Written evidence submitted by Dr. Mark Elliott, Reader in Public Law, University of Cambridge (DSB 01)

The Proposed Scotland Bill: The Constitutional Implications of Draft Clauses 1 and 2

Executive summary

Clause 1 of the proposed Scotland Bill:

- does not, as currently drafted, “make” the Scottish Parliament permanent as Lord Smith said it should in his foreword to the Report of the Smith Commission;
- does not unambiguously implement the proposal made in the Report itself, which said that UK legislation should state that the Scottish Parliament and Government are permanent institutions; Clause 1 instead adopts an arguably weaker formulation to the effect that those institutions are “recognised as permanent”;
- is likely to be of no legal effect. It may, however, be of political significance;
- could be revised so as to attempt to preclude abolition of the Scottish Parliament via UK legislation either absolutely or unless certain conditions (e.g. the consent of the Scottish Parliament) were satisfied. However, whether such a provision would be considered legally enforceable is far from certain.

Clause 2 of the proposed Scotland Bill:

- does not place the Sewel Convention “on a statutory footing“ in the sense of introducing a statutory rule equivalent to the rule presently reflected in the Convention;
- does place the Sewel Convention “on a statutory footing” in the sense of acknowledging in statute the existence of the convention;
- is likely to be limited or no legal effect.

Introduction

1. The Report of the Smith Commission for Further Devolution of Powers to the Scottish Parliament made two proposals that, if implemented, would be of potentially general significance to the constitutional relationship between the Scottish and UK Parliaments and to the constitutional status and authority of each of those institutions. While this is not to diminish the importance of the many other proposals made by the Smith Commission, the point is that the proposals that are the subject of this paper are significant at a more general level of abstraction than the specific proposals concerning the devolution of particular powers.
2. The first of the two proposals that form the concern of this paper relates to the “permanence” of the Scottish Parliament. This point is referred to in both Lord Smith’s preface to the Commission’s report and in the Report itself. In his foreword, Lord Smith writes:

The Scottish Parliament will be made permanent in UK legislation and given powers over how it is elected and run. The Scottish Government will similarly be made permanent.¹

In the report itself, these ideas are fleshed out (slightly) in the following terms:

UK legislation will state that the Scottish Parliament and Scottish Government are permanent institutions.²

These formulations are significantly different from one another: saying (as the Report does) that UK legislation “will state” that the Scottish Parliament and Government are permanent institutions is not the same as saying (as the foreword does) that the Scottish Parliament “will be made” permanent.

3. The second of the relevant proposals made by the Smith Commission concerns the “Sewel Convention”. The leading statement of the Convention is to be found in the Memorandum of Understanding that sets out an agreed position between the UK Government and the three devolved administrations on various matters pertaining to the operation of the devolution settlements. It says:

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. However, the UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature. The devolved administrations will be responsible for seeking such agreement as may be required for this purpose on an approach from the UK Government.³

The Cabinet Manual contains a statement to like effect.⁴ As a convention — as opposed to a legal rule — the Sewel Convention does not, at least on an orthodox analysis, have any specifically legal effect.

4. However, the Report of the Smith Commission says that:

The Sewel Convention will be put on a statutory footing.⁵

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³ Memorandum of Understanding and Supplementary Agreements (2013), 8.
⁴ Cabinet Manual (2010), 64.
This might be thought to imply that the practice reflected in the convention will — by being “put on a statutory footing” — be invested with a degree of legal effect that, as a convention, it presently lacks.

5. The aims of this paper are twofold: first, to consider the extent to which the recently published Draft Clauses of the proposed Scotland Bill would, if enacted, fully implement the relevant proposals made by the Smith Commission; and, second, to consider the broader constitutional implications of proceeding along such lines.

Permanence: Comparison of Smith Report and Clause 1

6. Clause 1 of the proposed Scotland Bill provides that:

   A Scottish Parliament is recognised as a permanent part of the United Kingdom’s constitutional arrangements.

7. On the question whether this would fully implement the proposals made by the Smith Commission, two points should be noted.

8. First, the formulation adopted in Clause 1 clearly does not purport to give effect to the “permanence” proposal as presented by Lord Smith in his foreword to the Report. If UK legislation were to state that the Scottish Parliament was “recognised” as a permanent part of the UK’s constitutional arrangements, no plausible legal argument could be made that the Scottish Parliament had thereby been “made” permanent.

9. Second, the formulation adopted in Clause 1 does not unambiguously implement the proposal contained in the Report itself. The Report, it will be recalled, said that UK legislation would state that the Scottish Parliament and the Scottish Government “are permanent institutions”. Clause 1, in contrast, says that they “are recognised” as such. The formulation adopted by the Smith Commission was potentially constitutive, the implication being that by operation of the relevant statutory provision, the Scottish Parliament and Government would be rendered permanent. However, by including the word “recognised”, Clause 1 might be taken to be merely declaratory of the supposed fact of the Scottish Parliament and Government’s permanence. Yet at the present time, the Scottish Parliament and Government are unarguably — as a matter of law — not permanent institutions (in the sense that they can be abolished by UK legislation). If, therefore, Clause 1 does no more than to recognise the Scottish Parliament as permanent, it is legally empty: it recognises a position that does not in law exist, while making no claim to alter the status quo.

10. The upshot, then, is that Clause 1 does not (as Lord Smith said it would) make the Scottish Parliament permanent, and it does not (as the Report said it would) state that the Scottish Parliament is permanent; it merely acknowledges a permanence that does not presently exist as a matter of law: a position that Clause 1, if enacted in its current form, would do nothing to change.
11. In the light of the foregoing conclusion, it is worth considering whether — and, if so, how — Clause 1 could be amended so as to go further than it presently does. Two options will be considered.

12. One option would be an either explicitly or implicitly constitutive statutory statement purporting to render the Scottish Parliament a permanent institution.

An implicit statement to such effect might read:

The Scottish Parliament is a permanent part of the United Kingdom’s constitutional arrangements.

The implication of such a provision would be that the Scottish Parliament could not be abolished.

An explicit provision might read:

The Scottish Parliament is a permanent part of the United Kingdom’s constitutional arrangements. Subsection (1)\(^6\) may not be amended or repealed.

13. If, however, Clause 1 were take one of these forms, it is unlikely that a court would consider it to be a legal inhibition upon the abolition of the Scottish Parliament via legislation enacted by the UK Parliament. Such a conclusion follows straightforwardly from the proposition that the UK Parliament — unlike its Scottish counterpart — is sovereign. Of course, questions can and do arise about the capacity of the UK Parliament to relinquish its authority, the UK’s relationship with the European Union being a case in point. On one view, it may be argued that the UK Parliament has relinquished sovereignty to the institutions of the EU, from which laws enjoying primacy over domestic law now originate.\(^7\) However, the better view — and one endorsed by recent judicial authorities, including at UK Supreme Court level\(^8\) — is that the UK Parliament has done nothing of the sort. On this view, to the extent that EU law enjoys priority over domestic statutes, it does so only because, only to the extent, and only for so long as UK primary legislation so permits. This is consistent with the view of Lord Justice Laws, according to which, “[b]eing sovereign, [the UK Parliament] cannot abandon its sovereignty”.\(^9\) It is also consistent with the position as stated in section 18 of the European Union Act 2011.

14. If this orthodox view is accepted, then two observations follow.

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\(^6\) Of the Scotland Act 1998, which provides that: “There shall be a Scottish Parliament.”


\(^8\) See \textit{R (HS2 Action Alliance) v Secretary of State for Transport} [2014] UKSC 3.

15. The first is that, whether in its current form or in one of the more far-reaching forms set out above, Clause 1 will be legally empty: to the extent that the permanence of the Scottish Parliament implies an absolute incapacity on the part of the UK Parliament to effect abolition, that is a state of affairs that the UK Parliament cannot legally bring about.

16. The second observation is that analysing these matters through a legal lens may inapposite. The significance of statements contained in primary legislation can be other than legal; they can, for example, be important in political and/or symbolic terms. An analogy may be drawn with legislation providing for independence from the UK. According to the orthodox view set out above, such legislation is incapable of permanently disabling the UK Parliament from reasserting legislative authority over newly independent States because — as Lord Justice Laws put it — it “cannot abandon its sovereignty”. However, as Lord Denning wisely observed, “Freedom once given cannot be taken away. Legal theory must give way to practical politics.” From this perspective, the legal emptiness of Clause 1 is likely to be eclipsed by its political symbolism.

17. A second possible approach to Clause 1 should also be considered. While it is improbable that a court would be willing to give effect to a statutory provision purporting to deprive the UK Parliament of all legal capacity to abolish the Scottish Parliament, the question arises whether Clause 1 might seek to impose more modest restrictions upon the UK Parliament’s powers that might be more likely to be recognised as legally enforceable. This brings to the fore the distinction between the absolute and contingent limitation of Parliament’s authority to legislate. The former — if it were legally possible — would amount to an irreversible limitation upon the UK Parliament’s authority. For example:

The Scottish Parliament cannot be abolished.

The latter type of limitation, as the name implies, entails only a conditional qualification of legislative authority, legislation upon a particular point being conditional upon the satisfaction of some condition precedent. For example:

The Scottish Parliament cannot be abolished unless the following condition is satisfied ...

The “following condition” might be a special majority in the UK Parliament, the consent of the Scottish Parliament, or the consent of the Scottish electorate as expressed through a referendum. If Clause 1 were to make provision along these lines, it might conceivably also provide that it was not to be amended or repealed unless specified conditions were satisfied (so as to attempt to foreclose the possibility of the restrictions upon abolition in Clause 1 being circumvented by the repeal or amendment of Clause 1 itself).

18. The question thus arises whether, if such conditions precedent to abolition were specified in Clause 1, they would be treated by the courts as legally binding. On the one hand, there are clear judicial statements to the effect that even contingent entrenchment is legally impossible. For example, in the *Ellen Street Estates* case, decided in 1934, Lord Justice Maugham said:

> The Legislature cannot, according to our constitution, bind itself as to the form of subsequent legislation, and it is impossible for Parliament to enact that in a subsequent statute dealing with the same subject-matter there can be no implied repeal. If in a subsequent Act Parliament chooses to make it plain that the earlier statute is being to some extent repealed, effect must be given to that intention just because it is the will of the Legislature.\(^{12}\)

More recently, Lord Justice Laws said in the *Thoburn* case in 2002 that:

> Parliament cannot bind its successors by stipulating against repeal, wholly or partly, of the 1972 Act. It cannot stipulate as to the manner and form of any subsequent legislation. It cannot stipulate against implied repeal any more than it can stipulate against express repeal.\(^{13}\)

19. However, not all judges have expressed such unambiguously negative views about the possibility of contingent entrenchment of provisions in Acts of Parliament. Notable counterpoints to the statements set out above are to be found in certain of the Law Lords’ speeches in the *Jackson* case\(^{14}\) — decided in 2005 — concerning the validity of legislation enacted under the Parliament Acts 1911-49 and the constitutional implications of those Acts. Lord Steyn concluded that a statute enacted under the Parliament Acts could be considered to be true Act of Parliament because the original — i.e. the 1911 — Parliament Act

> created a new method of ascertaining the declared will of Parliament. It restated the manner and form in which laws may be made in respect of what I will call "delayed Bills", i.e. Public Bills passed three times by the House of Commons and rejected on each occasion by the House of Lords. In respect of such Public Bills the new method of making law involved, subject to the precise conditions of the 1911 Act, the elimination of the House of Lords as a constituent element of Parliament.

A possible logical inference from Lord Steyn’s position is that if — as he maintained — Parliament can manipulate the conditions upon which legislation is to be enacted so as to make it *easier* in certain circumstances to legislate (e.g. by removing the need for the House of Lords’ consent), then it may be possible for Parliament to manipulate the conditions so as to make it *harder* (e.g. by requiring a super-majority or the prior consent of some other institution). What was arguably implicit in Lord Steyn’s speech was explicit — albeit tentatively — in Lady Hale’s:

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\(^{12}\) *Ellen Street Estates v Minister of Health* [1934] 1 KB 590.

\(^{13}\) *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin).

\(^{14}\) *Jackson v Attorney-General* [2005] UKHL 56.
If the sovereign Parliament can redefine itself downwards, to remove or modify the requirement for the consent of the Upper House, it may very well be that it can also redefine itself upwards, to require a particular parliamentary majority or a popular referendum for particular types of measure. In each case, the courts would be respecting the will of the sovereign Parliament as constituted when that will had been expressed.

These statements in Jackson do not form part of the binding aspect of the judgment; but they do suggest that the more negative judicial comments set out in the previous paragraph should not be taken to be the final word upon this matter.

20. A further point of potential significance is that Parliament, on occasion, appears to have supposed that it can do precisely the type of thing that Lady Hale contemplated in Jackson. The European Union Act 2011 is arguably an example. Section 2, for instance, stipulates that a treaty amending the European Union Treaties is not to be ratified unless (among other things) the legislation approving the amending treaty provides that it is not to enter into force until a referendum has been held. This appears to impose a requirement as to the form of future legislation.

21. Returning to Clause 1 of the proposed Scotland Bill, it is unclear whether an attempt contingently to limit the authority of the UK Parliament to abolish the Scottish Parliament (or, for that matter, to diminish the powers of the Scottish Parliament) would be treated as legally binding. However, the possibility of such an attempt being treated as legally valid is greater than the possibility of any attempt absolutely to guarantee the permanence of the Scottish Parliament. Yet an obvious political difficulty would arise if Clause 1 were framed in terms of a merely conditional guarantee of permanence: it would clearly fall short of the unconditional form of permanence which the Smith Report appears to envisage, while — at least implicitly — acknowledging the legal difficulties that would arise if a more fulsome attempt to implement Smith were made.

The Sewel Convention

22. The Sewel Convention can be dealt with more briefly, since some of what has been said is relevant here too.

23. Section 28(7) of the Scotland Act 1998 provides that:

This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland.

It is proposed that Clause 2 of the new Scotland Bill would insert into section 28 of the Scotland Act 1998 a new subsection (8) as follows:

But 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.
Would this provision, if enacted, put the Sewel Convention “on a statutory footing”, as the Smith Commission proposed? That depends on what the Commission meant by this. Two possibilities arise.

24. The first possibility is that the Commission may have envisaged that the practice reflected in the Sewel Convention would be translated into a legal rule disabling the UK Parliament from legislating — or “normally” legislating — on devolved matters without the consent of the Scottish Parliament. Clause 2 clearly would not accomplish this. It does not make any claim to preclude unilateral intervention in devolved affairs by the UK Parliament.

25. If the framers of Clause 2 wished to go further in seeking to accommodate such an approach, they might have looked to section 4 of the Statute of Westminster as a model:

No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof.

Either this model — which requires legislative confirmation of consent — or a more radical model — requiring consent itself — might have been considered. Whether such a model would be considered legally effective turns upon considerations, already addressed, pertaining to the constitutional feasibility of the contingent limitation of the UK Parliament’s powers.

26. The second possibility is that the Commission may have envisaged that the Sewel Convention would be acknowledged — as a convention — in statute. This possibility would be realised by Clause 2 as presently drafted: although Clause 2 does not refer to any convention as such, it acknowledges the existence of the practice reflected in the Sewel Convention. Thus Clause 2 does not take the “rule” contained in the Sewel Convention and turn it into a statutory, legal rule; it enshrines — or at least acknowledges — the convention in a statute while leaving the convention as a convention. As a result, Clause 2 — like Clause 1 — is likely to be without any direct legal effect. This prompts two observations.

27. First, even if Clause 2 were to lack all legal effect, this would not necessarily mean that it lacked any effect. While it is virtually impossible to imagine circumstances in which the UK Government would seek to procure legislation abolishing the Scottish Parliament (thus suggesting that Clause 1 is largely redundant), it is easier — but not easy — to envisage a scenario in which the UK Parliament wished to legislate without the Scottish Parliament’s consent on a matter falling within the latter’s competence. Clause 2 would not legally prevent such legislation from being enacted, but it would likely make its enactment politically more difficult. That is so because while acknowledging the Sewel Convention in statute does not turn the convention from a political into a hard legal restraint, legislative recognition of the convention
arguably does invest it with greater political — and small-c constitutional — force. A UK Government seeking to persuade the UK Parliament to legislate for Scotland against its wishes would inevitably face an uphill political struggle; Clause 2 would make the gradient steeper still.

28. Second, the possibility of some — albeit not direct — legal effect cannot be discounted. It is argued by some legal scholars that the distinction between constitutional law and convention is not — and should not be regarded as — an absolute one. A convention properly so-called is an institutionalisation of an underlying fundamental constitutional principle. The Sewel Convention, for instance, may be seen as an acknowledgment of a fundamental principle requiring respect for the autonomy of devolved institutions. To deny such a constitutional principle any legal relevance would be perverse. As a result, it is arguable that a court would, for instance, be entitled to take into account the principle underpinning the Sewel Convention when seeking to determine whether UK legislation should be interpreted as unilaterally interfering in devolved affairs: a tenable interpretation avoiding such an incursion would be constitutionally preferable. Such an argument could only be strengthened by a provision such as Clause 2 which, at the very least, would evidence a commitment on the part of the UK Parliament to the principle of respect for devolved autonomy.

Conclusion

29. Clauses 1 and 2 could have been drafted so as to attempt to implement in a more fulsome way the relevant proposals of the Smith Commission. However, whether more ambitiously framed provisions would be considered legally enforceable is a different question — and one to which, for the reasons sketched in this paper, the answer is not entirely clear.

30. It is tempting, therefore, to conclude that the wording of Clauses 1 and 2 is largely moot as a matter of law, their significance being essentially political. By way of conclusion, however, it is worth pointing out that orthodox legal theory should not necessarily be treated as a steadfast guide in this context. That point flows from the fact that if the questions considered in this paper were to acquire practical relevance, exceptional constitutional circumstances would first have to have eventuated. Such circumstances might test the courts’ commitment to orthodoxy, including to the doctrine of parliamentary sovereignty.

31. The likelihood of such circumstances eventuating is exceptionally remote. But if, in some presently unimaginable scenario, the UK Parliament were to attempt unilaterally to abolish or fatally diminish the powers of the Scottish Parliament, the prospect of judicial disobedience to such a statute cannot be entirely discounted. An admittedly small number of senior judges have in recently years countenanced in unprecedentedly explicit terms the possibility that there may be certain fundamental constitutional principles that are beyond legislative evisceration. If the

autonomy — and existence — of democratic devolved institutions ever turns out to be one of those principles, then Clauses 1 and 2 of the proposed Scotland Bill will be capable of being prayed in support. On this view, the permanence of the Scottish Parliament arguably transcends arguments about the capacity of the UK Parliament to limit its own powers, and raises more fundamental questions still about the capacity of the unwritten constitution to supply *in extremis* limitations upon the authority of that Parliament.

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