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Unionism in the courts? A critique of the Act of Union Bill

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The 'Act of Union' Bill stands out among proposals designed to reform and, ultimately, save the UK's Union of nations and jurisdictions. Taking the form of draft framework legislation, it offers a blueprint for how UK-wide constitutional change might be instigated. In doing so, the Bill provides a useful thought experiment in constitutional design: it allows us to consider how a distinct set of reforms to the Union might interact with recent legal and political developments.

This paper offers a critique of clause 2 of the Bill, which envisions new roles for the courts in respect of a constitutionally novel set of 'core purposes' of the UK state. While analogous legislation and case law suggest that a limited role is intended for the courts, we argue that clause 2 would pose significant constitutional dilemmas. Involving the courts in a contested vision of the Union and its aims could risk jeopardising the political confidence in judicial independence which is required for the effective resolution of intergovernmental disputes. Further, the ambiguous constitutional character of the Bill, which seeks to reflect traditions of both popular and parliamentary sovereignties, could facilitate a more assertive constitutional role for the courts in their approach to a clause 2-type provision. This would risk further politicisation of the judicial role.

The constitutional turmoil of recent years has prompted a variety of proposals aimed at securing the survival of the United Kingdom's (UK) Union of nations and jurisdictions. Among them, the 'Act of Union' Bill stands out.¹ Devised by the cross-party Constitution Reform Group (CRG), this draft legislation offers a comprehensive blueprint for how UK-wide constitutional reform might be instigated. The Bill outlines what its authors describe as 'a broadly federal system of government',² with numerous options for constitutional reform, while also proposing to conserve the legal sovereignty of the Westminster parliament. Conceived during the aftermath of the 2014 Scottish independence referendum, and revamped after the 2016 referendum on membership of the European Union (EU), it is offered as a means to ameliorate tensions unleashed in debates on the 'two unions' which

¹ Act of Union HL Bill (2017–19) 57(1).

² Constitution Reform Group, 'Act of Union Bill: Explanatory Notes' (Constitution Reform Group 2016), 2.

have previously anchored the UK's constitutional architecture. The latest iteration of the Bill was introduced in the House of Lords at first reading on 10 October 2018 by Lord Lisvane, former Clerk of the House of Commons and member of the CRG steering group.³

The various proposals contained within the Bill warrant serious attention. The CRG has gained pre-eminence as a champion for UK constitutional reform. Its cross-party membership includes former first ministers of Wales, Scotland and Northern Ireland (NI), and its work is aided by senior parliamentary technicians.⁴ Despite their different constitutional aspirations, both the Welsh and Scottish governments have expressed support for parts of the Bill.⁵ It has also generated notable fanfare from across the political spectrum in the London-based press.⁶

More importantly, the work of the CRG coincides with the arrival of a UK Conservative government elected on manifesto pledges to 'strengthen the Union' and to examine 'the broader aspects of our constitution'.⁷ As part of this agenda, it is said to be considering the Act of Union Bill, raising the possibility that either the Bill or particular provisions will be harnessed by an administration eager to brandish its unionist credentials.⁸ Along with the UK 'Internal Market' legislation, the establishment of an independent panel to consider the operation of judicial review underlines the determination for a profound constitutional shakeup. In this context, the CRG has made clear that it will continue to advocate the Act of Union Bill, both as a proposal in its own right and as a counterpoint to government plans.⁹ The Bill is therefore likely to have a prominent place over the coming years in discussions on the future of the Union.

Whatever its ultimate fate, the legislation provides a useful thought experiment in constitutional design, allowing us to consider how a distinct set of reforms to the Union could interact with current legal and political developments. This article offers an examination of one particular proposal contained in the Bill: clause 2. This provision envisions new responsibilities for the courts within a reformed UK Union. It declares, first, a set of 'core purposes of the United Kingdom' (cl 2(1)). Second, it directs public authorities

³ At the time of writing, a further draft of the Bill is expected in 2021.

⁴ The CRG steering committee can be viewed here: <https://www.constitutionreformgroup.co.uk/steering-committee/Politicians> [accessed 23 September 2020]

⁵ Welsh Government, *Reforming our Union: Shared Governance in the UK* (2019); Scottish Government, *Scotland's Right to Choose: Putting Scotland's Future in Scotland's Hands* (2019).

⁶ Editorial, 'The Guardian view on the Act of Union: time to reimagine the United Kingdom' (*Guardian*, 2016), <https://www.theguardian.com/commentisfree/2016/jul/10/the-guardian-view-on-the-act-of-union-time-to-reimagine-the-united-kingdom>; P Johnston, 'If the PM wants to save the Union, a radical new plan for a federal UK could be the answer' (*Telegraph*, 30 July 2019), <https://www.telegraph.co.uk/politics/2019/07/30/pm-wants-save-union-radical-new-plan-federal-uk-could-answer/> [Accessed 30 April 2020]

⁷ Conservative and Unionist Party, *Get Brexit Done: Unless Britain's Potential*, <https://vote.conservatives.com/our-plan> [Accessed 10 February 2020]

⁸ S Payne and G Parker, 'Tories focus on major overhaul of House of Lords' (*Financial Times*, 17 December 2019), <https://www.ft.com/content/dc8f0c22-201d-11ea-92da-f0c92e957a96> [Accessed 10 February 2020]

⁹ J George, 'House of Lords: York move would not work' (*The Times*, 29 January 2020), <https://www.thetimes.co.uk/article/house-of-lords-york-move-would-not-work-5ccn6svmp> [Accessed 30 April 2020]. George is a member of the CRG steering group.

to 'have regard' to those purposes (cl 2(2)). Third, it encourages (but does not compel) judges to have regard to the core purposes when they appear relevant to cases (cl 2(3)).

If enacted, cl 2 would be historic at two levels. It would represent the first attempt to give statutory expression to the purposes of the UK Union. In recent years, the courts have recognised various 'constitutional instruments' enacted throughout English and subsequently UK history.¹⁰ None of these instruments, however, has attempted to provide a comprehensive statement of the Union's fundamental purpose. The advent of political devolution has only accentuated this condition. As Jeffery and Wincott have argued, 'there has been little attempt to articulate what the United Kingdom is for since devolution'; instead the state has lacked 'a clear normative underpinning'.¹¹ The enactment of a set of core purposes would thus represent a significant moment in the UK's constitutional evolution. As such, the proposal in the Act of Union Bill to use those purposes, both as a standard against which public decision-making might be reviewed by the courts and as an aid to judicial interpretation, would also be without constitutional precedent in the UK.

This article argues that the Bill would have two, unintended consequences for the courts. First, cl 2 has considerable potential to politicise the judicial role. Both the Union and the aspirations identified in the Bill as its 'core purposes' are deeply contested both within and across the constituent parts of the UK. Tying the courts explicitly to these 'core purposes' would therefore risk undermining confidence in judicial independence, particularly in intergovernmental disputes over the division of legal competences.

The second unintended consequence concerns the broader, constitutional character of the Bill and how it might permeate cl 2. In its current construction, the Bill could facilitate a more assertive judicial involvement within a reformed UK Union than its authors appear to intend. It offers statutory and procedural recognition of the popular sovereignties of the constituent parts of the UK, which may – particularly in the light of an evolving UK Supreme Court (UKSC), which looks increasingly to constitutional principle in its reasoning – blunt the attempt to preserve the sovereignty of the UK parliament. This, in turn, could embolden the courts in their use of the core purposes of cl 2 in public law cases.

The rest of the article is structured into four main parts. First, we set out the renewed constitution envisioned by the Bill and the contents of cl 2. Next, we examine the intention behind cl 2 by reference to analogous legislative provisions and case law. We then elaborate the two principal contentions with cl 2, before offering our concluding remarks.

¹⁰ In this regard, the courts have cited Magna Carta, the Petition of Right 1628, the Bill of Rights 1689, the Claim of Rights Act 1689, the Act of Settlement 1701 and the Act of Union 1707, the European Communities Act 1972, the Human Rights Act 1998 and the Constitutional Reform Act 2005. *R (HS2 Action Alliance Limited) v Secretary of State for Transport and another* [2014] 1 WLR 324, [207] (Lord Neuberger and Lord Mance).

¹¹ C Jeffery and D Wincott, 'Devolution in the United Kingdom: statehood and citizenship in transition' (2006) 36(1) *Publius* 3, 10.

The Act of Union Bill: key provisions

Reform, not revolution

In its own words, the Bill proposes ‘a renewed constitutional form for the peoples of England, Scotland, Wales and Northern Ireland to continue to join together to form the United Kingdom’.¹² It envisions a more symmetrical distribution of powers among the constituent parts. It would establish a set of ‘central policy areas’¹³ to remain within the exclusive remit of the UK-level institutions while giving competence over all other matters to the legislatures in Wales, Scotland, NI and, potentially, England.¹⁴ The Bill also outlines options for UK parliamentary reform, and proposes new fiscal principles, powers and institutions, along with a unified UK civil service.¹⁵

Viewed in the historical context of devolution within the UK, this legislation would be the first measure of its kind. All such prior statutes, from the Government of Ireland Act 1920 to the Wales Act 2017, have consisted of bilateral processes, devolving powers from Westminster to one of the constituent territories. The Act of Union Bill, by contrast, concerns the whole of the UK.

Despite this proposal for a new holistic approach to constitutional design and far reaching reforms, the Bill would attempt to preserve the fundamental character of the present constitutional order. It is ‘designed to be treated by the courts ... as an over-arching piece of constitutional legislation’ but ‘not a full written constitution’.¹⁶ Thus, Westminster would continue ‘to exercise the authority of the Sovereign Parliament of the United Kingdom’ and ‘[n]othing in this Act diminishes or otherwise affects the extent of that Sovereignty’.¹⁷ The Welsh, Scottish, Northern Ireland (and, potentially, English) parliaments would remain ‘devolved legislatures’.¹⁸ Likewise, no change to the constitutional position of the courts is envisioned.¹⁹

Strikingly, however, the Bill is premised upon a ‘principle of self-determination’: an assumption that ‘the nations and parts of the United Kingdom are entitled to full sovereignty and self-determination’.²⁰ It provides that England, Scotland, Wales and Northern Ireland would each remain part of the UK ‘unless and until a majority of the people of that nation or part vote to leave in a referendum’.²¹ It is this part of the Bill which has won support

¹² Act of Union Bill (n 1), preamble.

¹³ The central policy areas are: the constitution, foreign affairs, rights, economic affairs, taxation, law and order, home affairs and public service. *ibid*, pt 2 and sch, pt 1.

¹⁴ With regard to English governance, the Bill provides various options: an English Parliament, statutory codification of ‘English votes for English laws’, city devolution, and regional devolution. Act of Union Bill (n 1), pt 3.

¹⁵ Act of Union Bill (n 1), pts 7, 8 and 10.

¹⁶ Constitution Reform Group, ‘Act of Union Bill: Explanatory Notes’ (n 2) 1, 3.

¹⁷ Act of Union Bill (n 1), cl 27(5)-(6).

¹⁸ Act of Union Bill (n 1), cl 52(4)(a)

¹⁹ The UKSC would maintain its position as ‘the most senior court of the United Kingdom’. Act of Union Bill (n 1), cls 7(4) and 50(1).

²⁰ Constitution Reform Group, ‘Act of Union Bill: Explanatory Notes’ (n 2) 2.

²¹ Act of Union Bill (n 1), cl 1(4).

from both from the Union-supporting Welsh Labour government and the pro-independence SNP government. In line with this self-determination principle, the Bill also proposes to ground the reformed Union in democratic foundations unprecedented in UK constitutional history. It contains a ‘post-commencement’ principle by which the Bill would not enter into legal force without the approval by referendum of each of the electorates in Wales, England, Scotland and NI, as well as sixty-five percent, UK-wide support overall.²²

The Bill therefore offers a constitutional framework both conservative and novel in its underpinnings. The self-determination principle is proposed to ‘replace the present top-down method of devolution with a bottom-up method’, breaking with the ‘imperial condescension from the centre’ which has characterised devolution to date.²³ Justified on this basis, the simultaneous attempt to retain the sovereignty of the Westminster parliament – arguably the root of that top-down condescension – is perplexing.

Such ambiguity, on the other hand, may be necessary for a unionist project of this kind. The nations and jurisdictions currently comprising the UK Union are defined both presently and historically by distinctive institutional arrangements and constitutional discourses. While the sovereignty of the Westminster parliament reflects the dominant, albeit historically contested, Anglo-British tradition,²⁴ notions of popular and shared sovereignties are today prevalent across Scotland, Wales and Northern Ireland. Viewed in that light, the UK is a Union sustained by constitutive, or even deliberate, ambiguities which can accommodate, to some extent, these different claims.²⁵ Any attempt to resolve the inherent tensions either way therefore may be doomed to failure.

The Act of Union Bill thus represents an attempt to engineer a moment of constitutional ‘crisis’: an intervention which stabilises decisively the trajectory of the UK state.²⁶ It seeks to do so, however, without constitutional ‘revolution’, instead leaving traditional principles intact.²⁷ Set within this legislative structure, which perpetuates rather than resolves the UK’s historical ambiguities, cl 2 offers a constitutional innovation with potentially unpredictable ramifications for the judicial role.

Clause 2: the ‘core purposes’ of Union

Clause 2 has a tripartite structure. Clause 2(1) offers a broad statement of ‘core purposes of the United Kingdom’. The purposes are:

- I. The rule of law and equality before the law;

²² Act of Union Bill (n 1), cl 53.

²³ HL Deb, 17 January 2019, vol 795, cols 332 and 334 (Lord Lisvane).

²⁴ CRG Murray and D Wincott, ‘Partition by degrees: routine exceptions in border and immigration practice between the UK and Ireland, 1921–1972’ (forthcoming) *Journal of Law and Society*.

²⁵ D Wincott, G Davies and A Wager, ‘Crisis, what crisis? UK pluri-constitutionalism, Brexit politics and the conceptualisation of crisis’ (forthcoming) *Regional Studies*; C Hay, ‘Crisis and the structural transformation of the state: interrogating the process of change’ (1999) 1(3) *British Journal of Politics and International Relations* 317.

²⁶ *ibid.*

²⁷ HWR Wade, ‘Sovereignty – revolution or evolution?’ (1996) 112 *LQR* 568.

2. The protection of fundamental rights and freedoms;
3. Defence of the realm and the conduct of foreign relations;
4. The promotion of tolerance and respect;
5. Equality of opportunity;
6. Provision of a safe and secure society;
7. Provision of a strong economy;
8. Protection of social and economic rights, including provision of access to education and health and other social services (including the National Health Service);
9. Benefiting from shared history and culture.

Clause 2(2) then provides that all public authorities in the UK ‘must have regard to the core purposes in the exercise of [their] functions’. By contrast, a more flexible use of the core purposes is envisioned for the courts under cl 2(3):

A court or tribunal may have regard to the core purposes of the United Kingdom in any case to which they appear relevant (but they do not take priority over the application of specific provisions of legislation).

Two, distinct roles are thus proposed for the courts. The first, under cl 2(2), would allow the courts to review the actions of public authorities on the basis of a failure to have regard to the core purposes. The second, under cl 2(3), would enable the discretionary use of the core purposes as an aid to judicial interpretation in relevant cases.

Clause 2: lessons from existing legislation

Clause 2(2): public sector regard for the ‘core purposes’

In order to gauge how the courts might interpret these provisions, we can look to existing legislation and case law. To varying degrees, several of the core purposes are already embodied in law. The rule of law, for example, is a well-established constitutional principle.²⁸ Likewise, for those who can afford litigation, many fundamental (civil and political) rights and freedoms are enforceable under the Human Rights Act (HRA) 1998 and the common law.²⁹ Their inclusion as ‘core purposes’, therefore, would be likely to have more symbolic than legal significance.

Socio-economic rights, by and large, have not been given the domestic legal recognition afforded to those rights contained in the HRA. Thus on questions of socio-economic policy the courts tend to accord considerable deference to the judgements of decision-makers,

²⁸ *R (Unison) v Lord Chancellor* [2017] 3 WLR 409 (SC); *R (Evans) v Attorney General* [2015] AC 1787 (SC); *R (Jackson) v Attorney General* [2006] 1 AC 262 (HL).

²⁹ E.g. *R (Osborne) v Parole Board* [2014] AC 1115. See also: M. Elliott and K. Hughes (eds), *Common Law Constitutional Rights* (Hart Publishing, 2020).

particularly with respect to resource allocation, unless it can be shown that the claims fall within existing legal protections.³⁰ Other core purposes, such as equality of opportunity and the promotion of tolerance and respect, are reflected in procedural requirements on decision-makers under the Equality Act 2010. Meanwhile, aspirations for a strong economy or the benefits of shared history and culture are, by ordinary standards, non-justiciable.³¹

Given the different extents to which these aims are protected in law already, the inclusion of some as core purposes could have potentially greater legal ramifications than others. This depends on the nature of the instructions under cl 2.

Clause 2(2) requires public authorities to have regard to the various core purposes listed under cl 2(1). A preliminary issue here is the meaning of ‘public authority’, and whether it includes the courts. Under the HRA, the courts are recognised explicitly as public authorities, and their identification in those terms has influenced how they enforce the Act.³² By contrast, the term here is not defined. Given that cl 2(3) contains a separate instruction for the courts, however, we can assume that they are not to be regarded as a public authority for the purposes of cl 2(2).

The principal issue, therefore, is the nature of the obligation on public authorities ‘to have regard’ to the core purposes. Such obligations are commonplace, and may take the form of procedural or substantive requirements.

The HRA s.6 is a prominent example of a substantive legal requirement. It created a duty on public authorities (including the courts), to achieve a particular, substantive outcome: namely, compliance with the ‘Convention rights’ included in sch I of the Act. Clearly, cl 2(2) would not create this kind of substantive obligation. While it would require public authorities to have regard to the core purposes, it would not, on its face, render their actions illegal if they chose to contravene those purposes.

Instead it seems that cl 2(2) is intended to operate as a procedural obligation. An illuminating comparison is the public sector equality duty under the Equality Act (EA) 2010 s.149. This requires public authorities to have ‘due regard’ to numerous aims, such as equality of opportunity and the elimination of discrimination. The case law on the duty contains well-established principles developed by the courts to encourage diligent decision-making.³³ For example, public authorities must be aware of the duty and should fulfil it before and at the time a policy is under consideration.³⁴ A general awareness of the duty is insufficient; it must be ‘exercised in substance, with rigour, and with an open mind’.³⁵ Before adopting a policy, decision-makers should assess the potential impact for the achievement of the statutory aims and ways in which any adverse implications could be minimised. They

³⁰ E.g. *R (on the application of Carmichael and Rourke) (formerly known as MA and others) v Secretary of State for Work and Pensions* [2016] 1 WLR 4550. E. Palmer, *Judicial Review, Socio-Economic Rights and the Human Rights Act* (Hart, 2007).

³¹ *Shergill and others v Khaira and others* [2015] AC 359, [42]-[43] (Lord Neuberger, Lord Sumption, and Lord Hodge).

³² Human Rights Act 1998, s.6(2). E.g. *RR v Secretary of State for Work and Pensions* [2019] UKSC 52.

³³ See A McColgan, ‘Litigating the public sector equality duty: the story so far’ (2015) 35(3) OJLS 453–485. The leading authorities were approved by the UKSC in *Hotak and others v London Borough of Southwark and another* [2016] AC 811.

³⁴ *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin), [91] (Aikens LJ).

³⁵ *ibid*, at [92] (Aikens LJ).

should also keep records demonstrating their fulfilment of the duty.³⁶ A blatant failure to have regard to the statutory aims is likely to result in a finding that the duty has been breached.³⁷

The adequacy of information considered by a public authority is particularly critical to judicial assessment of compliance with the equality duty. McColgan notes that this is a ‘hard-edged’ standard: thus, on several occasions, a failure to consider relevant information has resulted in a ruling against a public authority.³⁸

The equality duty, however, only goes so far. As a procedural obligation, it does not create ‘a duty to achieve a result’;³⁹ judicial restraint is required to keep it ‘in its proper place, which is the process and not the outcome of public decisions’.⁴⁰ Once a court is satisfied that the procedural duty has been fulfilled, the question as to whether the authority struck the appropriate balance is subject to the ordinary standard of *Wednesbury* unreasonableness. The extent of the duty was thus summarised in *Hotak*: ‘Provided that there has been “a proper and conscientious focus on the statutory criteria”, ... “the court cannot interfere ... simply because it would have given greater weight to the equality implications of the decision”’.⁴¹

Such obligations can, nonetheless, serve to alter cultures of decision-making. McColgan argues that by requiring decision-makers to ‘establish and confront’ the impact of their decisions for a particular set of aims, they ‘may produce different outcomes in the longer term’.⁴²

Like the equality duty, cl 2(2) of the Act of Union Bill is designed to engineer a new, administrative culture: in this instance, one based on respect towards the purposes of the UK Union, as defined in the Bill. Equally, it appears that the intention is to avoid creating wide scope for judicial review. Instead, cl 2(2) would likely require administrative compliance with a similar set of decision-making principles while allowing for judicial intervention only in cases of complete failure on the part of public authorities to have regard to the core purposes or information relevant to those purposes. Indeed, the duty to ‘have regard’ (as opposed to *due regard*) suggests a preference for an even less stringent threshold than the equality duty.

³⁶ *Stuart Bracking v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345, at [26] (McCombe LJ).

³⁷ *R (Luton Borough Council and others) v Secretary of State for Education* [2011] ACD 43

³⁸ McColgan (n 33), 463-4, cites: *R (Rahman) v Birmingham City Council* [2011] EWHC 944 (Admin); *R (W) v Birmingham City Council* [2011] ACD 84; *R (Green) v Gloucestershire County Council* [2011] EWHC 2687

³⁹ *R (Baker) v Secretary of State for Communities and Local Government* [2008] EWCA Civ 141, [31] (Dyson LJ).

⁴⁰ *R (MA) v Secretary of State for Work and Pensions* [2013] EWHC 2213 (QB), [74] (Laws LJ).

⁴¹ *Hotak* (n 26), [75] (Lord Neuberger), citing *R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin), [78] (Elias LJ)

⁴² McColgan (n 32), 478.

Clause 2(3): the ‘core purposes’ as an aid to judicial interpretation

Clause 2(3) envisions a different role for the courts. It would allow judges to draw upon the core purposes in relevant cases to the extent that their use does not contravene legislation. In contrast to the cl 2(2) procedural duty, cl 2(3) is discretionary: it would leave it to the courts to determine whether and how far they would have regard to the core purposes in a given case. Read with the purposes, which touch on virtually every aspect of governance, it would have a remarkably wide reach. Indeed, it is difficult to imagine a public law case in which at least one of the purposes would not be relevant.

Combined, the discretionary nature and broad scope of cl 2(3) would leave much heavy lifting for the courts. They would first be required to develop general principles to clarify the circumstances in which they would have regard to the purposes. This may not be a straightforward task. There is room for different views, for example, as to the circumstances in which regard to relevant core purposes would be appropriate. Equally, the practical implications of having ‘regard’ to the purposes would also be open to interpretation: in particular, judges might disagree as to the extent to which such regard should, as a matter of principle, influence decision-making.

Interpretive difficulties may also arise at the level of individual cases; for example, as to the relevance of the purposes to a particular set of facts. Further, where more than one purpose has relevance for a case, there may be different views as to how those purposes should be balanced. Judges may also differ on the implications of applying individual purposes. How, for example, should regard for equality of opportunity, a secure society, or a strong economy, affect decisions in practical terms?

Despite these potential difficulties, both the language of the Bill and analogous legislation suggest that, as with cl 2(2), a limited role is intended for the courts. For example, cl 2(3) is explicit that judicial use of the purposes would ‘not take priority over the application of specific provisions of legislation’, thereby reducing the scope for judicial intervention. That minimal judicial involvement is envisioned is further underlined by the Bill’s attempt to preserve Westminster parliamentary sovereignty.⁴³ As a statement of intent, therefore, it can be contrasted with a proposal in 2015 for a ‘Charter of the Union’ with ‘judicially-enforceable principles’ of ‘Union constitutionalism’.⁴⁴

Again, while cl 2(3) has no direct analogy, existing legislation points to the same conclusion. Here there is no provision, akin to s.3 HRA, instructing the judges to interpret legislation compatibly with the core purposes. Nor is there a statutory procedure, like s.4 HRA, by which the courts would declare legislation to be in contravention with those purposes.

Of course, the absence of HRA-type mechanisms would not preclude the courts from making such declarations. Indeed, the very inclusion of cl 2(3) would seem to invite

⁴³ Act of Union Bill (n 1), cl 27(5)-(6).

⁴⁴ Bingham Centre for the Rule of Law, *A Constitutional Crossroads: Ways Forward for the United Kingdom* (British Institute for International and Comparative Law 2015) pp 19-21. Echoing the language of the European Communities Act 1972 s.2, it proposed that the devolution statutes (though not Acts of the UK parliament) “shall be construed and have effect subject to” the Charter’.

occasional expressions of such ‘judicial disapproval’⁴⁵ on that basis. These, in turn, would have the potential to exert some normative pull on UK governments and legislatures. In the absence of the formal machinery seen elsewhere, however, cl 2(3) amounts to a far more limited invitation to judicial involvement. It suggests that – like cl 2(2) – the CRG envisages with cl 2(3) a new but minimal role for the courts in the realisation of the purposes of a reformed Union.

Unintended consequences

Despite the clear intention to limit the courts to benign responsibilities under cl 2, the contents of the provision, combined with the ambiguous constitutional character of the Bill, may have unforeseen consequences. Specifically, they raise the prospect of a judicial role which is both more politicised and constitutionally empowered.

Politicising the judiciary

The courts and the Union

The key proposal of the Bill to bring the Union and a particular conception of its purposes into the domain of law perhaps reflects an attempt to depoliticise them. Nonetheless, tying the courts to this innovation, however loosely, may leave them politically vulnerable. This vulnerability has various sources: the deeply politicised nature of the Union itself; the ambiguous, historical roles of the courts within UK territorial structures; and the contentiousness of the core purposes.

In multi-level states, courts perform a necessary role as constitutional umpires, policing the boundaries between the different tiers of government. The UKSC President, Lord Reed, has emphasised the importance of trust to this task: ‘The court’s success ... depends on public and political confidence in the court’s complete impartiality: something which both the court and the political institutions involved have a responsibility to maintain and support’.⁴⁶ Without that trust, judgments may not command the political compliance needed in order for the court to function as an effective arbiter of intergovernmental legal disputes.

Clause 2 has the potential to undermine that trust. In Scotland, Northern Ireland and Wales, support for, and opposition to, the Union represent one of the principal fault lines in politics, while in England support for the UK among Conservative (and Unionist) voters has been shown to be remarkably fragile.⁴⁷ Like the wider contents of the Bill, however, cl 2 is premised on the taken-for-granted assumption that maintaining the Union is an unqualified normative good: the whole exercise is concerned with *how* it should be done, rather than

⁴⁵ N Duxbury, ‘Judicial disapproval as a constitutional technique’ (2017) 5(3) ICON 649.

⁴⁶ Lord Reed, ‘Scotland’s devolved settlement and the role of the courts (Inaugural Dover House Lecture, London, 27 February 2019).

⁴⁷ Centre on Constitutional Change, ‘May’s ‘Precious Union’ has little support in Brexit Britain’ (8 October 2018), https://www.centreonconstitutionalchange.ac.uk/news_opinion/press-release-mays-precious-union-has-little-support-brexit-britain [Accessed 15 April 2020]

why. Post-devolution, however, a pressing need for a convincing normative justification for the Union remains.⁴⁸ Seen in that context, any attempt to involve the courts in an overtly unionist endeavour would risk eroding political trust in judicial independence, particularly among political parties with alternative constitutional aspirations.

Of course, it must be acknowledged that the courts *already* perform critical roles within the Union. Until relatively recently, however, these roles were ambiguous and inexplicit. Both existing and historical court structures, for example, give expression to the UK's asymmetrical constitutional form. The 1707 Treaty of Union preserved Scotland's distinctive legal jurisdiction, and a separate system has existed in Northern Ireland since Ireland's partition in 1921. By contrast, an 'assimilation tradition'⁴⁹ in the form of a single legal jurisdiction has been in place for Wales and England since the Laws in Wales Acts of 1535/6 and 1542/3, complete with a single body of courts after 1830.⁵⁰ Sir William Anson described 1830 as the moment of 'complete union' between England and Wales, when 'the separate jurisdiction of the Welsh courts of great session was taken away, their judges abolished, and Wales brought wholly under the jurisdiction of the Westminster courts'.⁵¹ Thus, in Scotland and Northern Ireland, the courts expressed a measure of institutional autonomy; in Wales, domination.

Additionally, the courts define the contours of the Union through legal interpretation. The classic statement of the sovereignty of the Westminster parliament by Victorian jurist and unionist AV Dicey – central to the understanding of the UK as a unitary state – has long been recognised by English courts as the fundamental basis of the constitutional order. Meanwhile, there are well-known Scottish judicial remarks which cast doubt on this interpretation.⁵²

Devolution gave the Judicial Committee of the Privy Council (JCPC) and, subsequently, the UKSC a far more explicit role within the Union. Malleon notes that as the UK developed further into 'a multi-layered constitutional order', the JCPC / UKSC was 'given a central role in the adjudication of this new constitutional settlement'.⁵³ In this capacity, the courts have defined the territorial constitution in profound ways. They have, for example, generally adopted a legalist interpretation of the devolution statutes, leaving the basic constitutional premise of Westminster parliamentary sovereignty intact. As McCorkindale, McHarg and Scott observe, the courts 'have been mostly unwilling to accept that the fact of devolution

⁴⁸ For an examination of political narratives and justifications for the Union, see: C Brown Swan and D Cetrà, 'Why stay together? State nationalism and justifications for state unity in Spain and the UK' (2020) 26(1) *Nationalism and Ethnic Politics* 46.

⁴⁹ G Parry, 'Is breaking up hard to do? The case for a separate Welsh jurisdiction' (2017) 57 *Irish Jurist* 61, 76.

⁵⁰ This followed the abolition of the Court of Great Sessions in Wales in 1830. The establishment of the Welsh tribunals, consolidated under the leadership of the President of Welsh Tribunals under the Wales Act 2017, has seen a measure of legal institutional divergence return to Wales.

⁵¹ W. Anson *Law and Custom of the Constitution. Part 2: The Crown* (Oxford 1892) p. 208

⁵² *MacCormick v Lord Advocate* 1953 SC 396 (IH).

⁵³ K Malleon, 'The evolving role of the Supreme Court' [2011] PL 754, 761.

effected any constitutional change beyond what is immediately apparent from the terms of those statutes'.⁵⁴

Curiously, UKSC Justices understand devolution as a system of government for the whole of the UK, and the devolution jurisprudence as a single body of UK constitutional law.⁵⁵ For some, by undertaking this 'unifying role' the UKSC has stifled the legal scope for different territorial interpretations of the constitution based on the distinctiveness of the individual devolution regimes.⁵⁶ This approach may extend beyond devolution. Walker argues that the UKSC and former Appellate Committee, uniquely situated at the helm of the UK's three legal jurisdictions (Scots criminal law excepted), have exhibited 'post-Union centralizing tendencies ... reflecting and in some measure reinforcing within the appellate structure the development of a body of law common to some or all jurisdictions of the UK'.⁵⁷

Aside from legal interpretation, judges and courts may also embody a tacit support for the UK in its existing form. Reflecting a less politicised Union and a judicial culture markedly different from today's, recent history furnishes examples of individuals who traversed the boundary between unionist politics and high judicial office. The most prominent example was the Scottish judge, Lord Reid. After serving as a Unionist MP from 1931-1935 and 1937-1948, as well as Solicitor General for Scotland and Lord Advocate, Reid sat on the Judicial Appellate Committee of the House of Lords from 1948-75, and is regarded as one of the most influential judges of the 20th century.⁵⁸

The UKSC now represents a clear, institutional embodiment of the Union. Its very establishment – bringing together the jurisdictions of the Appellate Committee and JCPC – provided for the first time, in effect, 'a single Court for the Union'.⁵⁹ Equipped with the administrative and financial independence lacked by its predecessor, it has since forged a distinctive identity centred on the Union. Its official emblem consists of a union of symbols from each of the nations and jurisdictions, bound together under law.⁶⁰ As of 2018, the Court is represented by Justices from each of the UK's constituent nations and jurisdictions, including Wales.⁶¹ The Justices are required to have awareness of constitutional

⁵⁴ McCorkindale C, McHarg A and Scott P, 'The courts, devolution, and constitutional review' (2017) 36 U Queensland LJ 289, 302. This echoes Feldman's observation of the early devolution jurisprudence: '... the English judges have not developed a vision or conception of the United Kingdom's constitution that gives particular weight to the nature of the devolution settlement'. D Feldman, 'None, one or several? Perspectives on the UK's constitution(s)' (2005) 64(2) Cambridge LJ 329–351, 350.

⁵⁵ Lord Reed, 'Scotland's devolved settlement and the role of the courts (Inaugural Dover House Lecture, London, 27 February 2019).

⁵⁶ McCorkindale, McHarg and Scott, 'The courts, devolution, and constitutional review' (n 53) 294–5.

⁵⁷ N Walker, *Final Appellate Jurisdiction in the Scottish Legal System* (Scottish Government 2010).

⁵⁸ L Blom-Cooper, B Dickson and G Drewry (eds), *The Judicial House of Lords: 1876-2009* (OUP 2009), p 769.

⁵⁹ R Cornes, 'Gains (and dangers of losses) in translation - the leadership function in the United Kingdom's Supreme Court, parameters and prospects' [2011] PL 509, 513.

⁶⁰ UK Supreme Court, 'New artwork', <https://www.supremecourt.uk/visiting/new-artwork.html#emblem> [Accessed 30 April 2020]

⁶¹ The appointment of Lord Lloyd Jones in October 2017 as de facto judicial representative for Wales follows previous ad hoc sittings on the Court by the former Lord Chief Justice of England and Wales, Lord Thomas of Cwmgiedd. As well as hailing from the country, Lord Thomas has shown sustained and consistent interest in and commitment to matters of law and justice in Wales.

developments in every part of the UK.⁶² From 2017-19, the Court also held historic sittings in Edinburgh, Belfast and Cardiff, delivering a judgment in Welsh during the latter.⁶³ Several of the Justices have also undertaken considerable extra-judicial, ‘community leadership’: attending events and giving lectures on legal and constitutional matters across the UK.⁶⁴ As Cornes has observed, ‘the Court itself both in practical, and symbolic ways, is sending signals about its place in the United Kingdom’s constitutional arrangements’.⁶⁵

The phenomenon of unionist politician-judges, however, has since ceased, and the recent emergence of the UKSC as a ‘unionist’ institution is not without difficulties. Its role in relation to the Scottish legal jurisdiction in particular has already been the subject of acute political controversy.⁶⁶ Moreover, while the courts already perform important structural, interpretive and sociological roles within the Union, they have to date never held responsibilities explicitly related to the purposes of the Union and their realisation – because such a statement has never been enacted in law. Such statements come with an additional layer of risk for judges because of their political contestability.

The contentiousness of the ‘core purposes’

It is not clear from either the Bill or accompanying documents how the particular purposes in cl 2(1) were decided upon, but they appear to enjoy at least a tacit consensus across the mainstream political perspectives which populate the CRG.⁶⁷ Nevertheless, they are problematic on a number of levels.

McHarg has offered a compelling critique of such attempts to distil the purposes of the Union. They are, she argues, ‘profoundly ahistorical’, since the rationale for the Union has evolved continuously from its establishment: ranging from market access and Crown succession, to a shared commitment to empire and, subsequently, a common welfare state,

⁶² Justices of the Court must possess the necessary ‘appreciation of the developing nature of the constitution and law in England, Scotland, Northern Ireland and Wales’ (note: not ‘England and Wales’). UK Supreme Court, ‘Information pack – vacancies for appointment as Justice of the Supreme Court’, <https://www.supremecourt.uk/docs/information-pack-for-justices-role-2019.pdf> [Accessed 30 April 2020]

⁶³ In 2016 the former UKSC President, Lord Neuberger, suggested that the visits would underline that the UKSC ‘serves all parts of the United Kingdom’. Based in London and dominated numerically by English Justices, there was a risk that the Court may be perceived ‘as being orientated to England’. Lord Neuberger, ‘The Role of the Supreme Court Seven Years On – Lessons Learnt’ (Bar Council Law Reform Lecture, 21 November 2016).

⁶⁴ E.g. Lady Hale, ‘What is the United Kingdom Supreme Court for?’ (Macfadyen Lecture, Edinburgh, 28 March 2019).

Hunter and Rackley define ‘community leadership’ as ‘the various ways in which judges engage in outreach work to the Court’s various communities, including the general public, the legal profession, academia (including law students), the devolved jurisdictions and international judiciaries’. R Hunter and E Rackley ‘Judicial leadership on the UK Supreme Court’ (2018) 38 LS 191 at 215–216.

⁶⁵ Cornes ‘Gains (and dangers of losses) in translation’ (n 58) 514.

⁶⁶ Walker, *Final Appellate Jurisdiction* (n 55). BBC, ‘No Alex Salmond apology in Supreme Court row’ (16 June 2011), <https://www.bbc.com/news/uk-scotland-13793330> [Accessed 30 April 2020]

⁶⁷ In this respect, the Bill can be contrasted with the similar exercise undertaken on behalf of the Bingham Centre for the Rule of Law. The ‘principles of Union constitutionalism’ proposed were devised using various sources: the pro-Union arguments deployed during the Scottish independence referendum, the work of the 1969-73 Royal Commission on the Constitution (the Kilbrandon Commission), and the devolution case law the UK courts, among others. Bingham Centre for the Rule of Law, *A Constitutional Crossroads* (n 44) 19.

among others.⁶⁸ Moreover, the defining feature of the UK constitution – parliamentary sovereignty – ‘explicitly eschews the idea of a fixed ideological purpose’.⁶⁹

The values proclaimed as the core purposes of the Union are also politically contestable in their own right. At first glance, they appear uncontroversial; Keating notes that they are ‘universal values, shared by Scottish, Irish and Welsh nationalists and promoted in the European Union and the European Convention on Human Rights’.⁷⁰ Equally, their universality makes them liable to be interpreted in different ways, thereby limiting their unifying potential.⁷¹ How to promote equality of opportunity or a strong economy, for example, are matters of fundamental political contestation both within and across the different UK polities. The core purposes, however, are even contentious as a statement of distinctly ‘British’ values. Recent empirical research underlines that ‘Britishness’ is understood differently in the various nations and jurisdictions that make up the UK: in England, a strong sense of British identity correlates with support for the UK’s membership of the EU; in Scotland and Wales, it manifests in support for Brexit.⁷²

Contentious, therefore, as a statement of the Union’s purposes, and contestable as a set of uniquely British political aspirations, it seems likely that judicial decisions related to a cl 2-type provision would also be disputed politically. This risk of politicisation is exacerbated by the discretionary nature of cl 2(3). Bellamy argues that

Too much judicial discretion in the application of the law risks appearing arbitrary as to both the source of law, which may then seem to reflect individual whim rather than a recognized public process, and its content, which may fail to give equal consideration to all relevant factors through being limited to those persons and arguments that have legal standing in the case at hand.⁷³

Senior judges have previously expressed the same unease over such discretionary clauses in the context of the European (Withdrawal) Bill. Clause 6 of the original bill provided that a court could have regard to CJEU case law after the UK’s exit ‘if it considers it appropriate to do so’.⁷⁴ In evidence to the UK parliament, the Court’s President, Lord Neuberger, voiced concern that this was an ‘open-ended formula, basically leaving it to the courts to do

⁶⁸ A McHarg, ‘Unity and diversity in the United Kingdom’s territorial constitution’. In: Elliott M, Varuhas JNE, Stark SW (eds) *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives* (Hart 2018) pp 279–300, 293.

⁶⁹ *ibid.*

⁷⁰ M Keating, ‘Building the Union again. The new Act of Union.’ (Centre on Constitutional Change, 24 October 2018), <https://www.centreonconstitutionalchange.ac.uk/opinions/building-union-again-new-act-union> [Accessed 30 April 2020]

⁷¹ McHarg, ‘Unity and diversity’ (n 67) 292.

⁷² A. Henderson, E.G. Poole, R. Wyn Jones, D. Wincott, J. Larner and C. Jeffery ‘Analysing vote choice in a multi-national state: National identity and territorial differentiation in the 2016 Brexit vote (forthcoming) *Regional Studies*. This analysis does not cover Northern Ireland. It is based on data from the British Election Study which is conducted within Great Britain.

⁷³ R Bellamy, ‘The democratic legitimacy of international human rights conventions: political constitutionalism and the European Convention on Human Rights’ (2014) 25(4) EJIL 1019, 1028.

⁷⁴ European Union (Withdrawal) HC Bill (2017–19) [5], cl 6(2).

as they wish'. It would require them to adjudicate over 'economic and ... high-level political factors'⁷⁵ to which they are not well suited.

The involvement of the courts in the realisation of the core purposes would also inflame already contentious territorial questions around judicial authority and constitutional values in the UK. As McHarg has put it, 'who is to decide how they are to be interpreted and why [is] their interpretation is to be preferred?'.⁷⁶ If the intention is that the UKSC would develop an understanding of the core purposes to be applied uniformly, it would be necessary to justify why the interpretation of supposedly universal values by a UK-level institution should be preferred to those of a Welsh, Scottish or Northern Ireland institution.

Devolution has already facilitated the expression of territorially distinctive constitutional values in respect of human rights and democracy. For this reason, McHarg suggests that cl 2-type provisions, rather than producing 'a cohesive effect', '... may make things worse, if particular territories feel that their political and constitutional aspirations are being curtailed in the name of common 'British' values to which they do not subscribe'.⁷⁷

Another step towards a constitutional court?

Between popular and parliamentary sovereignties

There may be even more profound consequences to the Bill. Despite the explicit attempt to preserve the sovereignty of the UK parliament, several features of the Bill outlined earlier might provide the basis for a stronger constitutional role for the courts. For example, it recognises the popular sovereignties of the 'peoples of England, Scotland, Wales and Northern Ireland'.⁷⁸ It also refers to 'removing powers of [the UK] Parliament'⁷⁹ to legislate in non-central policy areas. Most strikingly of all, the Bill provides for a post-legislative process truly unique in UK constitutional history: a commencement referendum requiring both majority support in each of the nations and jurisdictions of the UK and sixty-five percent approval overall.

On a conventional legal reading, such a process would mean nothing at all. The UK parliament would remain sovereign and the Act of Union would have the status of any other UK legislation. Alternatively, it would be recognised as a 'constitutional' statute immune from implied repeal.⁸⁰ This would be consistent with the interpretation of the devolution statutes by the courts to date.⁸¹

⁷⁵ House of Lords Select Committee on the Constitution, 'Corrected oral evidence: European Union (Withdrawal) Bill' (1 November 2017).

⁷⁶ McHarg, 'Unity and diversity' (n 67) 292.

⁷⁷ *ibid* 294.

⁷⁸ Act of Union Bill (n 1), preamble.

⁷⁹ *ibid*, cl 22(b).

⁸⁰ *Thoburn v Sunderland City Council* [2002] 3 WLR 247

⁸¹ *Imperial Tobacco v Lord Advocate* [2012] UKSC 61

Equally, given the magnitude of the proposed post-commencement process, it is difficult to conceive that the Act could simply have the same status as any other statute, or even the 'constitutional' kind apparently immune to implied repeal. No legal text in UK history has been subject to such stringent democratic requirements. Indeed, if the commencement criteria were met, the courts might interpret such a seismic event as having established a constitutional principle of one or both popular and territorial consent to changes to the Act, which in turn constrains Westminster parliamentary sovereignty. The legal recognition of popular and / or territorial sovereignties within the Act might then provide the basis for a more assertive judicial role in relation to the core purposes of Union under cl 2. The courts could, for example, reason that subsequent legislation is intended to be consistent with the Act of Union and its underlying principles, including self-determination and the core purposes.

Such a step is not inconceivable. Wade argued that the fundamental basis of the constitutional order in the UK '... is itself a political fact which the judges themselves are able to change when they are confronted with a new situation which so demands'.⁸² From that perspective, it would be within their remit to determine whether, and to what extent, Westminster sovereignty survived the enactment of the Bill.

Different strands of devolution jurisprudence are instructive here. At the outset of devolution, Loughlin considered that the courts might interpret the devolution statutes in such a way as to require the consent of the devolved institutions for the lawful revocation of their powers by the UK parliament.⁸³ Recent case law, however, has underlined judicial reticence to engage in such thinking. In *Miller I*,⁸⁴ the UKSC effectively denied the scope for either the Sewel Convention or the principle of consent under the Northern Ireland Act 1998 to condition the exercise of parliamentary sovereignty. Similarly, the court's reasoning in the '*Continuity Bill*' case⁸⁵ underscored the ability of the UK parliament to unilaterally alter the terms of the devolution settlements. Parliamentary sovereignty, it argued, is the '... essence of devolution: in contrast to a federal model, a devolved system preserves the powers of the central legislature of the state in relation to all matters, whether devolved or reserved'.⁸⁶

Combined with the clauses on parliamentary sovereignty, the fact that the language of 'devolution' is invoked throughout the Act of Union Bill would arguably reinforce this interpretation of the UK's constitutional architecture as a 'devolved system', and not a federal one.

That said, the courts have occasionally showed sensitivity to the constitutional context beyond the words of the devolution statutes. For example, the Northern Ireland Act 1998 was initially understood as 'in effect a constitution' which was therefore to be 'interpreted

⁸² Wade, 'Sovereignty – revolution or evolution?' (n 26) 574.

⁸³ M Loughlin, *Sword and Scales: An Examination of the Relationship between Law and Politics* (Hart 2000), 154.

⁸⁴ *R (Miller) v Secretary of State for Exiting the European Union* [2018] AC 61.

⁸⁵ *The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill – A Reference by the Attorney General and the Advocate General for Scotland* [2019] AC 1022.

⁸⁶ *ibid*, [41]

generously and purposively, bearing in mind the values which the constitutional provisions are intended to embody'.⁸⁷ Subsequent jurisprudence has retreated to a more cautious position on the constitutional significance of the devolution statutes. In *Imperial Tobacco*, for example, Lord Hope reasoned that the 'constitutional' status of an Act 'cannot be taken, in itself, to be a guide to its interpretation. ... [It] must be interpreted like any other statute'.⁸⁸ Nevertheless, the early reading of the Northern Ireland Act underlines the potential for the courts to go beyond a legalist approach when confronted by unique or historical constitutional conditions.⁸⁹ Just as the constitutional meaning attributed to the devolution statutes has ebbed within the jurisprudence, it could also flow and broaden in future, particularly with the kind of stimulus which the Act of Union Bill would provide.

We should also recall that a nascent federalism has already surfaced occasionally in judicial reasoning.⁹⁰ For example, in *Asbestos Diseases (Wales) Bill*,⁹¹ a major judgment on Welsh devolution, Lord Thomas questioned why, for the purposes of proportionality analysis,

... the United Kingdom Parliament in making legislative choices in relation to 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.⁹²

Each, he argued, had its own democratic legitimacy; each exercised primary legislative competence in parallel. There was thus 'no logical justification for treating the views of one such body in a different way to the others'.⁹³

Lord Thomas was in the minority in that decision, but the constitutional parity between the UK's legislatures which his reasoning envisions serves as another reminder of the potential for the courts to interpret the territorial constitution in a way which moves beyond the special status accorded to the legislation of the Westminster parliament. Thus the Act of Union Bill could provide the catalyst for a rupture with the present model of exclusive parliamentary sovereignty.

An evolving UKSC

Finally, the Bill in its current formulation would not be enacted within a constitutional vacuum. Rather, it would emerge alongside the evolving constitutional role of the courts, and in particular that of the UKSC. The transformation of the courts since the 1960s is well documented in public law scholarship. Administrative law, European law, human rights and

⁸⁷ *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32, [11] (Lord Bingham).

⁸⁸ *Imperial Tobacco* (n 78), [15].

⁸⁹ The House of Lords observed that 'The 1998 Act ... was passed to implement the Belfast Agreement, which was itself reached, after much travail, in an attempt to end decades of bloodshed and centuries of antagonism.' *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32, [10] (Lord Bingham).

⁹⁰ We are grateful to the reviewers for drawing our attention to this point.

⁹¹ *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill (Reference By The Counsel General For Wales)* [2015] AC 1016.

⁹² *ibid*, [122].

⁹³ *ibid*.

devolution each furnished the courts with constitutional functions by which the elected branches of government became increasingly subject to judicial oversight. The creation of the UKSC in 2009 facilitated a consolidation of these functions, formerly split between the jurisdictions of the Appellate Committee and the JPC. It represented what Murkens and Masterman describe as ‘a milestone in the formalisation of the judicial branch ... and a manifestation of an ongoing shift in the balance of power, away from politicians towards the judges’.⁹⁴ Based on this trajectory, Maleson suspected that the UKSC ‘may develop a general power of constitutional review, even if this is a power exercised very rarely to strike down legislation which conflicts with a small number of key constitutional statutes’.⁹⁵

Such a defining moment has yet to be reached, but recent UKSC jurisprudence has been animated by an approach which proceeds from constitutional principle rather than deference to legislative intent.⁹⁶ Murkens argues that such cases underline that ‘consensus about automatic deference to Parliament or other public bodies is crumbling’ and ‘foreshadow a more assertive and astute approach to judicial review by the UKSC’.⁹⁷

The Act of Union Bill may not necessarily provide the pretext for a shift to judicial supremacy within the UK constitutional order. Indeed, McHarg argues that the approach of UKSC in recent cases is, in one respect, characterised by a constitutional conservatism. While the court has been creative in upholding the rights of the UK parliament, it has so far declined to give legal recognition to the plurality of territorial constitutional claims advanced from across the UK.⁹⁸ Still, an increasingly principles-first approach to constitutional adjudication, combined with the wider machinery envisioned in the Bill, may actually facilitate a more powerful role for the Court in the realisation of the core purposes than the Bill’s authors appear to have intended. Clause 2 may offer, at the very least, a further step in the direction of a UK constitutional court.

Conclusion

The Act of Union Bill is a welcome basis for discussions on the future direction of the UK. However, the proposal to legally operationalise a particular understanding of the core purposes of the UK state poses significant constitutional dilemmas. While analogous legislation and case law clearly suggest that a limited role is intended for the courts, the efficacy of the intended limitations cannot be guaranteed. The encouragement to the courts to develop a unionist jurisprudence would potentially jeopardise the political confidence in their independence which is required for the effective resolution of intergovernmental legal disputes.

⁹⁴ R Masterman and JEK Murkens, ‘Skirting supremacy and subordination: the constitutional authority of the United Kingdom Supreme Court’ [2013] PL 800, 819.

⁹⁵ Maleson, ‘The evolving role of the Supreme Court’ (n 52), 772.

⁹⁶ *R (Miller) v Prime Minister*; *Cherry v Advocate General for Scotland* [2019] 3 WLR 589 (SC); *Miller I* (n 82); *R (Unison) v Lord Chancellor* [2017] 3 WLR 409 (SC); *R (Evans) v Attorney General* [2015] AC 1787 (SC); *R (Nicklinson) v Ministry of Justice* [2015] AC 657 (SC); *R (Jackson) v Attorney General* [2006] 1 AC 262 (HL).

⁹⁷ JEK Murkens, ‘Judicious review: the constitutional practice of the UK Supreme Court’ (2018) 77(2) CLJ 349, 373-374.

⁹⁸ A McHarg, ‘The Supreme Court’s prorogation judgment: guardian of the constitution or architect of the constitution?’ (2020) 24 Edin LR 88, 95.

Moreover, contrary to the apparent intentions of the CRG, the ambiguous constitutional character of the Bill could lay the foundations for greater empowerment of the courts. The Bill seems to invite the courts to make hard choices, which, in turn, may make judicial empowerment hard to avoid. The UKSC already looks increasingly to constitutional principle rather than deference to political decision-making. In that context, the Bill's proposal for a seismic constitutional event in the form of a post-commencement referendum, which would give recognition to the popular sovereignties of the constituent parts of the UK, could facilitate judicial constraint, though not displacement, of Westminster parliamentary sovereignty, and a more assertive use by the courts of the core purposes of Union. This, in turn, would risk further politicising their constitutional role.

Griffith famously argued that 'law is not and cannot be a substitute for politics', and that '[t]o require a supreme court to make certain kinds of political decisions does not make those decisions any less political'.⁹⁹ Those words have particular resonance in the present debate. The Union and a particular vision of its purposes are not rendered less political by the involvement of the courts; on the contrary, in a multi-nation state defined by conflicting constitutional aspirations, their increasingly direct involvement with one particular set of aspirations may exacerbate tensions and disagreements rather than alleviate them. If there is a solution to the UK's constitutional ills, it should not involve using the courts as political instruments of unionism.

⁹⁹ JAG Griffith, 'The Political Constitution' (1979) 42 MLR 1, 16.