A distinctive feature of Scottish devolution compared with other countries is that Scotland has always had its own statute book, with distinct Scottish legislation over a range of policy fields. Some of this consisted of separate Scottish bills, but a lot of it took the form of Scottish clauses tacked onto UK bills, making the statute book somewhat untidy and not easy to follow. Most Scottish MPs tended to specialize in Scottish legislation, which was dealt with largely by the Scottish Grand Committee and Scottish Standing Committees, isolating it from the Westminster mainstream. While they jealously guarded their prerogatives in these matters, the policy content of legislation was not greatly different from that pursued in England and Wales, given government dominance of the process and the fact that the essential Second Reading and Report votes were taken in the whole House. Standing Committees were also nominated to ensure a government majority, with English MPs being drafted in during the later years of the Conservative Government in order to make up the numbers.

One effect of devolution has been an increase in separate Scottish bills. From an average of six bills per year at Westminster between 1979 and 1999, the number increased to an average of 15 per year in the first session of the Scottish Parliament (1999-2003) and 17 in the second (2003-7). The first year of the third session saw only five bills passed, a not surprising outcome since the new SNP government lacked a parliamentary majority. A further effect of devolution has been to open up the possibility of a different legislative agenda and different policy content as compared with Westminster.

The First Session 1999-2003

The first session’s legislation showed strong continuity from pre-devolution days, as Labour ministers merely moved from the Scottish Office to the Scottish Executive, albeit in coalition this time with the Liberal Democrats. Of the 61 bills passed (including 50 from the Executive), 13 were essentially the same as legislation passed at the same time in Westminster, often cut and pasted so that the wording was identical. Some of these arose from international obligations, such as the International Criminal Court, while others were spillovers. For example one law banned fur farms, even though there were none in Scotland, but because fur-farmers could have moved there after the ban in England. Nine bills contained essentially the same policy as their Westminster counterparts, but with some scope for variation in application. Eight dealt with the same issue as equivalent England and Wales legislation but applying a different policy. In some cases, the differences looked small but were potentially important, such as the wording of the Freedom of Information Act, which was rather more liberal in Scotland.
Finally, 20 Holyrood bills had no counterpart at all at Westminster. These ranged from housekeeping matters for which time had not been found before, to historic items like the Land Reform Act, a measure demanded since the nineteenth century, as well as the annual budget act.

Not all of these distinctive Holyrood bills represented a divergence from England. As well as changing the relationship between Scotland and the United Kingdom, devolution shifted power within Scotland, allowing measures that had previously been blocked by vested interests well connected to the old Scottish Office system or neglected for want of time. The abolition of feudal tenure was a complex and overdue measure needing concentrated attention. National Parks had been blocked in the 1940s by landowner pressure within Scotland, while proceeding in England and Wales. The abolition of poindings and warrant sales ended a Scottish practice widely regarded as out of place in modern society.

Relatively few pieces of legislation stood out as beacons of a different legislative agenda. Acts to introduce ‘free personal care’ for older people (or at least heavily subsidise personal care at home) and abolish up-front tuition fees and replace them with an endowment payment upon graduation represented the flagship policies of the first session and introduced potentially significant divergence from the rest of the UK. Two education Acts reinforced existing policy differences based on a Scottish commitment to comprehensive education and local authority control of schools. The Mental Health Act 2003 accelerated differences established before devolution (including the significant absence in Scotland of controversial plans to preventatively detain people with personality disorders) and, perhaps more importantly, reinforced the idea of a ‘Scottish policy style’ involving relatively close and consensual relationships between government and interest groups, or policymakers and those they consult.

The Second Session 2003-7

These trends continued in the 2003-7 session. 67 bills were passed of which 53\(^1\) were Executive bills, but a systematic divergence of policy direction was never established. Instead, we can detect trends in policy priorities. Labour’s Cathy Jamieson replaced the Liberal Democrat Jim Wallace as Justice Minister following Labour suggestions that the Lib Dems were ‘soft on crime’, and promoted an extensive series of bills (approximately one-quarter of all Executive legislation) addressing the justice system, sentencing, weapon crime, prostitution and introducing anti-social behaviour orders (ASBOs) to deal with behaviour associated with certain sections of the population in what the press inevitably labelled the ‘war on neds’. Most of the legislation was very much in line with the UK Labour Government’s increasing emphasis on being more ‘tough on crime’ than ‘tough on the causes of crime’, marking a reframing of policy from social exclusion and disadvantage to social misconduct. Yet, there was considerable scope for variation in application, since local authorities in Scotland proved reluctant to use ASBOs as a form of social control and (given Scotland’s distinct judiciary) Scottish ministers were much less likely to be embroiled in the need for sentencing reforms following high profile cases. Overall, if the first session displayed continuity, then the second demonstrated incrementalism, with most bills focussed on reforming the details of existing provision on matters such as crofting, legal aid, bankruptcy, aquaculture, adoption, school meals,
alcohol licensing, housing repairs and tourism, rather than branching out into new territory.

Again, this left few examples of significant divergence or innovation. As with education, the National Health Service Reform (Scotland) Act 2003 legitimised existing significant differences by legally abolishing the ‘internal market’ at a time when the UK government was extending it in England through the introduction of foundation hospitals. This leaves two ‘flagship’ policies. The first bill reformed local government elections by introducing proportional representation by the single transferable vote (STV). This was a key demand of the Liberal Democrats in coalition negotiations and at the elections in 2007 had a profound effect on the local government landscape, eliminating single-party control almost everywhere and undermining an important support base for the Labour Party. The second introduced a comprehensive ban on smoking in public places, marking significant divergence until Westminster, influenced by events in Scotland, voted for similar legislation a year later.

One consequence of designing the new Scottish Parliament as a departure from ‘old Westminster’ is that the Members’ Bill process became much simpler and gave many MSPs a reasonable chance of legislative progress or, at the least, a strong agenda-setting tool. Until reforms in 2004, an MSP was given one month from publication of the bill to gather the support of eleven members. If successful, the bill would then go to committee for often extensive deliberations at stage 1 before being discussed in plenary. The smoking ban represents the best example of this new potential for ‘venue shift’ to the Scottish Parliament. The member’s bill process became a focal point for public health groups dissatisfied with Executive policy. Stewart Maxwell MSP introduced a (less comprehensive) bill to ban smoking in public places and gathered widespread support which continued into the extensive Health Committee stage 1 consultation and evidence-gathering process. This ability for MSPs and committees to set the agenda during the legislative process is stronger than in Westminster.

Yet, we should not go too far, for three main reasons. First, on the whole, non-executive legislation has been fairly limited in substance, covering ‘handout’ bills or issues such as post-graduate education at St Andrews, dog fouling, shop opening hours at Christmas and planning issues for land owned by the National Galleries of Scotland. The most high profile bills either took years to pass (fox hunting) or were superseded before being implemented (poindings). Second, MSPs and committees have limited resources with which to pass legislation. Indeed, excessive reliance on the Non-Executive Bills Unit prompted reforms in 2004 to increase the support needed (19 MSPs) and in 2005 to tighten the rules on NEBU help, based on size, scope and complexity of proposed bills. Third, after a flurry of excitement in the first session in which 11 Members’ and Committee bills were passed, representing 18 per cent of all legislation, non-Executive output fell to three Members’ bills and one committee bill from 2003-7. Indeed, proportionately, it has fallen to a level consistent with Westminster.

Therefore, if anything, the overall process of legislation from 1999-2007 said much more about the Executive-Parliament relationship than marking a new dawn in public policy divergence or innovation. The experience from 1999-2007 was that the Executive proposed (and amended) the majority of legislation, with the Scottish Parliament performing a fairly traditional scrutiny role. Yet, even this process stretched its resources, with MSPs and committees complaining that the Parliament became little
more than ‘part of the legislative sausage machine’, unable to inquire or set its own agenda because of the Executive’s excessive demands on it and the propensity to change committee numbers and membership throughout.

The Third Session: Minority Government 2007-

In this light, the effect of SNP minority government has been profound. There were two flagship policies requiring legislation. One was to replace the council tax with a local income tax and was abandoned in February 2009 when it became obvious that it would not be possible to assemble a parliamentary majority. The other was a commitment to a referendum on independence which, at the time of writing, looks impossible, although the Scottish Labour leadership has undertaken two U-turns on the issue. Only 6 Scottish Government bills had been passed by January 2009 (plus a Member’s Bill on the register of tartans), including four housekeeping bills initiated by the previous Executive (the budget, updating public health and the judiciary, preparing for the Commonwealth Games), a bill abolishing bridge tolls and a bill to abolish the graduate endowment. Most bills in the pipeline are also either inherited or housekeeping (debt and damages, rape and sexual offences, Creative Scotland, flooding), with plans to elect health board members (following an unsuccessful Member’s Bill in 2007) the exception. On public services, the drift of Scotland away from the English model of consumerism and competition has continued and accentuated, occasionally requiring legislation such as that proposed in 2009 to ban private firms from buying health centres.

Given its lack of a majority the SNP administration cannot use legislation as its primary policy vehicle, preferring instead a combination of public expenditure decisions, including an attempt to reject public-private-partnerships to finance major capital projects, and an imaginative use of the existing statute book. The legislative process takes much longer, and is dominated by the need to gain multi-party consent, even during the previously routine budget process. The new SNP strategy highlights the fact that primary legislation provides an imperfect picture of public policy decisions. The same was true before the SNP came to power; examples of non-legislative public policy from 1999-2007 include the pursuit of social inclusion, largely as a cross-cutting theme to be ‘mainstreamed’ into departmental portfolios, albeit with a presumption that all legislation would be exclusion-proofed; and rural policy, largely driven by an EU agenda and the use of finance associated with the Common Agricultural Policy.

There has been a less profound SNP effect on the governmental use of Legislative Consent Motions (LCMs, previously called Sewel Motions). These were passed frequently by the Scottish Parliament from 1999-2007 as a means of giving consent for Westminster to legislate in devolved matters. This provoked a lot of criticism that Holyrood was shirking its responsibilities or deferring too much to the centre. In fact most Sewel Motions were on rather technical matters, to block potential loopholes between Scottish and English provision that might be used by criminals, or in some cases to protect Scottish prerogatives in Westminster legislation (‘reverse-Sewel’). Passing responsibility for civil partnerships to Westminster, on the other hand, seems to have been the result of political cowardice after the bruising the Parliament had received over the repeal of Section 28/A on the ‘promotion’ of homosexuality. The debate on their use heightened during the 2003-7 session - in which the Scottish Green Party and the Scottish
Socialist Party joined the SNP in opposing most on principle – but the Procedures Committee effectively established the LCM as a routine tool of government in 2005. By April 2007, 79 LCMs (or 10 per year) had been passed. Since May 2007, the SNP Government has approved proportionally fewer (10 in 22 months) and has sought, when possible, to promote Scottish parliamentary measures instead, or accept ‘reverse-Sewel’ motions when offered. However, we have not witnessed the type of sea change we might have expected.

Devolution has profoundly changed the legislative process in Scotland from one conducted in the specialized committees of Westminster, away both from Scotland and the parliamentary mainstream, to a more open and transparent mode. Interest groups find it much easier to engage and there is more media scrutiny. Holyrood has emulated the Westminster model of government and opposition, and partisan politics dominates the legislative process in contentious matters. On the other hand, on many social and economic issues there are not big differences between the parties and, on non-partisan issues the committees have provided a vehicle for consensual solutions in a way that is more difficult at Westminster.

Further Reading