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THE CROWN, CONSENT, AND DEVOLUTION

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'Why would some Bills require the consent of Her Majesty, the Prince and Steward of Scotland or the Duke of Cornwall – who, I have now learnt, is also the Duke of Rothesay? I know who Her Majesty is, but who on earth is the Prince and Steward of Scotland? When did the people of Scotland ever elect any prince or steward for Scotland, and why does that person's consent have to be sought before a Scottish Bill becomes the law of the land?'[1]

A. INTRODUCTION

The aspect of the legislative process known usually as Crown's is poorly understood and controversial. It involves the legislature seeking permission from (usually) the Monarch in order to legislate in a way which touch upon the interests of the Crown. Where that consent is refused, the legislation cannot be enacted. It therefore amounts to a de facto veto belonging to the Crown (or, perhaps, the Government which advises it) but which has no basis in law nor, it appears, constitutional principle. These difficulties are multiplied by the manner in which the modern devolution settlement implements the Crown consent process. This article considers the question of Crown consent in the Scottish Parliament. It begins by explaining the operation of the process at Westminster, and the unresolved questions which exist in relation thereto. It addresses the way in which the matter was dealt with in the context of the first, abortive, attempts at devolution in the 1970s, and the reasons for which a different path was taken in 1998. It then turns to the question of how the matter has operated era of the Scottish Parliament at Holyrood. It ends by linking the question of consent to a broader set of issues regarding the position of the Crown in Scotland post-devolution.

B. BACKGROUND

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[1] HC Deb 29 January 1998, vol 305 col 557 (Dennis Canavan).

A Freedom of Information request to the Cabinet Office was the subject of a decision notice by the Information Commissioner in 2012.[2] The request related to the internal guidance on a procedure known as 'Queen's Consent' (and sometimes, by extension, 'Prince's Consent') or, more broadly, 'Crown Consent', which takes place within the legislative process at Westminster. The process applies where Parliament proposes to legislate in a manner which affects the prerogative or the interests of a given party– usually the Monarch or the Prince of Wales – it must seek the consent of that party in order to be able to do so. Though the matter appears to have existed in something approaching plain sight,[3] it had attracted little attention from constitutional scholars up until that point.[4]

The result was the publication, in 2013, of a manual produced by the Office of the Parliamentary Counsel, entitled 'Queen's or Prince's Consent',[5] last updated in 2018.[6] The manual states that consent is required in one of two sets of circumstances: where a Bill includes either 'provisions affecting the prerogative' or 'provisions affecting the hereditary revenues, the Duchy of Lancaster or the Duchy of Cornwall, and personal property or personal interests of the Crown.'[7] The personal property of the Crown includes the Queen's private estates.[8] The reference to the personal interests of the Crown means that consent will be required for 'anything that affects the Queen personally (whether as an individual or as landlord or employer)', such as anything which affects the Royal Palaces.[9] Prince's consent – the consent of the Prince of Wales – is needed where the interests of the Duchy of Cornwall are affected, though only where provisions of a Bill 'expressly mention the Duchy or otherwise have a special application to it' – where it is affected in the same way as other Crown land the consent of the Queen will suffice to cover the interests of the Duchy also.[10]

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[2] See Freedom of Information Act Decision Notice FS50425063 (21 August 2012) and, later, R Booth, 'Secret papers show extent of senior royals' veto over bills' *The Guardian* (15 January 2013).
[3] See, for example, the first edition of Erskine May: T Erskine May, *A Treatise upon the Law, Privileges, Proceedings and Usage of Parliament*, James and Luke J Hansard (1844), 263. And see generally House of Commons Political and Constitutional Reform Committee, *The impact of Queen's and Prince's Consent on the legislative process* (HC 2013–14, 784).
[4] It was discussed, for example, in R Brazier, 'Legislating about the Monarchy' (2007) 66 *Cambridge Law Journal* 86 at 95-97.
[5] Office of the Parliamentary Counsel, *Queen's or Prince's Consent* (November 2013).
[6] Office of the Parliamentary Counsel, *Queen's or Prince's Consent* (September 2018).
[7] OPC (n 6) para 2.1.
[8] OPC (n 6) para 2.20.
[9] OPC (n 6) para 2.2.
[10] OPC (n 6) para 3.5-3.6.

Shortly after the publication of the manual, the Political and Constitutional Reform Committee of the House of Commons reported on the consent process. It concluded that the process 'is complex and arcane and its existence, and the way in which the process operates, undoubtedly do fuel speculation that the monarchy has an undue influence on the legislative process.'[11] Though it rejected this, on the basis that consent is (or was) given or withheld on the advice of the government – which has indeed used it in order to effectively veto legislation in the past[12] – it is not clear that this properly reflects the operation of an involved process, which may (the record shows) include several rounds of consultation between the government, the various Palaces, and the legal representatives of the Queen and Prince of Wales.[13] That the government might on occasion advise that consent be withheld is entirely compatible with a situation in which its advice to grant such consent is not dispositive of the matter. As the Committee noted, the government has the option of simply not seeking consent.[14] While it may be the case that, as was put to the PCRC, a request for consent 'carries with it by implication Ministerial advice that consent should be granted' it does not follow that the granting of such a request is a formality. The Crown appears to play a substantive, possibly decisive, role in the process.

The PCRC did not pronounce with confidence on the underlying logic of the consent process and so whether it need exist at all. Though the process 'serves to remind us that Parliament has three elements' and that it 'could be regarded as a matter of courtesy between the three parts of Parliament', it noted that whether this is a 'compelling justification' for retaining the process is a 'matter of opinion'.[15] In evidence to the Committee, however, the Clerks of the Houses suggested that 'the first instance of the signification of royal consent to a public Bill was on 27 February 1728.'[16] This, notably, is within memory of the last occasion on which Royal Assent was refused by the Monarch of the day.[17] One reason that has been suggested for its operation is to ensure that a Bill which affects the prerogatives or interests of the Crown would not encounter difficulty in securing Royal Assent at the end of the legislative process. This was Brazier's claim: 'the procedure of obtaining the Queen's consent', he says, 'was adopted so as to avoid resort to the refusal of royal assent to a Bill affecting royal interests. That procedure prevents parliamentary time being

[11] PCRC (n 3) para 35.
[12] PCRC (n 3) para 22.
[13] See, for instance, the correspondence relating to Crown consent to the Water Resources Bill in TNA/HLG/29/602.
[14] 'It therefore follows that Consent is very rarely actually withheld; it is simply never sought in the first place, although in practical terms the effect is the same.' PCRC (n 3) para 11.
[15] PCRC (n 3) para 41.
[16] PCRC (n 3) para 14.
[17] See House of Lords Journal, vol 18 18 (11 March 1708) at 504-6.

devoted to a measure which was then vetoed.'[18] This would explain why the practice of seeking consent seems to have emerged precisely at the time when the Monarch's power to deny Royal Assent to a Bill passed by both Commons and Lords was becoming doubtful. More sensible to acquire the consent at an earlier stage and avoid the waste of time, energy, and political capital associated with piloting a Bill through Parliament, to say nothing of the squabbles over whether the withholding of Assent was constitutional. Assuming that is a fair approximation of the original logic of the consent, it holds true today only if and insofar as the Crown enjoys a genuine discretion at the Assent stage. If however the Monarch ceased, in the crystallisation of a constitutional convention, to enjoy the right to veto legislation at some point between then and the present, the logic of the consent process fell away.

It was noted above that the consent of the Prince of Wales is sometimes required where the specific interests of the Prince as Duke of Cornwall are affected by a provision in a bill. But the Prince of Wales is not only the Duke of Cornwall. He is also the Prince and Steward of Scotland.[19] The manual therefore notes that 'Consent as Prince and Steward of Scotland has always been rare and may now have been superseded altogether' but also that it has been required 'in exceptional cases for bills concerning Scottish land law and feudal reform in Scotland.'[20] So, for example, the Conveyancing and Feudal Reform (Scotland) Act 1970 provided that the Act would apply to 'land held of the Crown and of the Prince and Steward of Scotland… in like manner as it applies to other land.' Prince's consent was therefore sought and given to the Bill that became the 1970 Act.[21] With the abolition of feudal tenure in Scotland, however, there is 'no longer clear whether there is any remaining land or interest held by the Prince of Wales as Prince and Steward of Scotland' and so whether there is anything to which the Prince of Wales might in that capacity be called upon to consent to.[22] And, anyway, 'the fact that land and feudal reform has been devolved makes it even more unlikely that Prince's consent as the Prince and Steward of Scotland will ever be relevant to future Westminster bills'.[23]

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[18] Brazier (n 4) at 96.
[19] See *The Laws of Scotland: Stair Memorial Encyclopaedia*, Reissue (2001) para 913: the Principality of Scotland 'was created originally as an appanage (comparable to the Dauphiné in France) for the Prince and Steward of Scotland, the eldest living son of the sovereign.'
[20] OPC (n 6) para 3.11.
[21] OPC (n 6) Appendix B para B.2. Other examples include the Prescription and Limitation (Scotland) Bill (HL Deb 10 May 1973, vol 342 col 513); the Offshore Petroleum Development (Scotland) Bill (HL Deb 25 February 1975 vol 357 col 648); and the Land Registration (Scotland) Bill (HL Deb 15 February 1979, vol 398 col 1449).
[22] OPC (n 6) Appendix B para B.5.
[23] OPC (n 6) Appendix B para B.6.

The current rule regarding where Crown consent to Westminster Bills is required is as follows: 'Bills affecting the prerogative (being powers exercisable by the Sovereign for the performance of constitutional duties) on the one hand, or hereditary revenues, personal property or interests of the Crown, the Duchy of Lancaster or the Duchy of Cornwall on the other, require the signification of Queen's consent in both Houses before they are passed.'[24] Consent, *Erskine May* makes clear, 'is not signified unless authority to do so has first been obtained through individual application to Her Majesty. Such applications are submitted by a Minister of the Crown, normally the responsible Secretary of State.'[25] This perpetuates the situation whereby the sponsor of a Private Member's Bill is required to seek consent – if it is required – via the Government, which might, it seems, decline to make the request or do so but advise that it be refused.[26] It also contributes to the uncertainty, noted above, as to whether the decision to decision to give or withhold consent lies in practice with the Monarch or with the Government of the day. Finally, we might note that the process of seeking consent has no statutory basis, but is simply 'a matter of parliamentary procedure'. The effect of this fact is that '[i]f the two Houses of Parliament were minded to abolish Consent, they could do so by means of addresses to the Crown, followed by a resolution of each House. Legislation would not be needed.'[27] This position contrasts with the position in relation to the Scottish Parliament, and indeed has important consequences for that position.

C. CROWN CONSENT AND DEVOLUTION IN THE 1970s.

Before turning to the manner in which the devolution settlement put in place in 1998 accommodates the matter of Crown consent, it is helpful to examine the way in which the abortive process of the 1970s intended to implement it.[28] The process leading up to those rules is of interest, taking in as it does not only the drafting of (what became) the Scotland Act 1978, but also the prior Scotland and Wales Bill. In the period following Labour's narrow general election victory of October 1974 – on a platform including a commitment to create elected assemblies in Scotland and Wales – there had been discussion about the implications of devolution for the Crown. Two

[24] D Natzler (ed), *Erskine May: Parliamentary Practice*, 25 ed, LexisNexis UK (2019) para 9.6.
[25] *Erskine May* (n 24) para 9.6.
[26] The Political and Constitutional Reform Committee had recommended that 'if the House authorities decide that Consent is needed for a Private Member's Bill, the Government should as a matter of course seek Consent', which would 'remove any suggestion that the Government is using the Consent process as a form of veto on Bills it does not support.' PCRC (n 3) para 27.
[27] PCRC (n 3) para 20.
[28] See, for a recent appraisal, A Evans, "The best-laid schemes o' mice an' men'? Proposals, planning, defeat, and legacy, of devolution in the 1970s' (2020) 39 *Parliamentary History* 462.

points are key. The first is that it was central to the plan that all executive power in Scotland would continue after devolution to vest in Her Majesty.[29] But from whom would the Monarch take advice – the executive at Westminster or that to be created in Scotland? The answer was the former: indeed, the executive body to be created in Scotland would be denied access to the Monarch (including, if necessary, by making express provision to that effect in the devolution statute) so as to avoid the Monarch being drawn into conflicts between the two administrations. 'The only safe proposition', it was claimed, 'is that advice to the Sovereign about the administration of devolved responsibilities should come from the UK government',[30] even on the most minor of matters: 'The principle involved is not one to which exceptions could be permitted'.[31]

The second point is that it was nevertheless accepted that the Assembly to be created, would have to be capable, through its laws, of binding the Crown. The devolution to Scotland of, for example, hospital services would mean (hospitals being found on government land) it was necessary that it be able to do so.[32] Moreover, executive power deriving from the Crown, the Assembly would have to be able to bind the Crown if it was to 'legislate about its own office-holders, officials or departments'.[33] The difficulty would come, it was said, if the Scottish Assembly tried to bind the Crown 'in right of the UK' (a phrase which, we shall see below, is somewhat misleading).[34] It would be necessary, to avoid the problems that might follow if the Crown in that capacity was bound against its wishes, to give, in effect, the UK government a veto over any provision purporting to do so.[35] And if such a procedure was adopted, there was 'a case in logic for making a similar procedure available in relation to Crown land and to Crown private estates'.[36] That is, the consent procedure was viewed in the first place as protecting the interests of the UK government against the Scottish Assembly, and only secondarily as replicating the function of the consent process as it operated and operates at Westminster.[37]

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[29] Constitution Unit Constitutional Arrangements Group, 'The Crown' COU(75)146 (Revise) (24 July 1975) in TNA/CAB/134/3981, [3]. And see too Constitution Unit Constitutional Arrangements Group COU(C) 14th Meeting (29 July 1975) in TNA/CAB/134/3978 for discussion of this paper and endorsement of its points.

[30] This would, it said, 'serve as an affirmation of the principle that the Bill is about devolution and that ultimate responsibility rests as all times with the UK Government.' Constitution Unit Constitutional Arrangements Group (n 29) para 27-28.

[31] ibid para 27.

[32] ibid para 16.

[33] ibid para 21.

[34] ibid para 17.

[35] ibid para 17-18.

[36] ibid para 19.

[37] See also Morgan to Dewar (1 August 1975) in TNA/BD/108/197, making clear that the question was whether the Assembly should be permitted to legislate to affect non-devolved government and noting that the answer was that it could, 'but that a special "Consent" procedure would probably need to be applied'.

Clearly influential on this model was the Northern Ireland Constitution Act 1973.[38] That Act abolished the Parliament of Northern Ireland (suspended the previous year) and the office of Governor of Northern Ireland, introducing in the former's place an Assembly which would in time – or so it was planned – elect an Executive for Northern Ireland. The question of consent arose in relation to 'Measures' to be made by it.[39] Some topics were 'transferred' to the Assembly, allowing it to legislate thereon. Matters which were 'reserved' might later be transferred but could in the meantime be legislated on only with the consent of the UK government.[40] Others were 'excepted', meaning they could not be legislated on by the Assembly (even with the centre's consent) and could not be transferred to it.[41] In this third category lay the Crown.[42] The effect was that where the consent of the Secretary of State was required for a proposed Measure because it dealt with a reserved matter,[43] the Assembly could not proceed with the Measure (or, as the case may be, pass it) without that consent.[44] If a measure was passed which required consent but to which consent had not been given, then the Secretary of State possessed a further opportunity to give or deny consent when the Measure came to him for submission to Her Majesty in Council, whose approval was needed for its enactment.[45] If the Secretary of State gave consent, there was still – except in cases of urgency – a twenty day period in which either House of Parliament might vote to prevent it being submitted to Her Majesty in Council.[46] If, then, the consent scheme in the Scotland and Wales Bill a few years later ranged far beyond the narrow issue of the Crown, this was likely because it was influenced by a scheme which used the consent process as a means of delimiting legislative competence rather than controlling legislation otherwise within competence.

Turning back to Scotland, the question of consent in the devolved assembly was considered in greater detail following by the production of a paper in the name of the Lord

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[38] Constitution Unit Constitutional Arrangements Group (n 29) [20]: 'The structure of devolved matters in NICA 1973 was quite different from what is now contemplated; but it gives quite substantial indirect help'.
[39] See the overview in B Hadfield, 'Northern Ireland Affairs and Westminster' in P J Roche and B Barton (eds), *The Northern Ireland Question: Myth and Reality*, Wordzworth Publishing (2013). And see also R J Spjut, 'The Northern Ireland Constitutional Settlement of 1973 and the Loyalist Opposition' (1977) 12 *Irish Jurist* 24.
[40] Northern Ireland Constitution Act 1973 s 5, Schedule 3.
[41] NICA 1973 s 5, Schedule 2.
[42] NICA 1973 Schedule 2.
[43] Or an excepted matter, but consent could be given to a provision dealing with an excepted matter only where the Secretary of State considered the provision in question to be 'ancillary to other provisions (whether in that Measure or previously enacted) dealing with reserved matters or transferred matters.' NICA 1973 s 5.
[44] NICA 1973 ss 5(2) and (3).
[45] NICA 1973 s 5(5).
[46] NICA 1973 s 6.

President – the first draft dating from September 1975 – on issues which involved the Crown 'particularly closely'.[47] One element of the proposal was the one familiar from the contemporary constitution: where legislation would affect the 'Crown interest', consent would be required. The original draft, however, stated that requirement in an unfortunate way, referring not to the consent of the Crown (or the Monarch) but rather 'the consent of the Secretary of State … (as spokesman of the Sovereign)'.[48] A second element of the proposal, however, reflected the approach taken in Northern Ireland in 1973. Though the Scottish Assembly would be entitled to bind the Crown in relation to land held for devolved functions, any legislation seeking to bind the Crown 'in right of the United Kingdom' would require the Secretary of State's consent – on behalf, this time, of the Government of the day rather than the Monarch.[49] This juxtaposition of two distinct processes, both described in terms of consent, caused significant confusion and some consternation as the paper developed beyond this original draft. A response from a Home Office legal advisor noted that they appeared designed to 'prevent any Bill affecting Crown interests, including merely personal interests, from being debated (as opposed to being passed) by the Scottish Assembly without the consent of the central government' and that, overall, the proposals were 'not comparable to The Queen's consent as understood in Westminster'.[50] The Treasury asked that it be made clear that Crown consent would not be given by the Secretary of State on his own authority – a confusion that had either arisen or been exacerbated by the use of the language of 'consent' to address two processes with, as noted, distinct logics.[51]

A more striking response came from the Lord Advocate's Chambers, in which it was noted that the proposals would give the Secretary of State a 'right of intervention' in relation to 'almost any' Assembly Bill, allowing him to block its progress.[52] 'In my view' said the author, Norman Adamson, 'it is quite unacceptable as a matter of policy that over such a very wide area of the devolved field the territorial Secretary of State should be enabled to intervene to block discussion of Assembly Bills'. The proposal was based on a 'false analogy' with the concept of Crown consent and would work to 'enable the UK Government to circumvent the principle that, in the devolved fields, the Assemblies must be allowed to legislate'. The concept of Secretary of State's consent

[47] It being recognised that '[i]n an important respect the whole of our devolution proposals involve the Crown': Lord President of the Council, 'The Crown (Draft)' (September 1975) in TNA/CAB/198/408 para 2.
[48] ibid Annex para 9.
[49] ibid Annex para 8.
[50] 'Note by Home Office Legal Advisor' attached to Witney to Bantock (12 September 1975) in TNA/CAB/198/408.
[51] Buckley to Bantock (15 September 1975) in TNA/CAB/198/408.
[52] Adamson to Nafzger (1 October 1975) in TNA/CAB/198/408.

was therefore 'objectionable'; so too any attempt to use the mechanism of Queen's consent to the same end. The Queen's consent process was appropriate where the advice on giving of consent was tendered by the Government which controlled Parliament, but it was 'a very different matter when the Government tendering the advice in relation to an Assembly Bill may be opposed to the majority view of the Assembly.'[53] These objections were rejected, and a later (apparently final) draft of the same paper continues to propose two separate consent processes.[54] This was, the author now noted, 'far removed from Westminster practice', and involved putting Crown interest and government interest 'on exactly the same basis' and using the Secretary of State as the 'vital link in both cases' so as to avoid the sorts of conflict the danger of which justified denying the devolved administrations direct access to the Crown.[55]

The second conversation raising issues of consent was a consideration of how the Bill should treat the reserved interests of the Crown.[56] As part of that discussion a suggestion was made that secondary legislation made under Acts of the Scottish Assembly should also be subject to a consent process.[57] It was noted that the danger might be addressed instead by consideration of Crown consent vis a vis parent legislation,[58] again on the assumption that consent would be 'signified by… the Secretary of State.'[59] This is reflected also in the list of interests to be protected, which include not only the personal interests of the Monarch but also those of 'the Crown in right of HM Government in the UK',[60] including UK Government officials: 'We would not wish Assembly legislation to impose new obligations on UK Government officials without the Crown's consent thereto having been signified by the Secretary of State.'[61] This explains also the eventual inclusion in the 1978 Act, discussed below, of rules as to Crown privilege. The UK government wished to retain its right to invoke such privilege and so it was desired that 'the Assembly's legislative competence in relation to devolved matters should not extend to altering the existing law affecting Crown privilege so far as the UK Government of any claim of Crown privilege, unless the Crown otherwise consents.'[62] The drafter's response was to reject the idea of a separate

[53] ibid.
[54] Lord President of the Council, 'The Crown (Draft)' (October 1975) in TNA/CAB/198/408 Annex para 8-12.
[55] ibid Annex para 13.
[56] See generally the correspondence in TNA/CAB/198/335.
[57] Whyte (13 July 1976) in TNA/CAB/198/335.
[58] Cunningham to Rowe (21 July 1976) in TNA/CAB/198/335. Note also para 9: 'In view of the somewhat exploratory nature of this letter, it has not been copied to the usual recipients.'
[59] ibid Annex para 6.
[60] ibid Annex para 6.
[61] ibid Annex para 9.
[62] ibid Annex para 13. See also Gammie to Rowe (8 September 1977) in TNA/BD/108/36.

consent process for subordinate legislation,[63] and also to insist on distinguishing the procedural question (whether consent had been given) from that of legislative competence.[64] The following day a first draft of the list of matters to be subject to Crown consent was produced.[65]

When the time came to formally approach the Queen for consent to a specific legislative proposal (the Queen having already, it was said, read the White Paper),[66] a draft of the letter doing so was circulated by Bryars of the Cabinet Office Constitution Unit.[67] Bryars noted that he was 'slightly nervous about starting a hare if we refer to the doctrine of the indivisibility of the Crown',[68] a point discussed further below. The following day Gordon Gammie of the Unit noted, with foresight, that there 'may be some points about Crown interests which we have not yet flushed out' and so 'I have just taken my life in my hands and conveyed to Parliamentary Counsel a form of words which… will give Balmoral the protection which Her Majesty might feel inclined to insist on.'[69] The letter requesting the Queen's consent for the Scotland and Wales Bill was signed by Michael Foot.[70] 'In a general sense', Foot wrote, 'the whole of the devolution proposals involve the Crown's prerogative and interest, since what is proposed is the creation of administrations to discharge various responsibilities all of which ultimately derive from the Crown':

> The executive power in Scotland and in Wales will continue to vest in Her Majesty and there will thus be a chain of authority from the Sovereign to the administrations. But the general principle followed in the Bill, although nowhere stated in so many words, is that the Scottish and Welsh administrations should not have access to Her Majesty for any purpose. So advice to Her Majesty will continue to come only from the United Kingdom Government; and where the Scottish and Welsh administrations, in exercise of their devolved responsibilities, require to make recommendations on matters affecting the Crown, these will be channelled through the territorial Secretary of State.[71]

[63] Rowe to Cunningham (22 July 1976) in TNA/CAB/198/335.
[64] 'I think it would be unfortunate if the matter of Crown consent were allowed to intrude into questions of legislative competence and therefore validity.' Rowe to Cunningham (22 July 1976) in TNA/CAB/198/335,
[65] Rowe to Cunningham (23 July 1976) in TNA/CAB/198/335,
[66] Lisette A Clifford, 'Approach to the Palace' (25 November 1975) in TNA CAB 198/360.
[67] Kent to Bryars (8 November 1976) in TNA CAB 198/360.
[68] Bryars to Quinlan, 'Queen's Consent' (18 November 1976) in TNA CAB 198/360.
[69] Gammie to Quinlan, 'Queen's Consent' (19 November 1976) in TNA CAB 198/360.
[70] Foot to Charteris (24 November 1976) in TNA CAB 198/360.
[71] ibid.

The clauses relating to Crown consent for legislation proposed by the Scottish Assembly were specifically highlighted, as was the absence of specific provision relating to the Duchies of Cornwall and Lancaster.[72]

The Scotland and Wales Bill was introduced into House of Commons just a few days later. By clause 26(5) of the Bill, the standing orders of the Scottish Assembly which it would have created were to include 'provision for ensuring that a Bill proposing to make any such provision as is mentioned in Schedule 8 to this Act is readily recognisable as such and will not be allowed to pass unless the Crown's consent has been signified by the Secretary of State.' The matters so mentioned were as follows:

> 1. Any provision affecting the Crown in its private capacity.
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> 2. Any provision affecting Crown privilege in relation to the giving of evidence or the production of documents, except in cases where the power to claim or waive the privilege on behalf of the Crown is (apart from the provision) exercisable by a member of the Scottish Executive.
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> 3. Any provision affecting property vested in a Minister of the Crown or property vested in Her Majesty in right of the Crown or forming part of the Crown Estate or held in trust for Her Majesty.
>
> 4. Any provision imposing duties on, or on officers or servants of, a Minister of the Crown or any person, department or body mentioned in paragraph (b) of the definition of "Minister of the Crown" in section 113 of this Act or on members of the armed forces of the Crown.
>
> 5. Any provision affecting the provisions of a Royal Charter.[73]

The effort which had gone into drafting the Bill, and seeking the consent of the Monarch, was frustrated in the short term. The Scotland and Wales Bill died in the House of Commons when the Government lost, on 22 February 1977, a vote on a guillotine motion which would have limited

[72] ibid.
[73] Scotland and Wales Bill, HC Bill 7 (1976-77).

the time to be given to debate on the Bill.[74] Work on devolution was halted, and the remaining points of contention regarding the consent process put aside, though not before consent to the Scotland and Wales Bill itself had been indicated at second reading.[75]

When, then, a further attempt at devolution took place – now with separate Bills – the question of consent had therefore already been subject to detailed consideration, and could be rolled over into the new Scotland Bill.[76] Nevertheless, changes were made, reflecting discussions with the various Palaces which had not been completed when work was halted on the original Bill.[77] One change to the wording of clause 26(5) itself was suggested by the Palace at the point at which consent was given to that Bill.[78] Another was made in response to comments from the Duchies of Lancaster and Cornwall. Though the former had no property in Scotland, it sought protection for any it might later acquire, noting that the precedent might serve it well if legislative powers were eventually given to the Welsh Assembly.[79] The Duchy of Cornwall sought similar protection.[80] Amendments to that effect were agreed, but others were subject of disagreement. A lawyer for the Prince of Wales indicated certain concerns about the drafting of the Bills, and that in any event he could not 'at this stage, indicate that His Royal Highness' consent to the Bill will be signified at the appropriate stage as he must receive advice on the new draft first.'[81] This was resisted: there had been no suggestion that the original Scotland and Wales Bill required the Prince's consent and 'any changes we now contemplate making in the Bill with regard to him

[74] See J Kerr, 'The Failure of the Scotland and Wales Bill - No Will, No Way' in H M Drucker and M G Clarke, *The Scottish Government Yearbook*, Paul Harris Publishing Edinburgh (1978) and AB Evans, 'Devolution and parliamentary representation: the case of the Scotland and Wales Bill, 1976–7' (2018) 37 *Parliamentary History* 274.

[75] HC Deb 13 December 1976, vol 922 col 975. See Charteris to Foot (13 December 1976) in TNA/CAB/198/456, indicating that consent was being given only because the Bill itself contained provision ensuring that consent was required to Scottish Assembly legislation. A note from 9 December informed its recipients that 'The Bill is with their solicitors, but the Palace fully understand that we must have an answer – the right answer – before Monday afternoon': 'Queen's Consent' (9 December 1976) in TNA/CAB/198/456.

[76] See 'Instructions - Part II', accompanying Nafzger to Gammie (30 June 1977) in TNA/CAB/456, identifying changes to be made. Clauses 26 (3), (4) and (6) were to be removed, but not (5).

[77] One other difficulty in this process was the change (or clarification, depending on one's perspective) in the law of Crown privilege, resulting from the decision in *D v NSPCC* [1978] AC 171: see Gammie to Rowe (8 September 1977) in TNA/BD/108/36.

[78] The Scotland and Wales Bill imposed consent requirements in relation to any provision which was 'readily recognisable' as fulfilling the Schedule 6 criteria; the provision in section 24 of the Scotland 1978 required that any clause meeting those criteria do so 'expressly and not merely by implication': for discussion see Charteris to Foot (13 December 1976), Gammie to Nafzger (17 December 1976) and Gammie to Rowe (9 Feb 1977) in TNA/CAB/198/456.

[79] Austerberry to Owen (11 January 1977) in TNA/CAB/198/456.

[80] Duchy of Cornwall Office to Foot (6 January 1977) in TNA/CAB/198/456

[81] Boyd-Carpenter to Gammie (9 September 1977) in TNA/CAB/198/360.

would be to afford him added protection – not to impose added liabilities.'[82] The matter rumbled on, focusing on the question of whether adequate protection was offered to the Prince in his capacity as Prince and Steward of Scotland, and whether, if the Assembly being created was capable of binding him in that capacity, he would need to consent to the enactment of the Scotland Bill.[83] Protection was eventually included only for property belonging to the Principality and Stewartry of Scotland,[84] and not, as had been suggested, for the Prince and Steward himself.[85] Nevertheless, consent to the Bill was ultimately signified (again) by the Queen alone and communicated at second reading.[86]

The Scotland Act 1978 provided that the Standing Orders of the Scottish Assembly were to include provision 'for securing that a Bill proposing to make any such provision as is mentioned in Schedule 6 to this Act does so explicitly and not merely by implication and will not be allowed to pass unless the Crown's consent has been signified by the Secretary of State.'[87] There are two requirements here: a consent process and a requirement that Acts making any provision which would trigger the consent process make that provision explicitly. The latter is a striking inclusion.[88] It is a rule of statutory interpretation of a sort which one would not expect to find in the standing orders of the legislature: its inclusion in those of the Scottish Assembly would have neither determined the approach of the courts to questions of statutory interpretation (as to whether a given statute did or did not bind the Crown) nor compelled the Assembly to legislate for the rule. If adhered to by the Assembly it would however have minimised the possibility that a Bill which as interpreted and applied by the courts should have required Crown consent would have become law without having received it.[89]

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[82] Gammie to Boyd-Carpenter (30 September 1977) in TNA/CAB/198/360.
[83] See, eg, Boyd-Carpenter to Gammie (19 October 1977) and Rowe to Gammie (24 October 1977) in TNA/CAB/198/456.
[84] As had been agreed earlier: Gammie to Boyd-Carpenter (19 July 1977) in TNA/CAB/198/456.
[85] Boyd-Carpenter to Gammie (19 October 1977) TNA/CAB/198/456.
[86] HC Deb 14 November 1977, vol 939 col 52. A draft of the letter by which consent was requested second time around shows that a number of changes to the devolution plan were to be highlighted: Lord President to Charteris (10 October 1977) in TNA/CAB/198/360.
[87] Scotland Act 1978 s 24.
[88] 'Essentially, therefore, this repeats the provision which obtains in Parliament, but we think it desirable to go a little further because there is a rule—or perhaps something less than a rule in Scots Law; certain dicta suggest that the rule in Scotland is slightly different from the rule obtaining in England, and accordingly it is desirable to make the matter expressed. So what we really want is that where the Assembly Bill is to bind the Crown it should say, plainly and unambiguously, that its provisions or some of them are to bind the Crown, and the reader of the appropriate Act will simply look in the index for a Crown application clause': HL Deb 24 April 1978, vol 390 col 1452 (the Solicitor-General for Scotland, Lord McCluskey).
[89] See now Interpretation and Legislative Reform (Scotland) Act 2010 s 20(1), which implements the reverse rule: 'An Act of the Scottish Parliament or a Scottish instrument binds the Crown except in so far as the Act or instrument provides otherwise.

Though the 1978 Act made provision for the creation of a process of Crown consent as existed and still exists at Westminster, the substantive scope of that process was far broader than it has ever been at Westminster. Schedule 6 of the Act included the following list of provisions which would require Crown's consent:

1. Any provision affecting the Crown in its private capacity.

2. Any provision affecting the rules of law authorising or requiring the withholding of any document or the refusal to answer any question on the ground that the disclosure of the document or the answering of the question would be injurious to the public interest.

3. Any provision affecting property vested in a Minister of the Crown or property vested in Her Majesty in right of the Crown or of the Duchy of Lancaster or forming part of the Crown Estate or held in trust for Her Majesty, or affecting property belonging to the Duchy of Cornwall or the Principality and Stewartry of Scotland.

4. Any provision imposing duties on, or on officers or servants of, a Minister of the Crown, on members of the armed forces of the Crown or on any person whose remuneration is paid out of central United Kingdom funds.

5. Any provision-

(a) conferring on any person any privilege or immunity of the Crown;

(b) depriving any person of any such privilege or immunity;

(c) requiring or enabling any person to exercise any functions on behalf of the Crown; or

(d) securing that any functions exercisable by any person on behalf of the Crown are no longer so exercisable by him.

6. Any provision affecting the provisions of a Royal Charter.

> 7. Any provision relating to the care and preservation of, or access to, records in the custody of the Keeper of the Records of Scotland at the coming into operation of this paragraph, except court records and private records.[90]

Though this would include what is now covered by the Crown consent process, it would include much else. The second item in the list, for example, would encompass the common law of public interest immunity, preventing the Scottish Assembly from legislating upon it without consent.[91] The third item is exceptionally broad, encompassing much that is not caught by the modern consent process at either Westminster or Holyrood. Generally, what is striking is that this list encompasses throughout Bills affecting the position not only of the Crown but also of its Ministers. Over and above the substantive limitations on the Assembly sat a new procedural limitation on its legislative activity which may well have been of significant practical importance had devolution in the 1970s ultimately gone ahead. But, of course, it did not.

D. CROWN CONSENT IN THE SCOTLAND ACT 1998

In the 1998 Act, for which the consent of the Queen was also signified at the relevant time,[92] the matter is dealt with very differently. A choice was made, early on, to abandon the idea – central to the 1970s attempts – that there would be no direct access for the Scottish executive to the Crown.[93] Nor would the process of Crown consent play any role in permitting the UK government to override the decision-making of the devolved legislature.[94] And so the UK government now possesses within the Scotland Act itself the power to block Acts of the Scottish Parliament only on limited grounds, and only after they have passed through the Parliament and are awaiting Royal Assent.[95] In keeping with that picture – permitting access to the Crown; a narrow override – arrangements for Queen's consent to legislation of the Scottish Parliament affecting the

[90] Scotland Act 1978 Schedule 6.
[91] This is significant in particular because the law of public interest immunity in Scotland (under the previous name of 'Crown privilege') historically diverged from that of England and Wales: see, for example, *Glasgow Corporation v Central Land Board* (1956) SC 1 (HL).
[92] HC Deb 12 January 1998, vol 304 col 19.
[93] Scottish Office, 'Constitutional Policy and Relations between Edinburgh and Whitehall' (May 1997), attachment to Ministerial Committee on Devolution to Scotland and Wales and the English Regions, 'The Scotland Bill: Constitutional Policy and Relations between Edinburgh and Whitehall' DSWR(97)3 (12 May 1997) in TNA/CAB/134/6128 para 2.5.
[94] See generally Ministerial Committee on Devolution to Scotland and Wales and the English Regions, 'Devolution to Scotland and Wales: Over-ride Powers' DSWR(97)15 (29 May 1997) in TNA/CAB/134/6128.
[95] Scotland Act 1998 s 35. This power has been used only once: see the Gender Recognition Reform (Scotland) Bill (Prohibition on Submission for Royal Assent) Order 2023 (SI 2023/41).

prerogative or the Monarch in her private capacity would, it was decided, 'parallel UK legislation',[96] reflecting a desire to mirror, as far as possible in the context of a subordinate legislature, 'the spirit of existing arrangements'.[97] The rules as contained in the Scotland Act 1998 operate against a background in which the reservation of 'aspects of the Constitution' including the Crown excludes 'property belonging to Her Majesty in right of the Crown', 'the ultimate superiority of the Crown or the superiority of the Prince and Steward of Scotland', or 'property held by Her Majesty in Her private capacity'.[98]

Section 22 of the 1998 Act provides that the proceedings of the Parliament which the Act constitutes shall be 'regulated by standing orders'. Schedule 3 makes provision regarding those standing orders, paragraph 7 providing that they 'shall include provision for ensuring that a Bill containing provisions which would, if the Bill were a Bill for an Act of Parliament, require the consent of Her Majesty, the Prince and Steward of Scotland or the Duke of Cornwall shall not pass unless such consent has been signified to the Parliament.'[99] This approach contrasts sharply with that which was taken in 1978, first of all by focusing on the narrow issue of Crown interests rather than, as the 1978 Act had, grouping it together with a range of other issues. By piggybacking on the practice of the Westminster Parliament as regards Crown consent, it obviates the need to define the circumstances in which the rules must require the seeking of consent. In doing so, it not only passes over the opportunity to impose a wider requirement (as was done in 1978) but also avoids the risk of introducing one which otherwise diverges, even inadvertently, from the Westminster practice. The provisions requiring that this derivative process be put in place are protected against modification by the Scottish Parliament itself.[100]

Reflecting the requirements of the Act, rule 9.11 of the standing orders of the Scottish Parliament provides that where a Bill contains provisions which would 'if the Bill were a Bill for an Act of the United Kingdom Parliament, require the consent of Her Majesty, the Prince and Steward of Scotland or the Duke of Cornwall' then the Scottish Parliament 'shall not debate any question whether the Bill be passed or approved unless such consent to those provisions has been

[96] Ministerial Committee on Devolution to Scotland and Wales and the English Regions, 'Devolution to Scotland: Outstanding Constitutional Questions to be Considered' DSWR(97)17 (9 June 1997) in TNA/CAB/134/6128 Annex D para 5.5.
[97] ibid para 6.
[98] Scotland Act 1998 Schedule 5, Part I, paras 3(1) and (2), and 4(1).
[99] An amendment which would have substituted a reference to the Duke of Rothesay for that to the Duke of Cornwall was resisted: HC Deb 29 Jan 1998, vol 305 cols 557-8.
[100] They are not, that is, amongst those excepted from the general rule whereby the Scottish Parliament cannot modify the Scotland Act itself: Scotland Act 1998 Schedule 4, para 4.

signified by a member of the Scottish Government during proceedings on the Bill at a meeting of the Parliament.' Because this mirrors the formulation of the 1998 Act, importing by reference the requirement which applies at Westminster rather than restating it independently, the requirement appears to be ambulatory: if the Westminster Parliament chose to modify or even abandon the practice of seeking consent (which, as noted above, it could do without legislation) then the requirement imposed on the Scottish Parliament by its standing orders (as required by the 1998 Act) would itself change or, as the case may be, fall away without any further action on the part of either legislature. And so what the Scottish Parliament may not itself do– remove the requirement to acquire Crown consent – could be done by the Westminster Parliament without legislation and without reference to the devolved body.

The Scottish Government's Bill Handbook describes the circumstances in which a Bill is likely to require consent, noting – in line with the concern for Balmoral evidenced during the drafting of the original devolution Bills – that 'The Queen's private estates, e.g. Balmoral, are the main examples of The Queen's personal property and early attention is particularly required if the Queen's private estates are to be affected.'[101] It outlines the process to be followed where it is determined that a Bill requires consent:

> On the basis of a draft prepared by the Bill Team, the First Minister's Private Secretary writes to Her Majesty's Private Secretary enclosing 3 copies of the Bill and asking him or her to ascertain whether the provisions in the Bill which affect the Crown are acceptable to Her Majesty… This should be done as early as possible before the Bill is introduced since the Palace have stressed the need for time to be allowed for comments particularly where the Crown is involved in its personal as distinct from its official capacity.[102]

Note that there is no suggestion here that, as has been claimed in the context of Westminster, that a request for consent does or should take the form, implicit or explicit, of advice that consent be given. In particular, the reference to the Crown's personal capacity and the especial need for time to comment suggests that such requests are considered more carefully than are those which affect the Crown in its official capacity. This account implies strongly that the process is not a mere formality, but rather one in which consent might be given only after genuine consideration of the

[101] Scottish Government Legislation and Parliamentary Liaison Team, *Bill Handbook: A Guide to Bill Procedure for Scottish Parliament Bills*, Version 13 (March 2011) para 4.130.
[102] ibid para 4.131.

point, and perhaps even withheld. Indeed, correspondence relating to the Heat Networks (Scotland) Bill released under the Freedom of Information (Scotland) Act shows that the Bill was amended to address concerns raised by the Queen's solicitors,[103] apparently regarding the application to the Queen's private estates of rules permitting compulsory purchase.[104] As at Westminster, however, there is no reliable mechanism by which one might become aware that a request for consent was refused or given only after changes agreed. Though the political implications of such a refusal might be significant, and the fact of refusal liable to leak, it seems possible that at some point or other the legislative intentions of the Scottish government have been modified or thwarted by the process of Crown consent. What can be said with certainty, however, is that consent has been sought, and given, on a remarkable number of occasions in the period of the Scottish Parliament's existence.

E. CROWN CONSENT IN PRACTICE

On 15 December 1999, the Deputy First Minister, speaking to stage 1 motion on the Abolition of Feudal Tenure etc Bill, noted that 'Her Majesty and His Royal Highness the Prince of Wales as Prince and Steward of Scotland, have been informed of the purport of the Abolition of Feudal Tenure etc (Scotland) Bill, and have consented to place their prerogatives and interests, so far as they are affected by the bill, at the disposal of the Parliament for the purposes of the bill.'[105] Such consent was required because the Bill provided that as an Act it would bind the Crown and so its provision regarding the abolition of feudal estates was to apply to 'the superiority of the Prince and Steward of Scotland and to the ultimate superiority of the Crown'.[106] In May of the following year, at stage 3 of debate on the Bill, consent was once again signified to an amendment introduced in order to address concerns about the implications of the Bill for the regalia majora.[107] In the remainder of the Parliament's first session, consent was given by the Queen to 10 other Bills.[108] The only other Bill to which consent was granted by both the Queen and the Prince of Wales as

[103] Scottish Government, 'Correspondence relating to Heat Networks (Scotland) Bill: FOI release' FOI/202100181726 (25 May 2021) at 15.
[104] What became sections 68(3) and (6) of the Heat Networks (Scotland) Act 2021 were inserted into the Bill as government amendments at stage 3.
[105] Debate on the Abolition of Feudal Tenure etc. (Scotland) Bill, Stage 1, SP OR 15 December 1999, col 1558.
[106] Abolition of Feudal Tenure etc. (Scotland) Bill (as introduced), SP Bill 4, Session 1 (1999) s 56.
[107] SP OR 3 May 2000, col 220.
[108] National Parks (Scotland) Bill; Salmon Conservation (Scotland) Bill; Mortgage Rights (Scotland) Bill; Water Industry (Scotland) Bill; Scottish Public Services Ombudsman Bill; Freedom of Information (Scotland) Bill; Title Conditions (Scotland) Bill; Water Environment and Water Services (Scotland) Bill; Building (Scotland) Bill; Agricultural Holdings (Scotland) Bill.

Prince and Steward of Scotland was the Leasehold Casualties (Scotland) Bill.[109] Though it would not do to read too much into it, it is notable that in this first session a distinction seems to have been drawn between Bills affecting the Queen's prerogative and interests and those affecting only her interests. Whatever was the significance, of any, of the particular language used, it ceases after that first session, with the phrasing 'prerogative and interests' used on every occasion that consent has been signified thereafter. In the Parliament's second session, the Queen consented to place her prerogative and interests at the disposal of the Parliament in respect of nine Bills.[110] In the third session, the figure was eleven,[111] and in the fourth, eighteen.[112] In the fifth session, consent to thirteen Bills was signified in accordance with the procedure.[113] Up to the end of 2022, consent had been signified in relation to five Bills in the Parliament's sixth session.[114]

It is notable that the only consent given by the Prince of Wales as Prince and Steward of Scotland came in the first session of the Parliament. It is notable too the large number of Bills in respect of which consent has been sought and the wide – almost absurdly so – range of topics they cover. It is easy to see how a Bill abolishing feudal tenure affects the Crown's interests. The justification is far less obvious, however, in relation to others, including – for example – Bills regarding licensing law, for which consent has frequently been sought. One likely explanation,

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[109] SP OR 10 January 2001, col 25.

[110] Nature Conservation (Scotland) Bill; Tenements (Scotland) Bill; Water Services etc (Scotland) Bill; Animal Health and Welfare (Scotland) Bill; Planning etc (Scotland) Bill; Crofting Reform etc Bill; Transport and Works (Scotland) Bill; Aquaculture and Fisheries (Scotland) Bill; Rights of Relatives to Damages (Mesothelioma) (Scotland) Bill.

[111] Flood Risk Management (Scotland) Bill; Climate Change (Scotland) Bill; Tobacco and Primary Medical Services (Scotland) Bill; Marine (Scotland) Bill; Home Owner and Debtor Protection (Scotland) Bill; Public Services Reform (Scotland) Bill; Criminal Justice and Licensing (Scotland) Bill; Alcohol etc (Scotland) Bill; Historic Environment (Amendment) (Scotland) Bill; Wildlife and Natural Environment (Scotland) Bill; Damages (Scotland) Bill; Reservoirs (Scotland) Bill.

[112] Alcohol (Minimum Pricing) (Scotland) Bill; Land Registration etc (Scotland) Bill; Agricultural Holdings (Amendment) (Scotland) Bill; Long Leases (Scotland) Bill; Local Government Finance (Unoccupied Properties etc) (Scotland) Bill; Water Resources (Scotland) Bill; Aquaculture and Fisheries (Scotland) Bill; Regulatory Reform (Scotland) Bill; Buildings (Recovery of Expenses) (Scotland) Bill; Historic Environment Scotland Bill; Community Empowerment (Scotland) Bill; Air Weapons and Licensing (Scotland) Bill; Fatal Accidents and Sudden Deaths etc (Scotland) Bill; Succession (Scotland) Bill; Higher Education Governance (Scotland) Bill; Land Reform (Scotland) Bill; Private Housing (Tenancies) (Scotland) Bill; Burial and Cremation (Scotland) Bill.

[113] Animals in Travelling Circuses (Scotland) Bill; Forestry and Land Management (Scotland) Bill; UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill; Islands (Scotland) Bill; Scottish Crown Estate Bill; Prescription (Scotland) Bill; Planning (Scotland) Bill; Non-Domestic Rates (Scotland) Bill; Coronavirus (Scotland) Bill; Coronavirus (Scotland) (No 2) Bill; Agriculture (Retained EU Law and Data) (Scotland) Bill; Heat Networks (Scotland) Bill; Hate Crime and Public Order (Scotland) Bill.

[114] Coronavirus (Extension and Expiry) (Scotland) Bill; Non-Domestic Rates (Coronavirus) (Scotland) Bill; Coronavirus (Recovery and Reform) (Scotland) Bill; Fireworks and Pyrotechnic Articles (Scotland) Bill; Cost of Living (Tenant Protection) (Scotland) Bill.

suggested by the Bill Handbook quoted above, is that Balmoral Castle – the Queen's summer residence, and part of her 'personal property' – possesses a licence for the sale of alcohol, which would be in keeping with the suggestion – during the passage of the 1978 Act – that the position of Balmoral was a particular sensitivity. If that is the logic of the point, then we would seem to have gone further than the underlying justification for Crown consent, whatever it might be, could ever take us.

The effect is that a process, imposed on the Scottish Parliament by Westminster and outside the former's control, permits the Monarch to influence the manner in which policy is implemented in law. The logic of that process, already uncertain at Westminster, is doubly so in relation to the Scottish Parliament, which is a legislature of limited competence subject to a range of restrictions on what it can and cannot do. Any limitation on its ability to affect the interests of the Crown whose need is capable of articulation could have been included amongst the limits on legislative competence found on the face of the Scotland Act 1998. Instead, the detail of the consent process is kept off-stage, and we are left to surmise that the fact of the Crown having an effective veto, however unlikely it is to be used, is best explained by the fact that it is capable (as a matter of law, at least) of withholding the Royal Assent, and the consent process ensures that it is not required to exercise that option in order to deal with any perceived threat to its interests. This is unconvincing. Though the point has occasionally been contested in recent years as regards the sovereign legislature at Westminster, there has never been any serious suggestion that the Monarch enjoys discretion as regards the granting of Assent to a Bill passed by the Scottish Parliament. Any such suggestion would be incorrect: the granting of Assent to a Bill which has already passed the (many) hurdles to the Scottish Parliament legislating is a pure formality. And if the fact that Royal Assent is required cannot be a justification then there can be no justification: no other party whose interests are affected by proposed legislation enjoys an individual, potentially secret, veto over the relevant provisions.

F. THE CROWN AFTER DEVOLUTION

We noted above that the requirement of Crown consent – once it became widely known – was controversial because it seems to create a veto point within the legislative process. The question, then, was who possessed the veto power: whether the Crown exercised its own judgment on whether to give or withhold consent, or whether it simply followed the government's advice. The claim endorsed by PACAC was that the decision is in effect that of the government of the day.

Though there is reason to think the matter is more complicated – the monarchy seems to enjoy a more substantive role than the Committee suggested – if PACAC's diagnosis is accurate, the effect is that the government enjoys a veto power which is neater than any which may exist at the Royal Assent stage. There, it has been argued in recent years that the content of the relevant constitutional convention is not that the Crown assents to any Bill passed by Commons and Lords, but that the Crown assents (or not) on the basis of the advice of its Government.[115] The better view is that the former position is true, but even if the latter holds, Crown consent offers a more discreet and politically convenient veto point than Royal Assent could: the government simply has to decline to seek the required consent, without which a Bill is stopped in its tracks.[116] The Monarch need not be involved nor embarrassed. The truth, it seems, is that both parties currently enjoy a discretionary power over a Bill which requires Crown consent within the legislative process at Westminster: the Government in whether it seeks that consent; the Crown in whether it grants it.

The same questions as to the relationship between government and Crown in the consent process arise, in a more complex fashion, in the context of the Scottish Parliament. There are two governments: one for Scotland and the other for the whole UK. Which is to advise the Crown as to whether to give its consent? We noted above the fear amongst those responsible for designing and shepherding the Scotland and Wales Bill through Parliament in the 1970s of 'starting a hare if we refer to the doctrine of the indivisibility of the Crown'. But the specific question was not entirely overlooked within the process, including in relation to the question of consent in the Scottish Assembly. As the Scotland Bill was being debated, Tam Dalyell posed the question of whether advice would be tendered by the central or the devolved government (to be known as the Scottish Secretaries):

> Will the advisers be the Prime Minister, the Home Secretary, the Lord President, the Chief Secretary and the Secretary of State for Scotland, who are normally the advisers to the

[115] See, eg, R Craig, 'Could the Government Advise the Queen to Refuse Royal Assent to a Backbench Bill?' *UKCLA Blog* (22 January 2019).

[116] See, on this point, disputes as to whether Queen's consent was required for backbench bills requiring the government to seek (and in some cases agree) an extension to the period available, under Article 50 of the Treaty on European Union, to negotiate a Withdrawal Agreement. In relation to both the Speaker took the view that consent was not required: HC Deb 4 April 2019, vol 657, col 1130 and HC Deb 4 September 2019, vol 664 cols 211-212.

> Crown? What relationship does the Scottish Prime Minister or the First Secretary have to the Crown? If he has no relationship, I shall not detain the Committee further.[117]

The response Dalyell received was that '[t]he advice which will be given to the Crown on these matters will come from Ministers of the Crown and not from the Scottish Secretaries.'[118] It would come, that is, from the centre, and not from the devolved institutions in the process of being created. This aligns with the consent process as we have seen it develop – from the 1973 Act which prevented the Northern Ireland Assembly legislating on reserved matters without the consent of the Secretary of State through the Scotland and Wales Bill to the Scotland Act 1978. In each case consent was used to preserve the superiority of the Westminster government over the devolved institutions. The devolved administration was to be denied access, however minor, to the Crown.

Though democratically suspect, this is in keeping with the legal position of the Crown in the UK: it is one and indivisible. The Union of 1707 created – from two separate Kingdoms, each with their own Crown – one (Imperial) Kingdom, with one Crown. As the Dominions achieved independence, the Crown fragmented, such that even where those independent states remain monarchies, their Crown is legally distinct.[119] The United Kingdom created in 1707 and refigured in 1800 and 1921 persists, however, and forms – along with the Overseas Territories – a single, unified, realm.[120] In a case relating to one of those Territories, it has been held that when the Crown acts in relation to some part of that realm it is entitled – on the advice of the government at Westminster – to subordinate that part's interests to those of the realm as a whole.[121] Though that conclusion was articulated in the context of a conflict between the interests of the United Kingdom and one of its remaining Territories (and, moreover, one which is not self-governing), the logic of an undivided realm would seem to compel a similar conclusion in the context of a dispute internal to the UK: as a matter of law, that is, the government of the United Kingdom is entitled, in advising the Monarch as to the exercise of prerogative powers in relation to Scotland, to subordinate the interests of Scotland to those of the United Kingdom as a whole. And so the

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117 HC Deb 6 December 1977, vol 940 col 1185.
118 HC Deb 6 December 1977, vol 940 col 1185 (John Smith).
119 *R v Foreign Secretary, ex parte Indian Association of Alberta* [1982] QB 892 at 916-7.
120 'The United Kingdom and its dependent territories within Her Majesty's dominions form one realm having one undivided Crown': Halsbury's Laws of England (4th ed 2003 reissue) vol 6, para 716, cited with approval in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61 para 47.
121 'Her Majesty in Council is therefore entitled to legislate for a colony in the interests of the United Kingdom. No doubt she is also required to take into account the interests of the colony… but there seems to me no doubt that in the event of a conflict of interest, she is entitled, on the advice of Her United Kingdom ministers, to prefer the interests of the United Kingdom.' [2008] UKHL 61 para 49.

problem Dalyell identified persists and, at least as a matter of law, the position which was communicated to him holds good.

The general question of the Crown after devolution seems to have attracted little attention since the 1998 settlement was put in place. Instead, attention has been paid only to a set of more specific questions relating to, for example, the position of the Crown in litigation,[122] and the Crown Estate.[123] A convention developed at the time of devolution whereby the exercise of prerogative powers within devolved competence takes place on the advice of the Scottish government.[124] It is, for reasons given above, not clear that what passes between government and Monarch in the Crown consent process involves the former advising the latter. But it seems likely that if there is an advising element to that interaction then – in contrast to what Dalyell was told at the time of the first attempt at devolution, and reflecting the belated willingness to permit the Scottish executive direct access to the Crown – the modern devolution settlement accommodates similar practice in relation to Crown consent as in relation to the exercise of the prerogative (though the statement in which the 'administrative arrangement' was first noted does not mention it, and the giving of advice on consent does not self-evidently fall within the categories of function which were transferred to the First Minister upon devolution). Even that is the case, this convention – assuming it exists – is, by definition, not legally binding, and as is the case with other conventions (the Sewel convention, say) we might find that adherence to them is contingent upon a set of predicates that do not always hold. What, then, of situations in which the interests of the Scottish Government and those of the United Kingdom government are in direct and absolute opposition?

The doctrine of the indivisibility of the Crown implies that the Crown ultimately acts on the advice of its Ministers at Westminster. This would seem to mean that the Westminster government could, if it chose to do so, seek to 'pull rank' on the Scottish Government in the context of, amongst other things, the Crown consent process. If so, it would – as has been established in relation to the Overseas Territories – be entitled in proffering advice to prioritise the position of the whole United Kingdom, or even of some other part of that whole – over the interests of Scotland. Though these questions becoming live is by no means likely, the state of

[122] See, for example A Tomkins, 'The Crown in Scots Law' in A McHarg and T Mullen (eds), Public Law in Scotland, (Edinburgh, Avizandum Publishing 2006).
[123] As devolved by the Scotland Act 2016: see s 36. For discussion, see A McHarg, 'Crown Estate Devolution' (2016) 20 *Edinburgh Law Review* 388.
[124] HL Deb 1 July 1999, vol 603 cols 50-1WA. See also Political and Constitutional Reform Committee, *Role and powers of the Prime Minister: Written Evidence* (17 May 2011), Written evidence submitted by the Scottish Government.

intergovernmental relations in recent years – most obviously in the context of Brexit and the effective disapplication of the Sewel convention, but also in relation to the blocking of the Gender Recognition Reform (Scotland) Bill – makes a scenario in which the Crown is dragged into a conflict between the two administrations just about plausible. Certainly, the Brexit context suggests that there are those who would be willing to see the Westminster government use the formal cover of the Crown – as was argued for in relation to both Royal Assent and Crown consent at various points in the Brexit process – in order to achieve its political goals.

G. CONCLUSION

When consent was signified, in accordance with Rule 9.11 of the Standing Orders of the Scottish Parliament, to the Cost of Living (Tenant Protection) (Scotland) Bill on 6 October 2022, the process was notable firstly because it was the first time that consent had been given by King Charles III since he took the throne. But it was novel also in that the associated documentation offered a clear statement of the reasons for which it was considered necessary to seek consent. The Scottish Government, which has adopted this practice in response to criticism of the consent process,[125] suggested that consent was required because 'the provisions in the Bill affecting private residential tenancies could affect residential tenancies on the His Majesty's private estates and those on land forming part of the Scottish Crown Estate.'[126] This though tells us nothing that one could not have deduced from the content of the Bill and the rules governing consent. It will not tell us what changes, if any, were requested before consent was given.

The process of Crown consent remains concerning. There is an unacceptable lack of clarity as to the operation of the process, its underlying logic and whether, given its apparently anti-democratic nature, it should exist at all. The practice seems to create a veto that is more insidious than is that of Royal Assent: one which can be exercised surreptitiously, leaving no mark on the public record, and which prevents the debate taking place rather than rejecting the result that has been arrived at. This might have made sense when the possibility that Royal Assent would be withheld was a genuine one. That justification no longer holds: regardless of which view one takes

[125] Eg S Carrell, R Evans and D Pegg, 'Queen's secret influence on laws revealed in Scottish government memo' *The Guardian* (27 June 2022). And see SP OR (5 October 2022) cols 167-8: 'Parliament was made aware on Monday that the Scottish Government will, from now on, make clear in bills' accompanying documents how provisions in the bill apply to the Crown and why Crown consent is required…'

[126] Scottish Government, *Cost of Living (Tenant Protection) (Scotland) Bill - Policy Memorandum* (3 October 2022), [93]. And see also Scottish Government, *Trusts and Succession (Scotland) Bill - Policy Memorandum* (22 November 2022), [157].

of the convention around the granting of Royal Assent – whether it is a specific convention, or whether the process is covered by the 'cardinal convention' whereby the Monarch acts on the advice of government of the day – the Monarch has no constitutional right to withhold consent on his or her own initiative, and so the rationale for clearing the contents with a Bill with the Monarch at an earlier stage does not persist. If, on the other hand, it is the case that the government decides, either in advising the Monarch or merely deciding whether to seek consent, then that too is unacceptable: it is a veto which exploits the legal form of the Crown, but does so secretly and so without paying the relevant political price for its use.

Against this background, the transposition of the Crown consent process into the devolution settlement is unedifying. So too the position arising from the ambulatory nature of the relevant provisions of the Scotland Act and the Standing Orders of the Scottish Parliament whereby the issue is protected against modification or repeal by that body but can (it seems) be altered by Parliament, acting alone and not via legislation, and so evading the Sewel convention. Though much of the information which would be needed in order to assess the operation of the process at Holyrood is not in the public domain, it is clear that the requirement of consent works to catch a notable proportion of the Bills considered by the Scottish Parliament, with the logic of its application not always clear and often unjustifiable. That it has largely escaped attention speaks to, amongst other things, the lack of interest in the position of the Crown within the devolved settlement. And yet there is a real potential for the formal cover of the Crown – a single entity in the United Kingdom, with no separate existence in Scots law – to become the site on which disputes between the UK and Scottish governments play out.