UKAEL Conference on Devolution

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Devolution in the UK – a view from the Supreme Court

Background

1.1. The Supreme Court is, of course, a comparative newcomer in the devolution arena. It was always understood that a judicial body would be needed to act as the court of last resort should questions arise as to whether the devolved institutions in Scotland, Wales and Northern Ireland were acting within their devolved competence. The House of Lords was the court of last resort for the United Kingdom, so it might have been expected that it would have been selected to perform this function. But the Government made it clear in the White Paper that preceded the legislative process that its preference was for these matters to go to the Judicial Committee of the Privy Council[1]. That was what had been proposed for the original scheme for devolution in the Scotland Act 1978[2], which was repealed because the referendum that had to be held before it took effect failed to secure at the support of least 40% of the persons entitled to vote[3]. The idea of the House of Lords telling the Scottish Parliament what it could and could not do was simply unacceptable. Anticipating that the main source of dispute was likely to be between the devolved institutions and the Parliament at Westminster about the devolved institutions' legislative competence, it was regarded as essential for the credibility of the system that

[1] *Scotland's Parliament* (Cm 3658 (1997)), chapter 4.
[2] Scotland Act 1978, sections 19, 65 and Schedule 12.
[3] Ibid, section 85.

the court of last resort should be an institution which had nothing to do with that Parliament at all.

1.2. It was suggested in the course of debates in the House of Lords on the Scotland Bill that a new Constitutional Court should be created to assume the role of the ultimate judicial authority on devolution issues for all three jurisdictions[4]. There was something to be said for this, as the court's role can reasonably be described as a constitutional one. But this too was rejected by the Government – wisely, as it has turned out. The volume of cases requiring decisions at this level is well below that which would have justified the expense of creating and staffing a court that was to deal only with issues about devolution. So it was to the Judicial Committee sitting in its elegant courtroom in Downing Street that these matters came when the devolution legislation was brought into effect. It exercised that jurisdiction until 1 October 2009, when the jurisdiction of the Judicial Committee on devolution issues was transferred, both physically and in law, to the newly created Supreme Court of the United Kingdom[5].

1.3. A comparative newcomer the Supreme Court may be. But it is no secret that the Judicial Committee was staffed almost entirely by the Lords of Appeal in Ordinary. They were transported each day to Downing Street from the Palace of Westminster in an elderly Daimler motor car. Senior judges from elsewhere were occasionally asked to sit. For example, Lord Kirkwood, a Scottish judge, sat with the Board in one of the early

[4] *Hansard*, HL Debates, vol 593, cols 1963-1986.
[5] Constitutional Reform Act 2005, section 40(4) and Schedule 9.

devolution cases[6]. For the most part however cases raising devolution issues were heard by a Board consisting of five Law Lords. On 1 October 2009, when the appellate function of the House of Lords was transferred to the Supreme Court, all the serving Law Lords were transferred to that court and became its first Justices. So, while the names and the location have changed, an element of continuity has been preserved. The Supreme Court is now doing what the Judicial Committee used to do, and the same people as used to do it on the Judicial Committee are now doing it in the Supreme Court.

1.4. The jurisdiction which the legislation has vested in the Supreme Court falls into three distinct chapters. To simplify matters I shall use the Scotland Act 1998 to describe it. Equivalent provisions are to be found in the legislation relating to Wales[7] and to Northern Ireland[8]. But, as Scotland is the only jurisdiction that has made use of the relevant legislation to date and the Scotland Act has the most comprehensive code, it makes sense to use the Scottish legislation as the point of reference.

The system for judicial scrutiny

2.1 The first chapter is pre-legislative scrutiny. The Scotland Act provides for a system of pre-legislative scrutiny. The limits on the legislative competence of the Scottish Parliament are central to the whole scheme of devolution. This too can be divided into three parts: (a) the territorial limitation, as the Scottish Parliament can legislate only for or as regards Scotland; (b) the reserved matters limitation, as the Scottish Parliament

[6] *Brown v Stott* 2001 SC (PC) 43.
[7] Government of Wales Act 2006, which replaced the Government of Wales Act 1998; see section 149 and Schedule 9.
[8] Northern Ireland Act 1998; see section 79 and Schedule 10.

cannot legislate on matters that have been reserved to the UK Parliament at Westminster; and (c) the treaty limitations, as the Scottish Parliament cannot legislate in a manner that is incompatible with any of the Convention rights or with Community law.

2.2 The mechanism for pre-legislative scrutiny starts with a provision similar to that which is to be found in the Human Rights Act 1998[9]. The member of the Scottish Executive in charge of a Bill must, on or before its introduction, state that in his view the provisions of the Bill would be within the legislative competence of the Parliament[10]. The matter then passes to the Presiding Officer, who must on or before the introduction of the Bill decide whether or not the provisions of the Bill would be within its legislative competence and state his decision on it[11]. The views so expressed are advisory only. They have no effect in law. They are not binding on the courts at any level. Nor are they binding on the Law Officers of the respective Governments, for example – the Lord Advocate for the Scottish Government on the one hand, and the Advocate General for Scotland and the Attorney General for the UK Government on the other. They too have a function in the system for pre-legislative scrutiny. Each of them may refer the question whether a Bill, or any provision of a Bill, is within the legislative competence of the Parliament to the Supreme Court for decision[12]. This may be done at any time during the period of four weeks beginning with the passing of the Bill and any period of four weeks beginning with any subsequent approval of the Bill after amendment following its re-

[9] Human Rights Act 1998, section 19.
[10] Scotland Act 1998, section 31(1).
[11] Ibid, section 31(2).
[12] Ibid, section 33, as amended by Constitutional Reform Act 2005, Schedule 9, Pt 2, para 96.

consideration after a decision by the Supreme Court that it or any of its provisions are not within legislative competence.

2.3 This system of pre-legislative scrutiny is of limited scope. There is no requirement for a pre-legislative statement about competence in the case of Bills which are not under the charge of a member of the Scottish Government[13]. There is no provision for pre-enactment challenge by any member of the public, no doubt because of the risk that the opportunity for such a challenge might be used to disrupt the Government's legislative programme. Ordinary citizens who are affected by the provisions of an Act of the Scottish Parliament may raise questions about their legislative competence after the Act has been brought into operation. At the pre-legislative stage however the matter rests entirely with the Law Officers. It is thought unlikely that the Lord Advocate would refer one of the Scottish Executive's own Bills to the Supreme Court unless there was a difference of view about its competence among the Law Officers. But there are situations that could be imagined where a reference to the Supreme Court would be useful – to forestall a challenge to competence that it was known was likely to be made in the future; in consequence of an undertaking given in debate by a member of the Scottish Government; or in the event of non-Government Bill which the Lord Advocate thought was of doubtful competence being passed by the Parliament.

2.4 Limited though it may be, the idea of submitting a Bill to the Supreme Court for the Supreme Court's pre-legislative scrutiny is a novel and interesting one. It is novel,

[13] The statute uses the expression "Scottish Executive", but the current SNP administration has insisted on substituting the phrase "Scottish Government" and it has come to be accepted as in keeping with the reality.

because there is plainly no need for pre-legislative scrutiny in the case of Bills introduced to the Parliament at Westminster. The doctrine of the sovereignty of Parliament takes care of that. We have no written constitution by which it is bound. It would not be consistent with that doctrine for Parliament to be required to give effect to what the courts might say as to what it can and cannot do. The mechanism that is provided for declarations of incompatibility by the Human Rights Act[14] has been carefully designed so as to preserve the sovereignty of Parliament. It is interesting because of its novelty. Sadly, as it has never been used, I cannot say how the Supreme Court would react if such a reference were to be come before it. The fact that it has never been used is due, I think, to the fact that for most of the Parliament's life the same political parties have been the parties of government in Holyrood and at Westminster. Even now that the SNP is the party of government, it is a minority administration only. Realistic opportunities for testing the boundaries of competence in regard to reserved matters have not yet arisen.

2.5 Should a reference be made, it would make unusual demands on the Supreme Court. It would be exercising an original jurisdiction. The rest of its work is as a court of appeal, which means that it always has the advantage of having any issues of fact resolved and the issues of law focussed by the lower courts. It would also be under pressure to give the reference priority over all other business so as not to impede the legislative process at Holyrood. As it happens, issues about the Parliament's legislative competence are very rare. They have been raised in only three cases, which I shall

[14] Human Rights Act 1998, section 4.

mention below[15]. These were all cases where the Bill had already been passed and become an Act. The fact that these Bills were not the subject of a pre-legislative reference is unsurprising. They were all Bills that had been introduced by the Scottish Government.

2.6 The second and third chapters concern the procedure for dealing with what the Scotland Act calls "devolution issues"[16]. These are (a) whether an Act of the Scottish Parliament, or any of its provisions, is within its competence; (b) whether the exercise or purported exercise of a function by a member of the Scottish Government is or would be within devolved competence; (c) whether the exercise or purported exercise of a function by a member of the Scottish Government is or would be incompatible with any of the Convention rights or with Community law; (d) whether a failure to act by a member of the Scottish Government is incompatible with any of the Convention rights or with Community law; and (e) any other question about whether a function is exercisable within devolved competence and about reserved matters. As a list it is all-embracing, raising the possibility of bringing before the court every issue that could possibly arise as to the exercise or non-exercise of functions by members of the Scottish Government as well as to the legislative competence of the Scottish Parliament.

2.7 These issues can reach the Supreme Court in one or other of two ways. The first is by way of an appeal. This route starts with the raising of a Scottish devolution issue in proceedings before any court or tribunal in Scotland, England and Wales or Northern

[15] *A v The Scottish Ministers* 2002 SC (PC) 63; *AXA General Insurance Ltd, Petitioners* 2010 SLT 179*; Martin v HM Advocate* 2010 SLT 412.
[16] Scotland Act 1998, section 98 and Schedule 6.

Ireland. The usual system of appeal applies up to the Court of Appeal in the other two jurisdictions, the Inner House of the Court of Session or a court of two or more judges in the High Court of Justiciary. From there an appeal lies to the Supreme Court with leave of the courts below or the special leave of the Supreme Court. There are two aspects of this system that innovate on the right of appeal to the Supreme Court in cases from Scotland. First, an appeal is available in devolution issues in criminal cases as well as civil. Otherwise decisions of the High Court of Justiciary are final and not subject to review in the Supreme Court or elsewhere on any ground whatever[17]. Secondly, there is the requirement for leave. The ordinary rule is that an appeal from the Court of Session to the Supreme Court is available as of right[18].

2.8 The second way in which these issues can reach the Supreme Court is by means of a reference. These can take one or other of two forms. First, the Courts of Appeal in England and Wales and Northern Ireland, the Inner House of the Court of Session and a court of two or more judges in the High Court of Justiciary may refer any devolution issue which arises in proceedings before them for decision by the Supreme Court. And secondly, a direct reference of a devolution issue to the Supreme Court may be made by a Law Officer – the Lord Advocate, the Advocate General, the Attorney General and the Attorney General for Northern Ireland. The reference system is not unlike that for making of a preliminary reference to the Court of Justice for the European Union[19], except that in devolution cases there is no obligation to refer a devolution issue to the

[17] Criminal Procedure (Scotland) Act 1995, section 124(2).
[18] Court of Session Act 1988, section 40(1).
[19] Under TFEU article 267 (previously article 234 EC).

Supreme Court. To date no direct references have been made by a Law Officer, and only one reference has been made by a court.

2.9 There is one final chapter. This is judicial review. It is not provided for by the statute, and it is still open to question whether an Act of the Scottish Parliament is open to judicial review on traditional common law grounds. But the competency of a challenge to an Act as being outside its legislative competence was not disputed in a petition for judicial review which was decided recently in the Outer House of the Court of Session, is awaiting a hearing in the Inner House and is likely to reach the Supreme Court sometime next year[20]. The Act which is under challenge in that case is the Damages (Asbestos-related Conditions) (Scotland) Act 2009[21]. The basis of the challenge is that it is incompatible with the Convention rights of insurers who provide cover for employers in cases of personal injury. If and when this case reaches the Supreme Court it will come before it as an appeal as of right from the Court of Session under the ordinary procedure. But it is of interest from the point of view of the devolution jurisdiction because it is an example of legislation which might have been referred to the Supreme Court by a Law Officer prior to its enactment. It was a Government Bill, however, and as the matter was known to be contentious from the outset it can be assumed that the Lord Advocate was consulted and gave her consent to the statement made by the Minister that the Bill was within competence[22].

The system in practice

[20] *AXA General Insurance Ltd, Petitioners* 2010 SLT 179.
[21] asp 4.
[22] See fn 10.

3. 1 I have taken rather a long time to set out the background. In doing so I have mentioned that two of the routes that are available under the statute for bringing issues before the Supreme Court have never been used – the preliminary reference procedure in relation to a Bill prior to its enactment; and the direct reference procedure which, like the preliminary reference procedure, is in the hands of the Law Officers. Stepping back now from all this detail, the Supreme Court's view of the devolution procedure must necessarily concentrate on the cases which have reached it, and which reached the Judicial Committee until its jurisdiction was transferred to the new court, by means of an appeal.

3.2 It was, I think, anticipated that the problems that were most likely to occur were in deciding whether or not something that the Scottish Government or the Scottish Parliament wanted to do was or was not a reserved matter. The Scotland Act sets out a long list of reserved matters in a Schedule, and it contains a carefully worded set of provisions as to what the Parliament – and, because they are subject to the same rules[23], members of the Scottish Government – may or may not do. As I mentioned earlier, there have been only three cases which have raised issues about the Scottish Parliament's legislative competence[24]. One is the judicial review case[25]. Of the other two, the ground of challenge in one was that the Act in question was incompatible with the appellant's Convention rights[26]. The remaining case was concerned with the problem of legislating in a way that does not infringe the prohibition on dealing with reserved matters. As that

[23] Scotland Act 1998, section 54.
[24] See fn 15.
[25] See fn 20.
[26] *A v The Scottish Ministers* 2002 SC (PC) 63.

case was of considerable interest I shall leave it aside for the moment and deal with what, rather unexpectedly, has provided the Supreme Court, and the Judicial Committee before it, with the vast majority of cases that have raised issues about devolution.

3.3 The Lord Advocate is a member of the Scottish Government. Among her functions is the prosecution of offences. All prosecutions on Scotland – there is no right of private prosecution – are brought under her authority. Like all other members of the Scottish Government, she has no power to act in a way that is incompatible with the Convention rights or with Community law[27]. She is protected against acts which, because of section 6(2) of the Human Rights Act 1998, would not be unlawful under subsection (1) of that section[28]. But anything else she or anyone acting under her authority does is open to attack under the devolution issue procedure. This has given rise to a huge industry in the criminal courts in Scotland. Defence counsel have seized on it as providing them with a means of complaining that their clients will not receive, or have not received, a fair trial. Questions have been raised, for example, as to whether temporary sheriffs were an independent and impartial tribunal, as to whether the remedy for delay in the conduct of proceedings was that the conviction must be quashed and as to the Crown's obligation of disclosure. The effect has been to draw the Supreme Court into an examination of the law and practice of the conduct of criminal trials in Scotland. This is a highly specialised area with which the Justices, other than those from Scotland, are wholly unfamiliar. It is an area of law that never reached London at all until devolution, and Scots criminal law as such is a devolved matter. As a result an uneasy tension has developed between

[27] Scotland Act 1998, section 57(2).
[28] Ibid, section 57(3).

Supreme Court and the judges of the High Court of Justiciary, who not surprisingly see the Justices at risk of trespassing upon their territory.

3.4 Fortunately, the system provides that these cases can only come to the Supreme Court with leave of the courts below or with the special leave of the Supreme Court[29]. Most of the petitions that come before the court seeking special leave to appeal lack merit, and only a small number are given leave: on average about four or five cases only per year. So the volume is not large, and it is not wholly unreasonable to think that most of the more contentious issues have now been resolved. That fact that so much time and effort has been given to this area of jurisprudence, almost all of it devoted to questions about the right to a fair trial under article 6(1) of the ECHR, is unfortunate – an example of the law of unintended consequences. But the practice of disclosure has been improved significantly in ways that would probably have been unattainable had the matter been left entirely in the hands of the judges in the High Court of Justiciary. The traditional view was that decisions as to what should and should not be disclosed could safely be left to the Lord Advocate. It was hard for those who were close to the handling of criminal trials in Scotland to adopt the view about disclosure which had developed in England in the light of guidance from Strasbourg. Some good may therefore be said to have come of this – the product of the cross-fertilisation of ideas which the Supreme Court, presiding over all three jurisdictions in the United Kingdom, is uniquely well placed to deliver.

[29] Scotland Act 1998, Schedule 6, para 13.

3.5 I have left to the last the case which is of greatest interest – the only case to have raised an issue about the boundary between devolved and reserved matters[30]. This traditionally has been the area of greatest difficulty in resolving disputes between different levels of government. It arose from a rather unlikely source – but this is typical of the general run of devolution cases that have reached the Supreme Court. It was actually two cases that were heard together. The appellants in each of them had been convicted of driving while disqualified. Road transport, including the subject matter of the Road Traffic Act 1988, which creates the offence, and the Road Traffic Offenders Act 1988, which prescribes the maximum sentences, is a reserved matter[31]. The maximum sentence for this offence that might be imposed by a sheriff sitting summarily was fixed at six months. The maximum for cases prosecuted on indictment was twelve months. The appellants had each been sentenced by the sheriff sitting summarily to periods of imprisonment of more than six months. This was because an Act of the Scottish Parliament had increased the maximum sentence in the relevant provision of the Road Traffic Offenders Act that applied to summary cases from six months to twelve months, raising the upper limit to the same level as that which applied on indictment[32]. This has been done as part of a general readjustment of the sentencing powers of sheriffs sitting summarily right across the board, from cases dealing with common law offences and offences created by devolved legislation to – as in this case – offences created in relation to reserved matters.

[30] *Martin v HM Advocate* 2010 SLT 412.
[31] Scotland Act 1998, Schedule 5, Part II, Head E.
[32] Criminal Proceedings etc (Reform) (Scotland) Act 2007, section 45.

3.6 The case reached the Supreme Court towards the end of last year and the court's judgment was given in February 2010. Scots criminal law, including jurisdiction, procedure and penalties[33], is not among the matters listed by the Scotland Act as reserved matters. The appellants said that the amendment to the Road Traffic Offenders Act was outside the competence of the Scottish Parliament as that was a reserved matter. The Lord Advocate, under whose authority the prosecutions had been brought, said that the amending statute was concerned essentially with a matter of Scots criminal procedure, and that it was within the competence of the Scottish Parliament to extend its general reform of summary procedure in the sheriff court to the forms of procedure referred in this and other statutes that deal with reserved matters. In order to resolve this dispute the Supreme Court had to examine a series of provisions in the Scotland Act which identify the limits on the legislative competence of the Scottish Parliament. It is a remarkable fact that this was the first time that this exercise had had to be undertaken since 1 July 1999 when the Scottish Parliament came into existence.

3.7 The question whether an Act of the Scottish Parliament is within the legislative competence of the Parliament is a devolution issue. So it is for the courts to decide whether an Act which is challenged is within or outside competence. But the judicial function in this regard has been carefully structured. The court said that it was not for the judges to say whether legislation on any particular issue was better made by the Scottish Parliament at Holyrood or by the UK Parliament at Westminster. How that issue is to be determined had already been addressed by the legislators. It had to be decided according to particular rules that the Scotland Act 1998 had laid down. Those rules, just like any

[33] Scotland Act 19988, section 126(5).

other rules, had to be interpreted. That was the court's function. It was for the court to say what the rules meant and how, in a case such as this, they had to be applied in order to resolve the issue whether the measure in question was within competence[34].

3.8 Some degree of overlap between reserved matters and those that were devolved was inevitable. This is a familiar phenomenon in the case of federal systems such as those in Canada and Australia, where legislative competence is divided between the Dominion and the Provinces or the Commonwealth and the States. Sitting in the Judicial Committee in an appeal from India[35], Lord Porter said that it was not possible to make a clean cut between the powers of various legislatures: they were bound to overlap from time to time. The rule that was evolved by the Judicial Committee was to examine the statute that was impugned to ascertain its "pith and substance", or its "true nature and character", to determine whether it was legislation "with respect to" matters that were in the prohibited or permitted sphere. The same point was made by Lord Atkin in the House of Lords in an appeal from Northern Ireland[36]. Explaining what was meant by the "pith and substance" doctrine, he said that if, on the view of the statute as a whole, you find that the substance of the legislation is within the express powers, then it is not invalidated if it incidentally affects matters which are outside the authorized field. But the legislation must not under the guise of dealing with one matter in fact encroach upon the forbidden field.

[34] *Martin v Miller* 2010 SLT 412, para 15.
[35] *Prafulla Kumar Mukherjee v Bank of Commerce Ltd* (1947) LR 74 Indian Appeals 23.
[36] *Gallagher v Lynn* [1937] AC 863.

3.9 The rule that was evolved and applied in these cases, among others, provides the background to the scheme that is now to be found in the Scotland Act. The scheme seeks to give effect to the rule. Recognising that a degree of trespass into reserved areas was inevitable, the Minister who was promoting the Bill in the House of Lords said that it was intended that any argument as to whether a provision in an Act of the Scottish Parliament "relates" to a reserved matter would be decided by reference to its "pith and substance" or its purpose. If its purpose was a devolved one it was not to be outside legislative competence merely because it affected a reserved matter. But the question whether that aim has been achieved must be determined by examining the provisions of the Scotland Act in which the scheme is laid out. While the phrase "pith and substance" was used while these provisions were being debated, it does not appear in any of them. The idea has informed the statutory language, and the rules to which the court must give effect are those laid down by the statute. As to what they mean, the Scotland Act provides its own dictionary.

3.10 That being so, the exercise which the Supreme Court had to perform was an exercise of statutory construction. Instead of searching for the pith and substance of the measure in question, it had to work through a complex series of provisions in a section of the Act and one of its Schedules to reach a result[37]. In the end the decision turned on the question whether the rule in the Road Traffic Offenders Act that the Act of the Scottish Parliament sought to modify was "special to a reserved matter". Was it a road traffic question as to the maximum sentence which, plainly, was a rule which was special to the Road Traffic Acts and was a reserved matter? Or was the rule which determined the

[37] Scotland Act 1998, section 29; Schedule 4, paras 2 and 3.

procedure under which the maximum sentence can be imposed a rule about Scots criminal jurisdiction and procedure, which is not reserved? It was a very narrow point, and the case was decided by the narrowest of majorities – three to two, with the two Scots Justices providing detailed judgments on either side of the divide. In very simple terms – I must make it clear that I was with the majority – the split was between those who sought to find guidance in the purpose of the modification and preferred a generous application of the critical phrase as opposed to one which applies it narrowly, and those who regarded the purpose as irrelevant and wished to adhere strictly to the language of the statute. I suspect that we have not heard the last of this argument.

Conclusion

4.1 If I were to sum up the view from the Supreme Court of the way its oversight of the system of devolution is working in practice in just a few words, I would say that it works reasonably well. The more interesting methods of judicial scrutiny are underused – indeed not used at all. That is a pity, but it is probably due to the very high level of co-operation among officials at a professional level on both sides of the Border which has done much to ensure that the problems that inevitably arise are solved within the statutory framework. We have been asked to examine the powers of the Lord Advocate in criminal cases much more often that we would have liked, especially this has very little to do with devolution. But it has been shown by that area of our jurisprudence that the limits on the powers of the Scottish Ministers have to be taken seriously. The most interesting case, about the Parliament's legislative competence, tells us that the carefully-worked out statutory system for resolving the "pith and substance" issue requires careful

handling. It is not possible to legislate for every eventuality. In the final analysis a decision as to whether or not a provision is within competence may depend on the exercise of judgment[38]. Views may differ as to whether it was properly exercised.

4.2 I think that, in the end of the day, it all depends on whether you are in favour of devolution or you are not. Those who would not wish to inhibit the powers of the Scottish Parliament unduly will tend to read the statute more generously than those who look at the system from the point of view of the draftsman sitting in Westminster. It is quite likely that if we had been left to our own devices and applied the common law pith and substance rule we would have ended up with a split decision anyway. That is what makes overview of these matters by the Supreme Court so interesting.

23 April 2010 Lord Hope of Craighead

[38] See *Martin v HM Advocate* 2010 SLT 412, para 39.