

THE SUPREME COURT AND DEVOLUTION: THE SCOTTISH CONTINUITY BILL REFERENCE

INTRODUCTION: THE SCOTTISH CONTINUITY BILL

The *Scottish Continuity Bill* reference¹ – the first legislative competence dispute between the UK and Scottish Governments to reach the courts – took place against the background of a protracted political battle over what is now the European Union (Withdrawal) Act 2018 (“the Withdrawal Act”). That Act regulates the domestic consequences of the UK’s withdrawal from the European Union (“Brexit”) by: providing for the continuity of EU law post-Brexit (“retained EU law”); empowering ministers to adjust the statute book to deal with deficiencies arising from Brexit; and adjusting the scope of devolved competences in light of the “repatriation” of decision-making powers from the EU.

Unhappy with the way in which the then Withdrawal Bill affected devolved competences, the Scottish Parliament withheld its legislative consent, as was required under the Sewel Convention. On the assumption that this would mean that the Withdrawal Bill would be amended so as not to apply to devolved matters in Scotland, the Scottish Parliament intended to fill the resulting lacuna by enacting its own Brexit legislation. The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill (the “Scottish Continuity Bill”)² thus provided for EU law to remain in effect in relation to devolved matters after exit day (“retained (devolved) EU law”), and gave the Scottish Ministers powers to adjust the devolved statute book in the light of Brexit. In so doing, it largely mirrored the provisions of the Withdrawal Bill, but with some important differences. In the event, the Withdrawal Bill was *not* amended, and – in another constitutional first – it was applied to devolved matters in Scotland despite Holyrood’s refusal of consent.

Although the Scottish Continuity Bill was *passed* by the Scottish Parliament *before* the Withdrawal Act was enacted, the UK Law Officers exercised their power under section 33 of the Scotland Act 1998 to refer the Bill to the Supreme Court for a ruling on its competence. This had the effect of halting the granting of Royal Assent, and ultimately proved to be fatal to the validity of many of the Bill’s provisions – and indeed to the Bill itself, as the Scottish Ministers eventually decided not to proceed with the enactment of its remaining provisions. The decisive issue was that the Withdrawal Act amended the Scotland Act so that it itself became a “protected statute” which the Scottish Parliament was unable to modify. The Supreme Court held that this meant that any provisions of the Scottish Continuity Bill which were inconsistent with the Withdrawal Act were “not law” under section 29(2)(c) of the Scotland Act, although it also held that the Bill would mostly have been *within* competence had it been enacted *before* the Withdrawal Act. In fact, most of the (numerous) objections that the UK Law Officers had raised were rejected.

The political and constitutional consequences of the saga of which the *Continuity Bill* case forms part are potentially far-reaching, and still unfolding. However, the Court was at pains to emphasise the narrowly *legal* nature of its function:

“not...to form or express any view on those questions of policy, which are the responsibility of our elected representatives...[but]...simply to determine as a matter of law whether and to

¹ *The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill – A Reference by the Attorney General and the Advocate General for Scotland* [2018] UKSC 64.

² Parallel legislation passed by the Welsh Assembly was also referred to the Supreme Court. However, the reference was withdrawn when the Assembly eventually consented to the Withdrawal Bill, and the Welsh Act was later repealed – Law Derived from the European Union (Wales) Act 2018 (Repeal) Regulations 2018, SI 2018/1211 (W 247).

what extent the Scottish Bill would be within the legislative competence of the Scottish Parliament.”³

In fact, the case is a landmark in the developing devolution jurisprudence, with the Court having taken the opportunity to reaffirm established principles, as well to address a number of novel questions, which are relevant across the UK’s devolved jurisdictions. In this note, we therefore focus on the legal significance of the decision, extracting the guidance offered by the Court regarding the scope of devolved competence, and the constitutional status of devolution.

PLENARY LEGISLATIVE COMPETENCE AND THE RESERVED POWERS MODEL

Central to the political dispute between the Scottish and UK Governments was the effect that the approach taken to the repatriation of EU decision-making powers had on the structure of devolution. As initially drafted, the Withdrawal Bill amended the Scotland Act to remove Holyrood’s obligation to legislate compatibly with EU law, but replaced it with a duty not to modify retained EU law. This would have allocated all returning EU competences to Westminster. For the Scottish Government, this was a “power grab” because, under the reserved powers model of devolution, the effect of removing the EU law constraint should have been that EU decision-making powers in areas otherwise within devolved competence would fall to the devolved level. The UK Government rejected this claim, arguing that there was no diminution in Holyrood’s legislative competence, and that it could not be assumed that Westminster, when enacting the Scotland Act, would have intended these powers to be devolved.

Although the Withdrawal Bill was eventually amended to restore the default assumption that EU competences within otherwise devolved areas would be devolved, the devolved institutions will nevertheless have been relieved that the Supreme Court robustly reasserted the principles of the reserved powers model. The Court summarised those principles, drawn from earlier cases, as follows:

The powers of the Scottish Parliament, like those of Parliaments in many other constitutional democracies, are delimited by law. The Scottish Parliament is a democratically elected legislature with a mandate to make laws for people in Scotland. It has plenary powers within the limits of its legislative competence. But it does not enjoy the sovereignty of the Crown in Parliament; rules delimiting its legislative competence are found in section 29 of and Schedules 4 and 5 to the Scotland Act, to which the courts must give effect. ... The Scotland Act must be interpreted in the same way as any other statute. The courts have regard to its aim to achieve a constitutional settlement and therefore recognise the importance of giving a consistent and predictable interpretation of the Scotland Act so that the Scottish Parliament has a coherent, stable and workable system within which to exercise its legislative power. This is achieved by interpreting the rules as to competence in the Scotland Act according to the ordinary meaning of the words used.⁴

This approach led the Court to rebuff some of the more extravagant challenges to the Bill’s validity. Thus, a general attack that the Bill was “contrary to the constitutional framework underpinning the

³ *AG’s Reference* at [11].

⁴ *AG’s Reference* at [12].

devolution settlement”,⁵ was rejected since “The constitutional framework underlying the devolution settlement is neither more nor less than what is contained in the Scotland Act”⁶

Similarly, the Court resisted overly-expansive interpretations of specific reservations. For instance, the UK Law Officers argued that the Continuity Bill as a whole was outwith competence because it related to the reserved matter of relations with the EU,⁷ by cutting across the Withdrawal Act’s attempt to deal with the legal consequences of Brexit in a coherent and consistent manner across the UK.⁸ Noting that there was little scope for the Scottish Parliament to legislate in a manner affecting international relations, the Court held that the Bill did not “relate to” relations with the EU, but simply regulated the consequences in Scots law of the cessation of EU law as a source of domestic law relating to devolved matters, which was within devolved competence.

The Court also rejected an attack on section 17 of the Continuity Bill which had the potential to eviscerate Holyrood’s legislative competence. Section 17 purported to render the exercise of powers to make subordinate legislation conferred on UK ministers by UK legislation, but which affected devolved matters, conditional upon the consent of the Scottish Government. The latter acknowledged that this was an attempt to achieve what it had failed to achieve through amendments tabled to the Withdrawal Bill. According to the UK Law Officers, to impose on Westminster a limit that it had rejected was inconsistent with the power of a sovereign Parliament,⁹ and therefore related to the reserved matter of the UK Parliament.¹⁰ However, the Court agreed with the Lord Advocate that “the reservation ... cannot have been intended ... to protect legislation enacted by Parliament from the effects of legislation passed by the Scottish Parliament, since that purpose is effected by other provisions of the Scotland Act.”¹¹ Thus, Holyrood could validly legislate to give effect in Scotland to a policy which has been rejected by the UK Parliament, as has happened in the past.¹²

A final point worth mentioning is the treatment of section 33 of the Continuity Bill, which purported to repeal spent references to EU law in the 1998 Act. The UK Law Officers argued that this was outwith competence, *inter alia*, because it breached the principle in *Bribery Commissioner v Ranasinghe*¹³ that “A legislature has no power to ignore the conditions of lawmaking that are imposed by the instrument which itself regulates its power to make law.” However, the Court was not persuaded,¹⁴ given that the 1998 Act itself permitted the Scottish Parliament to repeal spent provisions.¹⁵ Moreover, had it been necessary, the Court would have relied on its duty under section 101(2) of the Scotland Act to read a provision, where possible, “as narrowly as it required for to be within competence” so as to ensure that section 33 could not be brought into force before exit day.¹⁶ Although used sparingly, this interpretive obligation has been described as a significant constitutional safeguard for devolution that sends a clear signal to the courts that Parliament “wanted to uphold Acts of the [devolved

⁵ Ibid at [23].

⁶ Ibid at [35].

⁷ Scotland Act 1998, Sch 5, Part 1, para7(1).

⁸ *AG’s Reference* at [25].

⁹ Ibid at [58].

¹⁰ Scotland Act 1998, Sch 5, Part 1, para 1(c).

¹¹ *AG’s Reference* at [61].

¹² Ibid at [62].

¹³ [1965] AC 172 at 197.

¹⁴ *AG’s Reference* at [71].

¹⁵ Scotland Act 1998, Sch 4, Pt 1, para 7.

¹⁶ *AG’s Reference* at [77].

legislatures]” and was “sensitive to the freedom of action which must be allowed to the Legislatures to safeguard their legitimate interests as in their wisdom they see fit.”¹⁷

RESERVED POWERS AND PROTECTED STATUTES

A key message that emerges from the *Scottish Continuity Bill* case, then, is that competence challenges must be grounded in a careful analysis of the wording of the Scotland Act and of the purpose and effect of the impugned devolved legislation. Thus, whereas generalised attacks on the competence of the Bill failed, more targeted challenges based on the inconsistency of certain of its provisions with particular statutes protected from modification under section 29(2)(c) and Schedule 4 of the Scotland Act were successful.

This was the first time judges have had to consider what it means to “modify” a protected statute. The Court emphasised the important distinction between the effects of Schedule 4 and Schedule 5.¹⁸ Whereas the listing of a particular subject matter within Schedule 5 reserves the entire area of law to the UK Parliament, the inclusion of a specific enactment within Schedule 4 does not. Rather, Holyrood has the power to legislate on the same subject matter, provided it does so consistently with the protected statute. However, consistency is to be judged by considering the *substantive effect* of the devolved provision, not merely whether it expressly amends or repeals a protected enactment:

Without attempting an exhaustive definition, a protected enactment will be modified by a later enactment, ..., if it is implicitly amended, disapplied or repealed in whole or in part. That will be the position if the later enactment alters a rule laid down in the protected enactment, or is otherwise in conflict with its unqualified continuation in force as before, so that the protected enactment has to be understood as having been in substance amended, superseded, disapplied or repealed by the later one.¹⁹

Accordingly, while the Court rejected the argument that the whole of the Continuity Bill modified the Withdrawal Act,²⁰ it held that large parts were inconsistent with it, insofar as they made different provisions for the continuity of EU law or gave the Scottish Ministers differently-drawn powers to remedy deficiencies in retained (devolved) EU law.

More problematically, the Court also held that section 17 was inconsistent with section 28(7) of the Scotland Act – one of the provisions in that Act which Holyrood is not permitted to modify. Section 28(7) preserves the right of the UK Parliament to make laws for Scotland. The Court accepted that section 17 did not affect Westminster’s sovereignty, because the provision could be repealed.²¹ Nevertheless section 17 was seen as *conditioning the exercise* of Westminster’s legislative powers in relation to devolved matters and therefore amounted to a modification of section 28(7).

A QUESTION OF TIMING

Another novel issue that the Court had to address was that of timing. That is, at what point do competence constraints bite: when a Bill is passed; when it receives Royal Assent; or when contested

¹⁷ Lady Arden, ‘What Is the Safeguard for Welsh Devolution?’ [2014] PL 189 at 191.

¹⁸ *AG’s Reference* at [51] and [99].

¹⁹ *Ibid* at [51].

²⁰ *Ibid* at [99].

²¹ *Ibid* at [63].

provisions come into force? The importance of the timing issue was two-fold. First, it was argued that the Bill breached the obligation in section 29(2)(d) of the Scotland Act to legislate compatibly with EU law. The UK Law Officers adopted the argument made by the Presiding Officer upon the Bill's introduction that, notwithstanding that its provisions modifying the domestic status of EU law would take legal *effect* only after Brexit, this would be to anticipate a change in Holyrood's legislative competence, which was not permitted. Legal competence, in other words, was distinct from legal effect.²² However, the Court rejected this view, holding instead that there was no incompatibility with EU law arising from the Continuity Bill *precisely because* those provisions would have no legal effect until EU law itself ceases to have effect.²³

The second issue concerned the impact of the Withdrawal Act on the validity of the Continuity Bill. The Attorney General for Northern Ireland intervened to argue that competence is to be judged at the date a Bill is passed, taking no account of any subsequent changes to devolved competence.²⁴ However, the Court took the view that, implicit in the conditional wording of section 33, which enables the Court to answer the question as to whether a Bill "would be" within legislative competence, as well as in the wording of section 29, which governs the legality of Acts of the Scottish Parliament,²⁵ is that the Court must assess the competence of a Bill if it were to receive Royal Assent.²⁶ On this reading, the Court was therefore required to take into account the effect of the Withdrawal Act on the validity of the Continuity Bill.

We can therefore add to the settled principles of devolution jurisprudence the proposition that legislative competence is to be assessed from the point of enactment and that the relevant date may be the date at which the provisions of an Act take legal effect. As Lord Reed has subsequently said, the consequence is that, as happened here, "it is legally possible for the UK Government to react to the passage of a Bill in the Scottish Parliament by making a reference and then persuading the UK Parliament to amend the Scotland Act so as to render the Bill invalid."²⁷

THE BROADER CONSTITUTIONAL CONTEXT

As already noted, the Court rejected any suggestion that Holyrood's powers could be narrowed by implying into the words of the Scotland Act any broader understanding of the constitutional context in which devolution is situated. But in one respect, the Court's understanding of the constitutional character of devolution was crucial to the decision. This is the continuing sovereignty of the UK Parliament, which, according to the Court, "reflects the essence of devolution: in contrast to a federal model."²⁸ This both informed the Court's general approach to devolved competence, in terms of the importance attached to the words of the Scotland Act, and the particular significance it gave to section 28(7) in rendering *ultra vires* section 17 of the Continuity Bill.

The decision that section 17 was inconsistent with section 28(7) is, though, hard to understand, given that the Court accepted that section 17 did *not* affect the sovereignty of Parliament, since Westminster could repeal it, and that Holyrood could legislate *after the event* to amend or repeal

²² Ibid at [81].

²³ Ibid at [84].

²⁴ Ibid at [91].

²⁵ Scotland Act 1998 s 28(2).

²⁶ *AG's Reference* at [94] and [96].

²⁷ Lord Reed, 'Scotland's Devolved Settlement and the Role of the Courts' at The Inaugural Dover House Lecture (27 February 2019) 17. Available at: <https://www.supremecourt.uk/docs/speech-190227.pdf>.

²⁸ *AG's Reference* at [41].

secondary legislative powers conferred on UK Ministers by UK legislation. The objection seems to be that Westminster would have had to expressly repeal section 17, which in itself would amount to a constraint upon its legislative freedom. However, the courts have accepted the need for express rather than implied repeal in other contexts, albeit express repeal of Westminster's own legislation. Justification for extending this approach to devolved legislation could have been found in the other constitutional provisions contained in the Scotland Act, namely the permanence of the devolved institutions declared by s63A, and the statutory recognition of the Sewel Convention in section 28(8). These provisions were referred to at the beginning of the judgment,²⁹ but thereafter ignored. Thus the decision appears to extinguish any lingering hope that, despite the decision in *R (Miller) v Secretary of State for Exiting the European Union*,³⁰ statutory recognition of the Sewel Convention might have some juridical effect as an interpretive obligation, even if not directly enforceable, and casts further doubt upon whether the courts would treat the permanence provision any differently.

ACTS OF THE SCOTTISH PARLIAMENT AND THE COMMON LAW

The idea that the broader constitutional context is not relevant to an understanding of devolved competence is also hard to reconcile with the decision in *AXA General Insurance v Lord Advocate*.³¹ There, Lord Hope stated that section 29 of the Scotland Act was *not* intended to be a "complete or comprehensive statement of limitations." Hence, as the Act had not expressly excluded the supervisory jurisdiction of the Court of Session, it followed that devolved legislation must be subject to judicial review at common law, albeit that, as a democratically elected legislature with plenary law-making powers, a successful challenge on common law grounds would only be possible in exceptional circumstances where the impugned provision(s) violated fundamental rights or the rule of law.³² Here, the UK Law Officers unsuccessfully argued that the legal complexity arising from having separate provisions governing the legal consequences of EU withdrawal for reserved and devolved matters meant that the Continuity Bill was inconsistent with rule of law principles of legality and legal certainty.³³

However, the Court took the opportunity to provide further guidance about the operation of the common law constraint. Emphasising its residual nature, the Court distinguished between want of legislative competence and review on general public law grounds. Legislative competence, it said, is a term of art that describes the exhaustive limits set out in section 29, beyond which any enactment is a nullity,³⁴ whereas an enactment that is held to be unlawful on common law grounds is not necessarily a nullity – although no reasons or authority for this proposition were given. Accordingly, the Court held that the reference procedure is limited to scrutiny for "legislative competence", narrowly defined. Evidence of inconsistency with fundamental rights or the rule of law might assist in determining whether a Bill strays beyond the statutory boundaries, but they are not free-standing grounds available in pre-enactment challenges.

²⁹ Ibid at [17]-[20].

³⁰ [2017] UKSC 5.

³¹ [2011] UKSC 46.

³² Ibid at [42]-[52] (per Lord Hope) and [135]-154] (per Lord Reed).

³³ *AG's Reference* at [35].

³⁴ *AG's Reference* at [56]. See Mark Elliot, 'The Supreme Court's judgment in the Scottish Continuity Bill case', Public Law for Everyone blog (14 December 2018), available at: <https://publiclawforeveryone.com/2018/12/14/the-supreme-courts-judgment-in-the-scottish-continuity-bill-case/>.

CONCLUSION

The approach to devolved competence which must be regarded as having been firmly cemented by the *Scottish Continuity Bill* reference is one which simultaneously confirms the strength and weakness of the devolved legislatures. By insisting upon adherence to the reserved powers model now contained in all three devolution statutes,³⁵ the Supreme Court has emphasised the breadth of the legislative powers that they enjoy within the limits of their competence. However, the *Continuity Bill* case and its wider political backdrop also vividly illustrate the constitutional vulnerability of devolved institutions which owe their existence and powers to nothing more than statute.

Aileen McHarg and Chris McCorkindale
University of Strathclyde

³⁵ See also the Northern Ireland Act 1998 and the Wales Act 2017.