. DOCHERTY - M. KENNEDY, *Jurisdiction and Devolution Issues,* in *Cambridge Journal of International and Comparative Law*, n. 3/2014, 239.

presence of the devolved assemblies, as they are democratically elected and extremely important from a political and constitutional point of view.

Lastly, in November 2022, the UK Supreme Court delivered a unanimous judgment on *Reference by the Lord Advocate of devolution issues under paragraph 34 of Schedule 6 to the Scotland Act 1998* concerning whether a referendum on Scottish independence is within the legislative competence of the Scottish Parliament. The Court concluded that the Scottish Parliament could not legislate for a referendum on the question of whether Scotland should become an independent country. Even though the referendum would have been 'advisory' without any legal effect on the Union, it would have had important political consequences. According to the Court:

> «A lawful referendum on the question envisaged by the Bill would undoubtedly be an important political event, even if its outcome had no immediate legal consequences, and even if the United Kingdom Government had not given any political commitment to act upon it. A clear outcome, whichever way the question was answered, would possess the authority, in a constitution and political culture founded upon democracy, of a democratic expression of the view of the Scottish electorate»[55].

## 5. Conclusion

It goes without saying that the Court must confine itself to overseeing the action of the devolved Parliaments, and that this action must be carried out within the limits laid down by the laws of Westminster. On no account may this oversight extend to setting limits on the UK Parliament or its decisions on the governance of devolved matters, whose scope is purely political[56]. At present, the framework of political relations between Westminster and the devolved assemblies appears to be strongly influenced by divergences and conflicts over the laws implementing Brexit, and these conflicts seem to be shifting the pendulum in favour of the central Government[57]. However, the political balance between the United Kingdom and Scotland is susceptible to continuous fluctuations. The legal framework, defined in part by the Scotland Act 2016, therefore plays a crucial role in setting the confines within which this oscillation can take place.

[55] *Reference by the Lord Advocate of devolution issues under paragraph 34 of Schedule 6 to the Scotland Act 1998*, [2022] UKSC 31, 29.

[56] J. WOLFFE, *Miller and Scotland*, cit., 344; Lord LISVANE, *Why Is There So Much Bad Legislation?*, in *Statute Law Review*, n. 3/2020, 291.

[57] M. SANDFORD, C. GORMLEY-HEENAN, *Taking Back Control', the UK's Constitutional Narrative and Schrodinger's Devolution*, in *Parliamentary Affairs,* n. 1/2020, 108 (116).