

## **Devolution and The Supreme Court – 20 Years On**

**Scottish Public Law Group 2018, Edinburgh**

**Lady Hale, President of The Supreme Court**

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1998 was a momentous year for the United Kingdom Constitution. It saw the significant devolution of powers to institutions in Scotland, Wales and Northern Ireland. Some would like to call them nations, as the English, the Scots and the Welsh undoubtedly see themselves as nations, but this is more debateable, controversial even, in Northern Ireland. Hence in the Constitutional Reform Act 2005, they are referred to as ‘parts’ of the United Kingdom – the Supreme Court has to have at least one Justice with knowledge and experience of the law and practice in each ‘part’ of the United Kingdom. We have traditionally always had two Scottish Justices and usually one Northern Irish. There is now increasing pressure for us also to have one Welsh. If the Welsh can make their own laws, it is said, should they not also have their own justice system, separate from that of England, and their own Supreme Court Justice? Fortunately, the appointment of Lord Lloyd-Jones has solved this question for the time being.

The models of devolution adopted in 1998 were different for different parts of UK in some respects but they shared some common features.

### **How are they different?**

The **Northern Ireland** model is the most complicated. The Northern Ireland Act 1998 draws a distinction between *excepted*, *reserved* and *transferred* matters.

*Excepted* matters are those which it was envisaged would never be devolved to the Northern Ireland institutions. Significantly, they include our international relations, which must include ensuring that the United Kingdom is not in breach of the obligations undertaken in international treaties, although in respect of transferred matters this responsibility may be shared.

*Reserved* matters include things like import and export controls, the minimum wage, financial services and banking, intellectual property and data protection, which it was envisaged might one day be devolved. Indeed, some which were originally reserved, such as criminal law, prosecutions, public order and the police, have now been transferred. This can be done by Order in Council – an example of a Henry VIII clause which does not appear to have caused controversy. Before transfer, the United Kingdom can legislate for reserved matters by Order in Council (Northern Ireland Act 1998, s 87).

### **Transferred matters are everything else.**

However, the Act does not say that the Northern Ireland Assembly cannot legislate for reserved matters. It can do so, but only with the prior consent of the Secretary of State for Northern Ireland. It can also legislate, with consent, for excepted matters if this is ancillary to provisions dealing with a reserved or transferred matter (s 8). There are also certain ‘entrenched’ provisions which cannot be modified (s 7).

The reason for this more complicated model is that Northern Ireland has had devolution for much longer than anyone else – since the Government of Ireland Act 1920, which set up separate Parliaments for Northern Ireland and Southern Ireland. That Act distinguished between excepted (though it didn’t call them that), reserved and all other matters – but in the expectation that the separate Parliaments for Southern and Northern Ireland would eventually merge into an all-Ireland Parliament to which the reserved matters might be devolved. The all-Ireland Parliament came to nothing, when the South seceded from the Union, but the tripartite division remained, and was maintained in the Northern Ireland Constitution Act 1973 and now in the 1998 Act.

**Scotland** has the same model in the sense that everything is devolved unless it is reserved. But it only has two categories – *reserved* and *the rest*. As Lord Hope explained in the *Imperial Tobacco* case,<sup>1</sup> there is a common theme in reserved matters:

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<sup>1</sup> *Imperial Tobacco Ltd v Lord Advocate* [2012] UKSC 61, 2013 SC (UKSC) 153, para 29.

‘It is that matters in which the UK as a whole has an interest should continue to be the responsibility of the UK Parliament at Westminster. They include matters which are affected by its treaty obligations and matters that are designed to ensure that there is a single market within the United Kingdom for the free movement of goods and services.’

But that did not mean that they were set in stone. Some reserved matters have since been transferred to the Scottish institutions. As with Northern Ireland, this can be done by Order in Council rather than primary legislation. However, primary legislation was required to transfer some all-important matters relating to elections to the Scottish Parliament – the franchise, the system, the number of constituencies and regions and the number of members for each – as the 1998 Act was amended to require that legislation on those protected matters be passed by a two thirds majority, not only of those voting, but of the number of seats in the Parliament. It is interesting that Parliament was aware of the technique of requiring super-majorities for important constitutional changes, but has not employed it for other important changes recently.

However, in contrast to Northern Ireland, the Scottish Parliament cannot legislate for reserved matters.

**Wales** originally did not have full legislative powers. The Welsh Assembly only acquired them in 2011, after the referendum provided for in Government of Wales Act 2006 (GOWA). Originally this was on the model that everything was reserved unless it was devolved, so we were construing the schedule to find out what they *could* do, rather than to find out what they could *not* do. I wonder whether that made a difference and if so in which direction?

However, as from 1 April 2018, Wales has gone over to the Scottish model of everything devolved unless reserved. And, like Scotland, it cannot legislate for reserved matters.

### **How are they the same?**

First, a provision of an Act of a devolved legislature is ‘not law’ if it is outside its legislative competence: the Northern Ireland Act says ‘if’ (s 6(1)); the Scotland Act and GOWA say ‘so far as’. I doubt if that makes a difference. The point is that it is only the impugned provision which is not law: the rest remains.

Secondly, some circumstances in which a provision is outside competence are common to all three. These are if:

- (i) it would form part of the law of a country or territory other than Northern Ireland or Scotland; Welsh law must not extend otherwise than to England and Wales, and must not apply otherwise than in relation to Wales; this no doubt reflects the fact that England and Wales still have one justice system.
- (ii) in Northern Ireland if it 'deals with' an excepted or matter, or (presumably) if it deals with a reserved matter and does not have the Secretary of State's consent; in Scotland or Wales if it 'relates to' a reserved matter;
- (iii) it is incompatible with any of the Convention rights, or
- (iv) it is incompatible with European Union law.

In Northern Ireland, a provision is also 'not law' if it discriminates on grounds of religious belief or political opinion. This again dates back to 1920 Act when a united Ireland was envisaged and the fear was more that the Roman Catholic majority might discriminate against the Protestant minority. There is a similar provision in the Irish Constitution.

In Scotland and Wales there are detailed additional restrictions on legislative competence, mainly dealing with UK legislation which cannot be modified. Also, the Scottish Parliament cannot modify a rule of Scots private law or criminal law which is 'special to' a reserved matter.

Thirdly, the United Kingdom Parliament is still sovereign and can legislate even on matters which are devolved to the Scottish, Welsh and Northern Irish legislatures. But all three devolution Acts now provide that 'it is recognised' that UK Parliament will not 'normally' legislate for devolved matters without the consent of the local legislature, thus putting the convention originally formulated by Lord Sewel into statutory form.<sup>2</sup>

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<sup>2</sup> Eg Scotland Act 1998, s 27(8).

In *R (Miller) v Secretary of State for Exiting the European Union*,<sup>3</sup> the Northern Ireland High Court, on the direction of the Attorney General for Northern Ireland, referred several questions to the Supreme Court. These included whether, if primary legislation was required before the United Kingdom could give notice to leave the European Union, the consent of the Northern Ireland Assembly was required before it was enacted. Clearly, leaving the European Union would affect the scope of devolved matters: without further legislation, it would enlarge them because the Assembly would no longer be constrained by European Union law in relation to transferred matters. But the Supreme Court held that consent was not required. Basically, as had been held years ago by the Privy Council in *Madzimbamuto v Lardner-Burke*,<sup>4</sup> constitutional conventions are not law in the usual sense. Hence, the policing of the scope of the Sewel convention and the manner of its operation did not lie within the constitutional remit of the judiciary which is to protect the rule of law (para 151).

This is perhaps a relief to us in present circumstances. The Supreme Court has just held that abortion law in Northern Ireland is incompatible with the Convention rights in three respects.<sup>5</sup> The fact that this is technically obiter dicta does not affect the essential validity of those conclusions. Abortion is – and has always been – a devolved matter. Hence the Abortion Act 1967, which applies in England, Wales and Scotland, does not apply in Northern Ireland. So the Northern Ireland Assembly could legislate to change the law even though it is the product of an Act of the UK Parliament, the Offences against the Person Act 1861 (together with an Act of the Northern Ireland Parliament, the Criminal Justice (Northern Ireland) Act 1945). But that would not prevent the UK Parliament from legislating should it choose to do so – the Sewel convention notwithstanding - even if there were a functioning Northern Ireland Assembly which at present there is not. Not only that, the UK is responsible for ensuring that the law throughout UK complies with our international obligations. So, as Lord Wallace of Tankerness has pointed out, despite the clear preference of the UK Government that the Northern Ireland Assembly

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<sup>3</sup> *R (on the application of Miller and another) v Secretary of State for Exiting the European Union*, Reference by the Attorney General for Northern Ireland - In the matter of an application by Agnew and others for Judicial Review, Reference by the Court of Appeal (Northern Ireland) – In the matter of an application by Raymond McCord for Judicial Review [2017] UKSC 5, [2018] AC 61.

<sup>4</sup> [1969] 1 AC 645.

<sup>5</sup> *In re Northern Ireland Human Rights Commission's application for judicial review* [2018] UKSC 27.

should sort this out, the matter is ‘complicated’. Fortunately, I cannot currently envisage any circumstances in which it would be for the Supreme Court to decide who should do what.

Fourthly, the question whether legislation passed by a devolved legislature is outside its legislative competence can come before the Supreme Court in two ways.

The most common way is in ordinary litigation – a person who is affected by the legislation challenges its validity and hence its application to him. This happened with the very first Act of the Scottish Parliament, the Mental Health (Public Safety and Appeals) Act 1999, which was challenged for incompatibility with article 5 of the European Convention by one Alexander Reid and two others.<sup>6</sup> They failed, but obviously their aim was to get out of hospital. All the other challenges to Acts of Scottish Parliament have so far come before Scottish courts and the UK Supreme Court in this way.

This is concrete review of the sort we are very used to in the common law world. It has two advantages (and there may be more). First, it comes up in the context of a specific set of facts involving real people; and second, it comes up through the courts of the part of the United Kingdom in question. This is how such questions come before Judicial Committee of Privy Council in cases challenging the constitutionality of legislation in, say, Jamaica or Trinidad and Tobago. We very much welcome having the views of the local courts on such issues, especially where they involve the delicate balancing of competing interests, as rights-based challenges tend to do, and in which there may be local sensibilities (I have in mind a case from Mauritius in the which the Judicial Committee of the Privy Council found that local perceptions of the role of women were relevant to whether sex discrimination in the rules about the composition of juries was constitutionally acceptable<sup>7</sup>).

Much less commonly used is the power in all three devolution statutes for the local or UK law officers (who include the Attorney General for England and Wales) to refer a Bill which has passed the local legislature but not yet been given royal assent to the UK Supreme Court to

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<sup>6</sup> *Alexander v Scottish Ministers* [2001] UKPC D 5, [2003] 2 AC 602, 2002 SC (PC) 63.

<sup>7</sup> *Poonsamy Poongavanam v The Queen*, 6 April 1992, referred to in the dissenting judgment in *Rojas v Berlaque (Gibraltar)* [2003] UKPC 76, [2004] 1 WLR 201.

determine whether it is within local legislative competence and thus will be good law if royal assent is given.

This form of ‘abstract review’ is common in civil law countries. Politicians – and sometimes others - can refer such questions to a separately constituted constitutional court which is not part of the normal justice system. Some have exclusive jurisdiction, in the sense that they are the only court which can rule on such questions. The object is to preserve the democratic legitimacy of the laws passed by Parliament, which cannot be called in question in the ordinary courts, but only in this separate body, with its specialist expertise and political legitimacy – appointments are typically made by or through the national Parliament. Some common law countries have similar powers in their constitutions – notably, for example, in article 26 of the Constitution of Ireland.

Such abstract review has some advantages – of which more anon – but also some disadvantages, as once a provision is held within scope it cannot later be challenged in a concrete case. So the Supreme Court has to try and envisage all possible scenarios in which it will come up before giving it the all clear. And in doing that we do not have the benefit of the views of the local courts.

Curiously, although this reference power exists in all three devolution statutes, we have decided no references of this sort from Northern Ireland,<sup>8</sup> and no references from Scotland until the one which is coming before us this July in relation to the United Kingdom Withdrawal from the European Union (Legal Continuity) (Scotland) Bill, but we had three from Wales within a short time of the Assembly acquiring full legislative powers. Why might that be? There are several possible reasons – but this is pure speculation:

- (a) The presiding officer has to certify that the Bill is within scope and strong independent legal advice in doing so can head off some – but by no means all – problems. However, as the Scottish Continuity Bill shows, the Parliament can pass the Bill without such a certificate.

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<sup>8</sup> The Attorney General for Northern Ireland made a reference but withdrew it when similar Scottish legislation came before the Supreme Court in the *Axa* case (see footnote 10) and intervened in those proceedings.

- (b) There is a long history of the UK Parliament legislating separately for Scotland, so there are established channels of communication between London and Edinburgh enabling things to be sorted out at official level.<sup>9</sup> Following devolution, it had become customary for Scottish Bills to be notified in advance to the Advocate General. The Continuity Bill was the first where this had not been done. There is also a long history of the UK legislating separately for Northern Ireland during periods of direct rule. But there was no similar tradition of the UK Parliament legislating separately for Wales.
- (c) The result of the referendum in Wales was perhaps unexpected in 2006 when the Government of Wales Act was passed (although the tide of public opinion was already moving in favour of a ‘yes’ vote), so it may be that the contents of the relevant schedules defining legislative competence were not quite as fully thought through as they would otherwise have been.
- (d) The different models of devolution may also have played a part.
- (e) There might have been political considerations too – who am I to say?

### **A body of devolution case law**

Whichever way the question of legislative competence comes before us, it is the same question. And we do now have a body of devolution case law, from which hopefully some consistent principles might be deduced.

First, perhaps most important of all, the devolved legislatures are not like local authorities, to which the normal principles of judicial review of administrative action apply. As held in the *AXA* case,<sup>10</sup> their decisions cannot be challenged for so-called *Wednesbury* unreasonableness.

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<sup>9</sup> Lord Rodger’s irritation that this had not been done was palpable in *Martin v Most* [2010] UKSC 10, 2010 SC (UKSC) 40.

<sup>10</sup> *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46, [2012] 1 AC 868, 2012 SC (UKSC) 122.



Secondly, however, there were some comments in the *AXA* case about whether there might be general limits upon their powers, other than those set out in the devolution statutes. Lord Hope, after pointing out the power which a government elected with a large majority has over a single-chamber Parliament, returned to the point he had made in *Jackson* (the Hunting Act case):<sup>11</sup>

‘It is not entirely unthinkable that a government which has that power may seek to use it to abolish judicial review or to diminish the role of the courts protecting the interests of the individual. . . . The rule of law requires that the judges must retain the power to insist that legislation of that extreme kind is not law which the courts will recognise.’

Lord Reed reached the same conclusion but by a different route. The ‘principle of legality’ means that the UK Parliament cannot itself override fundamental rights or the rule of law by general or ambiguous words. There is a rule of statutory interpretation to that effect. Parliament has to be specific and face up to the political consequences<sup>12</sup>. Nor, therefore, can it confer upon another body, by general or ambiguous words, the power to do so. The UK Parliament could not be taken to have intended to establish a body which was free to abrogate fundamental rights or to violate the rule of law.<sup>13</sup>

Thirdly, there cannot always be hard and fast lines between devolved and reserved matters. Demarcation disputes are not always easy to resolve. There is not much guidance in the Northern Ireland Act, which simply says ‘deals with’. Interestingly, this form of words was adopted in 1998 instead of the formulation in the Government of Ireland Act 1920. This gave the Parliaments of Southern and Northern Ireland power ‘to make laws for the peace, order and good government’ of their respective territories; but they were not able to make laws ‘in respect of’ excepted or reserved matters. One of the excepted matters was trade with any place outside

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<sup>11</sup> *R (on the application of Jackson) v Attorney General* [2006] UKHL 56, [2006] 1 AC 262, para 51.

<sup>12</sup> *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 539; *Ahmed v Her Majesty’s Treasury* [2010] UKSC 2 and 5, [2010] 2 AC 534.

<sup>13</sup> Para 153.

the part of Ireland within their jurisdiction (s 4(1)(7)). So a question of legislative competence came before the House of Lords in *Gallagher v Lynn*.<sup>14</sup>

Mr Gallagher was a farmer in Donegal who had for many years been selling milk in Londonderry. He was prosecuted under an Act of the Northern Ireland Parliament, the Milk and Milk Products Act (Northern Ireland) 1934 for selling milk without a licence. He protested that the Act was unconstitutional as it was an Act ‘in respect of’ trade. Lord Atkin gave this short shrift:

‘this Milk Act is not a law ‘in respect of’ trade; but it is a law for the peace, order and good government of Northern Ireland ‘in respect of’ precautions taken to secure the health of the inhabitants of NI by protecting them from the dangers of an unregulated supply of milk’.<sup>15</sup>

He referred, without citing, to a whole range of authority, largely coming from Canada, about the powers of subordinate parliaments or the distribution of powers between parliaments in a federal system. It was well-established that you are to look at the ‘true nature and character of the legislation’ (which comes from *Russell v The Queen*,<sup>16</sup> a case about whether the Canadian federal Parliament had power to legislate to restrict alcohol sales) or ‘the pith and substance of the legislation’ (which comes from *Union Colliery Co of British Columbia Ltd v Bryden*,<sup>17</sup> a case about whether British Columbia could prohibit Chinese from working underground in coal-mining under its power to regulate coal-mining or whether this fell within the federal power to regulate aliens). If the legislation is within the express powers, the fact that it incidentally affects matters outside the authorised field does not invalidate it. On the other hand, it must not under the guise of dealing with one matter, in fact encroach upon the forbidden field. In deciding the matter the court could look, not just to the actual object of the legislator, but also to the terms of the legislation.

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<sup>14</sup> [1937] AC 863.

<sup>15</sup> *Ibid*, at 869.

<sup>16</sup> (1882) 7 App Cas 839.

<sup>17</sup> [1899] AC 580.

In *Martin v Most*,<sup>18</sup> Lord Hope described the Canadian (and similar Australian and Indian cases) as providing the background to the scheme of the Scotland Act 1998 – Lord Sewel had even told Parliament that arguments about whether a provision ‘relates to’ a reserved matter should be decided by reference to its ‘pith or substance’. But, as Lord Hope pointed out, the Scotland Act does not use that phrase and, as Lord Walker explained, cases about drawing exclusive boundaries between one legislature and another may not be so helpful when considering whether a legislature with limited powers has trespassed impermissibly into areas reserved to a legislature with unlimited powers.

Both the Scotland Act (s 29(3)) and GOWA (s 108A(6)) provide that whether a provision ‘relates to a reserved matter’ is to be determined by reference to the purpose of the provision, having regard (amongst other things) to its effect in all the circumstances. The most recent case in this area is *Christian Institute v Lord Advocate*<sup>19</sup> where the UK Supreme Court drew together the threads emerging from *Martin v Most*, *Imperial Tobacco v Lord Advocate* and *Attorney-General for England and Wales v Counsel General for Wales, re Agricultural Sector (Wales) Bill*.<sup>20</sup>

First, ‘relates to’ indicates more than a loose or consequential connection (Lord Walker in *Martin v Most* endorsed by Lord Hope in *Imperial Tobacco*).

Secondly, in determining the purpose of a provision having regard to its effect, among other things, as Lord Mance explained in *Re Agricultural Sector (Wales) Bill*,<sup>21</sup> it is necessary to look at more than what can be discerned from an objective consideration of the effect of its terms.

Thirdly, where the provision has more than one purpose, one of which does relate to a reserved matter, Lord Hope in *Imperial Tobacco* expressed the view,<sup>22</sup> obiter, that if one of its purposes does so, then unless that can be regarded as consequential and of no real significance in the overall scheme of things, it will be outside competence.

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<sup>18</sup> [2010] UKSC 10, 2010 SC (UKSC) 40, para 14.

<sup>19</sup> [2016] UKSC 51, 2016 SC (UKSC) 29, paras 29 to 32.

<sup>20</sup> [2014] UKSC 43, [2014] 1 WLR 2622.

<sup>21</sup> Para 50.

<sup>22</sup> Para 43.

Finally, this is not the same as the ‘pith and substance’ test and these cases should be dealt with according to the terms of the devolution statutes in question and not otherwise.

Thus far, the UK Supreme Court has held:

In *Martin v Most*, that the general increase in sentencing powers of Sheriffs trying cases summarily did not relate to the reserved matter of road traffic, even though it applied to road traffic offences. Its purpose was to relieve pressure on the higher courts in all kinds of criminal case.

In *In re Local Government Byelaws (Wales) Bill 2012*,<sup>23</sup> the first of the Welsh references, that removing the power of Ministers of the Crown to confirm certain bye-laws was merely incidental to or consequential on the purpose of the Bill in conferring powers to make bye-laws on local, small scale issues.

In *Imperial Tobacco*, that the restrictions on the display of tobacco and smoking related products and cigarette vending machines (contained in the Tobacco and Primary Medical Services (Scotland) Act 2010) did not relate to the reserved matters of consumer protection and product safety.

In *In re Agricultural Sector (Wales) Bill*, that its provisions about the pay and conditions of agricultural workers did ‘relate to’ agriculture, which was a devolved matter under GOWA as it then was, and thus were within scope.

In *In re Recovery of Medical Costs from Asbestos Diseases (Wales) Bill*,<sup>24</sup> by majority, that its provisions requiring employers whose breach of duty resulted in asbestos related diseases (and their insurers) to reimburse the NHS in Wales for the costs of treatment did *not* relate to ‘organisation and funding of the NHS’, another devolved matter under GOWA as it then was.

And in *Christian Institute*<sup>25</sup> that the information sharing provisions of the Children and Young People (Scotland) Act 2014 did not ‘relate’ to the reserved matter of data protection, as the

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<sup>23</sup> [2012] UKSC 53, [2013] 1 AC 792.

<sup>24</sup> [2015] UKSC 3, [2015] AC 1016.

<sup>25</sup> Para 64.

objective of information sharing was not truly distinct from the overall purpose of promoting their wellbeing and could be regarded as consequential upon it.

So I think that means that *Asbestos* is the only case in which legislation has been found to be outside competence for this reason – as opposed to incompatibility with Convention rights (as happened in *Salvesen v Riddell*,<sup>26</sup> *Asbestos* and *Christian Institute*) or European Union law (as might have happened but did not in the *Scotch Whisky Association* case<sup>27</sup>) and in *Asbestos* it was a close run thing, with the Welsh Lord Chief Justice in the minority.

Fourthly, these are of course constitutional statutes, so there has been some discussion of whether different rules of statutory construction should apply. There is an oft-repeated principle that Constitutional provisions call for a generous interpretation avoiding the ‘austerity of tabulated legalism’;<sup>28</sup> and in *Robinson v Secretary of State for Northern Ireland*,<sup>29</sup> Lord Bingham said that the categorisation of the Northern Ireland Act as constitutional gave rise to an obligation that its ‘provisions should, consistently with the language used, be interpreted generously and purposively, bearing in mind the values which the constitutional principles are intended to embody’. But this was in connection with whether the election of the First Minister and deputy First Minister after the time limit in the Act was valid and not in connection with whether an Act of the Assembly was within its competence. In the latter connection, it could be suggested that devolution provisions should be construed broadly, which would mean a narrow construction of the exclusions in Scotland, and until this year a broad construction of the devolved matters in Wales.

In *Imperial Tobacco*, the Lord Advocate argued that a construction should be avoided which would render giving the Scottish Parliament plenary law-making powers futile, while the Advocate General argued that it would be wrong to favour an expansive approach. The Supreme Court (echoing what was said in the *Welsh bye-laws* reference) held that the rules in the Scotland Act should be interpreted in the same way as the rules in any other UK statute – but they must ‘be taken to have been intended to create a system . . . that was coherent, stable and workable’. The

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<sup>26</sup> [2013] UKSC 32, 2013 SC (UKSC) 236.

<sup>27</sup> *Scotch Whisky Association v Lord Advocate* [2017] UKSC 76, 2017 SLT 1261.

<sup>28</sup> *Ministry of Home Affairs v Fisher* [1980] AC 2319, at 328, per Lord Wilberforce.

<sup>29</sup> [2002] UKHL 32, [2002] NI 390, para 11.

best way to do this was to adopt an approach to the meaning of a statute which is constant and predictable. This would be achieved if the legislation is construed according to the ordinary meaning of the words used.<sup>30</sup> But the purpose of the Scotland Act was to ensure that the Scottish Parliament was able to legislate effectively about matters which were intended to be devolved to it – that was the context within which its provisions were to be interpreted.<sup>31</sup>

In *In re Agricultural Sector (Wales) Bill*, the court reiterated that to describe GOWA as an Act of great constitutional significance could not be taken, by itself, to be a guide to its interpretation. The statute had to be interpreted in the same way as any other statute.<sup>32</sup> But the Lord Chief Justice also pointed out that the way powers had been distributed under earlier legislation was not a guide to how they were distributed under an Act giving the Welsh Assembly full legislative powers.

This is a rather different question from that addressed by section 101 of the Scotland Act. This says that a provision in an Act of the Scottish Parliament (and Scottish subordinate legislation) which could be read in such a way as to be outside competence, but could also be read narrowly so as to bring it within competence, is to be read and given effect so as to bring it within competence. However, when the issue is compatibility with Convention rights, the prior question is whether the provision can be read and given effect compatibly, as required by section 3 of the Human Rights Act 1998.<sup>33</sup>

### **A knotty problem**

But suppose we have gone through all of that and found that a provision in an Act of a devolved legislature is outside its competence: a rare event so far, but certainly not unforeseeable. The question then arises as to whether that finding operates from when the legislation came into effect or only from the court's finding that it was outside competence. That same question also arises where the local law derived from a UK statute is found incompatible with the Convention rights or with EU law. In the case of an incompatibility with Convention rights, it would only

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<sup>30</sup> Para 14.

<sup>31</sup> Para 15.

<sup>32</sup> Para 6.

<sup>33</sup> *Salvesen v Riddell* [2013] UKSC 32, 2013 SC (UKSC) 236.

arise if the statute could not be read and given effect in a compatible way. In the case of an incompatibility with EU law, it would arise in its most acute form, as the incompatible provision has simply to be ignored. The problem did arise, of course, in the case of *Cadder v Lord Advocate*,<sup>34</sup> where the UK Supreme Court held, to general consternation, that the provisions of the Criminal Procedure (Scotland) Act 1995 had to be read and given effect in a way which was consistent with the Convention presumption of innocence.

Fortunately, the issue does not often arise. The two most important cases recently were the *Scotch Whisky Association* case, where legislation providing for minimum unit pricing of off-sales of alcohol was said to be inconsistent with EU law, and the *Christian Institute* case, where legislation setting up the named persons scheme was said, not only to relate to a reserved matter, but also to be incompatible with the Convention right to respect for private and family life. The challenge failed in the *Scotch Whisky Association* case but succeeded in the *Christian Institute* case. Both schemes had been enacted but had not yet come into effect, so the problem was avoided.

This might also be seen as an advantage of the reference procedure – where validity can be decided once and for all before the impugned measure becomes law. But this may bring political disadvantages that a pragmatic delay in implementation would not.

But what if the law was already in effect, perhaps for some time, when it was found to be outside competence? This happened, for example, in *Salvesen v Riddell*, where in 2013, section 72(10) of the Agricultural Holdings (Scotland) Act 2003 was held incompatible with certain landlords' rights under article 1 of the First Protocol.

The problem does, of course, arise in any country with a written constitution which provides that legislation which is incompatible with the Constitution is invalid or void (eg Article 15.4.2 of the Irish Constitution). 'Invalid' or 'void' connotes void ab initio rather than voidable by order of the court. And this is consistent with the declaratory theory of common law – that the court is merely declaring the law as it has always been. Hence the general rule is that legal decisions have retrospective effect (although the House of Lords did not rule out the possibility of prospective

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<sup>34</sup> [2010] 1 WLR 2601, 2011 SC (UKSC) 13.

overruling in *In re Spectrum Plus Ltd*<sup>35</sup>). But how is this to affect cases already decided under the law as it was thought to be, including convictions and sentences under such laws, or other concluded transactions?

The problem gets worse when one considers the evolutive or teleological nature of constitutional interpretation. In 1930 the Judicial Committee of the Privy Council held that the Constitution of Canada was a 'living tree', capable of growth and expansion albeit only within its natural limits, so it could change over time and women could become 'persons' in the 1920s when they had not been in the 1860s.<sup>36</sup> See also the Irish case of *Brennan v Attorney General*,<sup>37</sup> where the system of valuing agricultural land for rating purposes was found to have become over time so arbitrary and unjust as to be unconstitutional. This problem could arise in relation to devolution, because of the evolutive approach to the construction of European Convention – a living instrument rather than a living tree – and (for the time being at least) of EU law.

The Court of Justice of the European Union and the Strasbourg court have recognised this and provided in some cases that the effect of their rulings shall be prospective only – *ex nunc* rather than *ex tunc*. For example, in *Marckx v Belgium*,<sup>38</sup> the Strasbourg court followed the principle adopted in the CJEU case of *Defrenne v SABENA*,<sup>39</sup> in holding that, because it had taken time to recognise that discrimination between legitimate and illegitimate children could not be justified, the principle of legal certainty meant that the state was not obliged to re-open legal acts or situations predating the delivery of the judgment. A similar position had been adopted in member states with constitutional courts when ruling on the validity of legislation.

In Ireland, on the other hand, the principle was established in *Murphy v Attorney General*<sup>40</sup> that the general rule was invalidity *ab initio*. However, that case also established that there might be exceptions in particularly dramatic or catastrophic cases: the case concerned taxation of married couples, who were taxed more severely than if they were two single people. But the effect of

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<sup>35</sup> [2005] UKHL 41, [2005] 2 AC 680.

<sup>36</sup> *Edwards v Attorney General* [1930] AC 124.

<sup>37</sup> [1983] ILRM 449.

<sup>38</sup> (1979-80) 2 EHRR 330

<sup>39</sup> [1976] 2 CMLR 98, at 128.

<sup>40</sup> [1982] IR 241.



having to repay all the taxes collected on the unconstitutional basis would indeed have been catastrophic. So they were limited to getting their tax back from the date when they had challenged the legislation and no-one else got anything back at all.

A similar result was reached in *A v Governor of Arbour Hill Prison*,<sup>41</sup> where A had been convicted of an offence of unlawful carnal knowledge which was later found unconstitutional (because no mens rea was required as to the age of the complainant). The High Court said that the finding was a ‘judicial death certificate’ for the offence so he must be released – as no doubt would have to be many others. The Supreme Court said no – final convictions could not be upset, although cases which were still in the pipeline could be.

The general principle of English law is that final convictions can only be reopened in exceptional circumstances: *R v Cottrell*<sup>42</sup> identified a continuing public imperative that there should be finality and certainty in the administration of criminal justice, and adopted the views of Murray CJ in *Arbour Hill*, that unjustified retroactivity would be a denial of justice to the victims of crime and offend against the fundamental and just interests of society. Both were relied on in *R v Budimir*.<sup>43</sup> Budimir had been convicted of supplying pornographic videos under a law which was unenforceable because it had not been notified by the UK government to the European Commission. But the Court held that to apply the usual English rule would not be contrary to the principles of EU law.

*Arbour Hill* and *Budimir* were also relied upon by UK Supreme Court in *Cadder v HM Advocate* when deciding that the ruling did not have the effect of reopening closed cases - only those which had not yet gone to trial, or where the trial was in progress or where the appeal process had not yet run its course would have to be dealt with on the new basis. Obviously, there are options when making decisions prospective only: only for the future, only for this case, or only for the cases not yet finally concluded.

There is express power in section 102 of the Scotland Act, where a court or tribunal finds that Scottish legislation is not within competence, to make an order limiting any retrospective effect

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<sup>41</sup> [2006] 4 IR 88.

<sup>42</sup> [2007] 1 WLR 3262.

<sup>43</sup> [2010] EWHC 1607, [2011] QB 744.

of that decision. In doing so, the court must have regard to the extent that persons who are not parties to the proceedings might otherwise be adversely affected. In its original form, this did not cover *Cadder*, because *Cadder* was not about the validity of Scottish legislation. Rather, it was about the validity of decisions of the Lord Advocate to pursue prosecutions on the basis of the old understanding of how the law was to operate. Since then, section 102 has been amended to cover any purported exercise of a function by a member of the Scottish Government which is outside competence. Furthermore, if the UK Supreme Court has decided an issue of compatibility (but not other issues of competence), only the High Court of Justiciary can make an order under section 102 (s 102(5A)).

Section 102 also allows the court to suspend the effect of the decision for any period and on any conditions, so as to allow the defect to be corrected. That is a separate question from denying retrospective effect – it is saying that we’ll give you time to work out a solution. It is a device which has been adopted in Canada – for example in the *Manitoba Language Rights* case,<sup>44</sup> where provincial legislation was held invalid because it had not been translated into French. It is also a device which is sometimes sanctioned by Strasbourg – where the member state is already on the case. Particularly in cases of discriminatory legislation, there will be choices about how to put it right – levelling up or levelling down – and Parliament may need time to decide between them. In *Salvesen v Riddell*, decided by the Supreme Court before section 102 was amended, the Court declined to make an order limiting the retrospective effect of its decision, but did give the Scottish Parliament up to 12 months to find a solution.

## **Conclusion?**

I think that the only conclusion I can draw is that devolution of legislative- as opposed to executive – power turns the United Kingdom Supreme Court into a genuinely constitutional court. As members of the Judicial Committee of the Privy Council, we were familiar with this role in the context of the Commonwealth Constitutions with which we have to deal. But there are some special features to UK devolution which are different – not least because the UK Parliament retains, in theory at least, its full legislative competence. But we have now had sufficient experience of devolution cases to have worked out some principles which operate reasonably consistently across the different parts of the United Kingdom despite the different

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<sup>44</sup> *Re Manitoba Language Rights* [1985] 1 SCR 721.

models adopted. Hopefully, these do not now cause too much discontent within the devolved jurisdictions. Indeed, it could be that it is within the different regions of England that more discontent may be felt, but that's another question.