



BRIEFING PAPER

Number 07670, 27 July 2016

The Supreme Court on Devolution

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Summary

The Supreme Court plays an important role in the United Kingdom's system of devolution. The Court is responsible for deciding cases on the division of power between the devolved institutions in Scotland, Wales and Northern Ireland and the United Kingdom's own institutions. This division is set out in the Acts of Parliament which devolve power to each of the three nations in the United Kingdom: the *Scotland Act 1998*, the *Northern Ireland Act 1998* and the *Government of Wales Act 2006* ("the devolution statutes") as amended.

Each of these statutes enables the Supreme Court to rule that primary legislation, made by each of the devolved legislatures, is outside of competence. Each of the devolved legislature's legal power, its legislative competence, is defined by the relevant devolution statute. The Supreme Court must decide, when it is contested, whether a particular provision is within the legal powers granted to the devolved legislature by Parliament in the corresponding devolution statute. The devolution statutes provide for a special procedure for "devolution issues" raised in litigation, including the legal validity of an Act made by the devolved legislatures, to be referred or appealed from certain courts to the Supreme Court.

The *Constitutional Reform Act 2005* transferred the "devolution issues" jurisdiction from the Judicial Committee of the Privy Council to the Supreme Court. Since the establishment of the Court in 2009, there have been a number of significant judgments on devolution, in particular as a result of references made to the Court from the National Assembly for Wales. These judgments contain analysis, in the form of the interpretation of the devolution statutes, which informs the constitutional and legal meaning of the UK's devolution settlements. The influence of these judgments extends beyond the specifics of the relevant case. They affect how the constitutional framework is used and understood by the politicians and officials that engage with the legislation on a day-to-day basis.

While there has not been a dramatic departure from the approach of the Appellate Committee of the House of Lords, the Supreme Court's judgments in a number of major devolution cases since 2009 has added a distinctively constitutional character to the Court's work. Even if they represent a relatively small proportion of the Court's workload, the impact of a Supreme Court judgment, particularly when it concerns a challenge to the legality to a Bill or to an Act, can be wide-ranging. Further, certain judgments, for example the *Agricultural Sector* case in 2014, provide an important backdrop for understanding the debate on reforms to devolution in Wales.

This briefing paper provides an analysis of a selection of the most important judgments of the Supreme Court on devolution to date. The first section sets out the basic constitutional context. The second section outlines how devolution cases reach the Supreme Court. The third section examines some of the devolution cases decided by the Privy Council and the House of Lords prior to the creation of the Supreme Court in 2009. The fourth section covers the Supreme Court's most notable devolution cases in chronological order.

1. Constitutional context

The Supreme Court is the United Kingdom's final court of appeal for civil cases, which combined with the Court's devolution jurisdiction, secures the Court an important role in shaping the development of the law on devolution.

The devolution statutes enable the courts to review the legality of primary legislation made by the devolved legislatures. The review of primary legislation by a court is a constitutional innovation for the UK. Parliamentary sovereignty limits the ability of the courts to rule on the legality of Bills or Acts of the UK Parliament. UK courts can disapply legislation that is incompatible with EU law in particular cases, through the powers enacted in the *European Communities Act 1972*, and they can issue a non-binding declaration of incompatibility under Section 4 of the *Human Rights Act 1998*.

The devolution statutes go further. Courts can rule that provisions enacted by any of the devolved legislatures is legally invalid, if it is outwith competence. Chris McCorkindale, Lecturer in Law from Strathclyde University, argues that this aspect of legislative devolution has “fundamentally altered” the orthodox understanding of the role of the courts in relation to legislation in the United Kingdom.¹ This can be either because the legislature has legislated on a subject matter that has not been devolved, or because a provision is not compatible with Convention Rights or European Union Law. If a provision is found to be outwith competence, the court is not required to invalidate the provision. For example, under section 102 of the *Scotland Act 1998*, the courts can suspend a finding that legislation is outside of competence, so as to enable the legislature to remedy the finding themselves.

More broadly each of the devolution statutes provides that the executive and the legislature must ensure that they respect Convention Rights. As a result, the devolution statutes operate as an additional and alternative mechanism to the *Human Rights Act 1998* for individuals to seek judicial enforcement of their Convention Rights. A number of the devolution cases outlined in this briefing centre on questions of convention compatibility.

¹ Chris McCorkindale “The New Powers of the Judiciary in Scotland” Judicial Power Project Blog 29 April 2016

2. How do devolution cases reach the Supreme Court?

Summary

This section explains how devolution cases reach the Supreme Court. There are broadly three routes. The first is through a reference of a Bill that is before a devolved legislature by one of the law officers. The second is through a statutory reference or appeal of a “devolution issue”, as defined in each of the devolution statutes. The third is through the normal judicial process, with cases arriving at the Court on appeal from lower courts. This final route makes assembling a comprehensive list of devolution cases difficult, in part because there is no hard and fast rule as to what counts as a “devolution” case outside of the statutory routes. Cases from each of these routes are outlined in sections 2 and 3.

The variety and unusual nature of the procedural devices that enable devolution cases to be taken to the UK’s highest judicial authority are a reflection of the innovative and constitutional character of the Court’s devolution issues jurisdiction

2.1 Referring a Bill to the Supreme Court

Each of the devolved legislatures is subject to a procedure that allows for Bills, after they have passed all of their legislative stages and before Royal Assent, to be referred to the Supreme Court to determine if they are within competence. A reference to the Court can be made by either the UK Law officers (the Attorney General) or the chief law officers of each of the devolved governments (for example the Counsel General in Wales).

Section 112 of the *Government of Wales Act 2006* provides:

- (1) The Counsel General or the Attorney General may refer the question whether a Bill, or any provision of a Bill, would be within the Assembly’s legislative competence to the Supreme Court for decision.
- (2) Subject to subsection (3), the Counsel General or the Attorney General may make a reference in relation to a Bill at any time during—
 - (a) the period of four weeks beginning with the passing of the Bill, and
 - (b) any period of four weeks beginning with any subsequent approval of the Bill in accordance with provision included in the standing orders in compliance with section 111(7).

This provision enables a Bill or any provision within a Bill to be referred to the Court if it is thought that it is outside the National Assembly’s legislative competence. The Bill must be challenged within four weeks of it being passed by the Assembly.

The *Scotland Act 1998* and the *Northern Ireland Act 1998* contain similar procedures, in section 33 and section 11 respectively.

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When the Scotland Bill was introduced, the Secretary of State for Scotland, Donald Dewar MP said of the procedure:

The Bill includes a fair and open system for resolving disputes over vires. The Law Officers either of the UK Government or of the Scottish Executive will be able to refer a Scottish Bill to the Judicial Committee of the Privy Council if they have doubts about its competence.²

At the time of writing, the reference procedure has only been used in relation to Wales.

Box 1: Supreme Court cases generated by the reference procedure for Bill in the devolved legislatures

1. [Local Government Byelaws \(Wales\) Bill 2012 – Reference by the Attorney General for England Wales \[2012\] UKSC 53](#)
Bill passed by Assembly on 3 July 2012
Judgment given on 21 November 2012
Royal Assent given on 29 November 2012
2. [Agricultural Sector \(Wales\) Bill – Reference by the Attorney General for England and Wales \[2014\] UKSC 43](#)
Bill passed 17 July 2013
Judgment given on 9 July 2014
Royal Assent given on 30 July 2014
3. [Recovery of Medical Costs for Asbestos Diseases \(Wales\) Bill: Reference by the Counsel General for Wales \[2015\] UKSC 3](#)
Bill passed 20 November 2013
Judgment given 9 February 2015

2.2 Referring or appealing “devolution issues” to the Supreme Court

A second way in which devolution cases can come before the Supreme Court is through a statutory reference or appeal of a “devolution issue”.

There are three main types of “devolution issues” cases. The legality of the acts of devolved institutions, including both the legislative and executive branch, can be challenged for acting: (a) beyond the boundaries of the subject-matter competences conferred by the devolution acts; (b) in a way which is incompatible with Convention rights (the European Convention on Human Rights); and (c) contrary to European Union Law.³

The majority of the “devolution issues” cases that have reached the Supreme Court have concerned challenges to the acts of the Scottish executive for being incompatible with Convention rights. However, the jurisdiction has also been used to challenge the legality of Acts of the Scottish Parliament, for example in the case of *Salvesen* [2013] (summarised in section 3.5 below).

² HC Deb 12 January 1998 vol 304 c 29

³ H Woolf, J Jowell, A Le Sueur, C Donnelly, I Hare, *De Smith's Judicial Review* (2013) 62.

Each of the devolution statutes defines a “devolution issue”

Paragraph 1 of Schedule 6 of the *Scotland Act 1998* does so in the following terms:

- (a) a question whether an Act of the Scottish Parliament or any provision of an Act of the Scottish Parliament is within the legislative competence of the Parliament,
- (b) a question whether any function (being a function which any person has purported, or is proposing, to exercise) is a function of the Scottish Ministers, the First Minister or the Lord Advocate,
- (c) a question whether the purported or proposed exercise of a function by a member of the Scottish Government is, or would be, within devolved competence,
- (d) a question whether a purported or proposed exercise of a function by a member of the Scottish Government is, or would be, incompatible with any of the Convention rights or with EU law,
- (e) a question whether a failure to act by a member of the Scottish Government is incompatible with any of the Convention rights or with EU law,
- (f) any other question about whether a function is exercisable within devolved competence or in or as regards Scotland and any other question arising by virtue of this Act about reserved matters.

But a question arising in criminal proceedings in Scotland that would, apart from this paragraph, be a devolution issue is not a devolution issue if (however formulated) it relates to the compatibility with any of the Convention rights or with EU law of

- (a) an Act of the Scottish Parliament or any provision of an Act of the Scottish Parliament,
- (b) a function,
- (c) the purported or proposed exercise of a function,
- (d) a failure to act.

Schedule 6 of the *Scotland Act 1998* provides for a number of different ways that a “devolution issue” can be elevated to the Supreme Court:

- The Court of Session and the High Court of Justiciary can refer a devolution issue to the Supreme Court (paragraphs 10 and 11);
- An appeal can be made by the parties against a determination of a devolution issue from the Inner House of the Court of Session and the High Court of Justiciary to the Supreme Court (paragraphs 12 and 13);
- References can be made from the Court of Appeal to the Supreme Court and appeals from both the High Court and the Court of Appeal to the Supreme Court (paragraphs 22 and 23);
- The law officers in each jurisdiction, (the Advocate General or the Lord Advocate in Scotland and the Attorney General in the UK) have the power to require a court to refer a devolution

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issue to the Supreme Court (paragraph 33 of the *Scotland Act 1998*);

- The law officers in each jurisdiction can also refer any devolution issue which is not the subject of proceedings (paragraph 34 of Schedule).

The *Governance of Wales Act 2006* and the *Northern Ireland Act 1998* contains equivalent procedures in Schedules 9 and 10 respectively.

2.3 Other appeals on matters related to devolution

The third route for devolution matters to reach the Supreme Court is through ordinary judicial proceedings. As such cases do not arise through a statutory mechanism, they can be less straightforward to identify. Nevertheless, there are a number of important cases on devolution that have reached the Supreme Court and, prior to 2009, the Appellate Committee of the House of Lords through this route, including the cases of *Robinson* [2002] (see section 2.2) and *AXA* [2011] (see section 3.2).

3. Devolution cases 1998-2009

Before 2009, devolution cases were heard by the Judicial Committee of the Privy Council and the Appellate Committee of the House of Lords. These cases provided significant initial direction on how the devolution statutes should be interpreted, which in turn has informed the Supreme Court's approach.

3.1 The Judicial Committee of the Privy Council (JCPC)

The JCPC's case law on devolution tackled some major themes, including: the extent to which the *Scotland Act 1998* requires the Scottish government to act compatibly with Convention Rights, the relationship with the *Human Rights Act 1998*, the autonomy of the criminal law in Scotland, the role of the Lord Advocate in criminal prosecutions in Scotland and more broadly the proper approach to the interpretation of the devolution statutes themselves. This section outlines a select number of the Privy Council's most significant cases.

Devolution Issues, Convention rights and the Lord Advocate

The JCPC's first case under the "devolution issues" jurisdiction was [*Montgomery & Ors v Her Majesty's Advocate and The Advocate General for Scotland*](#) in 2000.⁴ The High Court of Justiciary allowed an appeal to the Privy Council under paragraph 13(a) of the Schedule 6 of the *Scotland Act 1998*. The question in the appeal was whether the acts of the Lord Advocate, in relation to two appellants in a murder trial, were contrary to the right to a fair trial under Article 6 (1) of the European Convention of Human Rights, and therefore outside of his powers under 57 (2) of the *Scotland Act 1998*.

The case concerned Scottish criminal procedure, which Lord Hope of Craighead highlighted had developed distinctively from that in England and Wales, partly because of the fact that no appeal to the Appellate Committee of the House of Lords was possible from the High Court of the Justiciary in Scotland:

Its [Scotland's] criminal laws and rules of procedure are entirely separate from those which exist in England and Wales and, based on the English model, in Northern Ireland. Its separate existence is due in large measure to the fact that, as I have already mentioned, no appeal lies to the House of Lords from the High Court of Justiciary.⁵

Lord Hope argued that the acts of the Lord Advocate in this case amounted to an exercise of the function of a member of the Scottish Executive, meaning that it was covered by both section 57 (2) and paragraph 1 of Schedule 6 of the *Scotland Act 1998*.

⁴ [2000] UKHL D1

⁵ *Montgomery & Ors v Her Majesty's Advocate and The Advocate General for Scotland* [2000] UKHL D1

Lord Hoffman disagreed. He argued that no devolution issue arose as criminal charges are determined by courts and not by prosecutors.⁶ For Professor Timothy Jones, professor of public at the University of Swansea, this disagreement, on whether an act qualified as a “devolution issue”, demonstrates that there were a number of alternative interpretations available.⁷

In *Procurator Fiscal v Brown (Scotland)*,⁸ the majority concurred with Lord Hope, who restated his approach in *Montgomery*. Lord Hope explained the *Scotland Act 1998* aimed to ensure that the acts of the Lord Advocate in prosecuting offences would be subject to the limitations imposed by Convention Rights protected by “judicial control under the devolved system”.⁹

In *R v Her Majesty's Advocate & Anor*,¹⁰ the Lord Advocate sought to argue for a restrictive interpretation of the word ‘act’ in section 57 (2) of the *Scotland Act 1998*, which would not include an act bringing a prosecution. His argument was based on two factors: firstly, that a broader interpretation could lead to the Privy Council becoming in effect the final court of appeal in a range of Scottish criminal matters; and secondly, that such an approach would replicate the protection provided in Scots law in criminal cases by section 6 (1) of the *Human Rights Act 1998*.

In *Anor*, Lord Hope rejected these arguments as not relevant to interpretation of the provision. Those arguments, according to Lord Hope, were policy matters for Parliament. On the first point, Lord Hope emphasised that the Privy Council had set clear limits on what could be raised as devolution issues. On the second, he argued that the accused human rights protection against the Lord Advocate was only available under the *Scotland Act 1998*, and that further, it was clear that Parliament intended to provide an additional level of human rights protection to complement that provided by the *Human Rights Act 1998*.

3.2 The Appellate Committee of the House of Lords

Some of the most significant cases on the operation of the devolution statutes have come through appeals in ordinary judicial proceedings (such as judicial review cases), rather than through the “devolution issues” jurisdiction. Prior to the creation of the Supreme Court in 2009, these cases could eventually be heard by the Appellate Committee of the House of Lords.

⁶ Ibid

⁷ Timothy Jones, ‘Splendid isolation: Scottish criminal law, the Privy Council and the Supreme Court’ *Criminal Law Review* (2004) 102.

⁸ [2000] UKPC D3

⁹ *Procurator Fiscal v Brown (Scotland)* [2000] UKPC D3

¹⁰ [2002] UKPC D3

Robinson [2002]¹¹

The case of *Robinson* was a challenge to the legality of the election of the First Minister and Deputy First Minister by the Northern Ireland Assembly on 6 November 2001. The case was brought by Peter Robinson, at the time an MLA and an MP. He argued that the election was unlawful because under section 16(8) of the *Northern Ireland Act 1998*, the Assembly had no power to elect a First Minister and Deputy First Minister after the expiry of the six week period from the offices becoming vacant as required by the provision.

The action for judicial review was unsuccessful before the Queen's Bench Division (Northern Ireland) and the Court of Appeal (Northern Ireland) and the House of Lords. The case is important because the Lords' judgments represent one of first, and most wide-ranging, set of pronouncements on the approach that should be taken to interpreting the devolution statutes.

The Law Lords did not speak with one voice, they were split three to two. The majority and minority strongly disagreed on the significance of the status of the *Northern Ireland Act 1998* as a "constitutional statute".

The majority

Lord Bingham characterised the *Northern Ireland Act 1998* as an "in effect a constitution".¹² This characterisation meant that the provisions of the Act 1998 should "be interpreted generously and purposively, bearing in mind the values which the constitutional provisions are intended to embody".¹³

This approach informed Lord Bingham's judgment on the question of whether with the conditions of section 16 (8) of the 1998 Act should be read literally so as to result in a ruling that the election of the Ministers was illegal. He rejected such a strict reading. Lord Bingham argued that if Parliament had intended for a new assembly election to be automatically arranged by the Secretary of State for Northern Ireland upon the failure to elect a First Minister and Deputy First Minister within six weeks, then this would have been stated on the face of the statute. This led Lord Bingham to conclude that Parliament had not included such a restriction to avoid placing the Assembly and the Secretary of State in a "tight straightjacket".¹⁴ As a consequence the Assembly had the power to make a valid election of a First Minister and a Deputy First Minister even though the six week period prescribed by the 1998 Act had expired.

Lord Hoffman agreed with Lord Bingham. He also stressed the status of the *Northern Ireland Act 1998* as a factor relevant to rejecting the appellant's argument that a strict construction of section 16 (8) should be rejected.¹⁵

¹¹ *Robinson v Secretary of State for Northern Ireland & Ors* [2002] UKHL 32

¹² *Ibid* paragraph 11

¹³ *Ibid* paragraph 10

¹⁴ *Ibid* paragraph 14

¹⁵ *Ibid* paragraphs 30-31

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Lord Millett agreed with the judgments of Lords Bingham and Hoffman, adding that the appellant's argument failed due to its reliance on the idea that the Assembly's power to elect a First Minister and Deputy First Minister was entirely reliant on terms of section 16 of the 1998 Act. Instead he argued that the power "is derived from the structure of the constitutional arrangements made by the Act and the provisions of Part III of the Act as a whole".¹⁶

The minority

The minority took a strikingly different approach. Lord Hutton, a former Lord Chief Justice of Northern Ireland, rejected the idea that background of the 1998 Act warranted a different approach:

Where a statute gives power to a statutory body to perform a certain act within a specified period the normal rule is that the body has no power to perform that act outside the period, and I see nothing in the provisions of the Act pointing to a different conclusion.¹⁷

Lord Hobhouse of Woodborough agreed with Lord Hutton's approach.¹⁸

A strict interpretation of the statute, as favoured by Lord Hutton and Lord Hobhouse, could have led to the failure of the political compromise struck by the political parties which saw Mr Trimble and Mr Murkan elected. Such a result, according to majority, did not fit with the context of Belfast Agreement.

The strength of the disagreement between the majority and the minority judgments has been reflected in the reactions of constitutional lawyers, judges, and other commentators. Some such as Adam Tomkins, John Millar Professor of Public Law at the University of Glasgow and now a Member of the Scottish Parliament, regard the majority's approach as out of step with the Supreme Court's subsequent devolution case law, and therefore to be as an "extraordinary decision".¹⁹ Others, such as the Rt Hon Lady Justice Arden, have endorsed Lord Bingham's approach to the interpretation of devolution statutes.²⁰

David Feldman, Rouse Ball Professor of English Law, argues that the conflict between the majority and minority in this case shows that in hard cases, neither the literal meaning nor the legislative intention behind a provision or Act can produce a definite answer.²¹ For Feldman this means that identifying the meaning of constitutional provisions in hard cases should take their purpose at a "high level of generality".²² The "golden rule" of statutory interpretation, that the literal meaning of a provision should be departed from if it would

¹⁶ Ibid paragraph 93

¹⁷ Ibid paragraph 54

¹⁸ Ibid paragraph 75

¹⁹ A Tomkins, '[Confusion and Retreat: The Supreme Court on Devolution](#)' UKCLA Blog 19 February 2015

²⁰ M Arden, 'What is the safeguard for Welsh devolution?' Public Law [2014]

²¹ D Feldman, 'Statutory interpretation and constitutional legislation' Law Quarterly Review [2014] p496

²² Ibid

produce an absurd result, is particularly important in relation to constitutional legislation, where issues are likely to be of national significance.

Making the system work in a reasonable way is a relevant factor in statutory interpretation. Dimelow has argued that the majority in *Robinson* rejected a literal interpretation as it would have produced a result that was at odds with the purpose of the Act. In such a situation, he argues that this right that the overall purpose of the Act, to create a workable system of devolution for example, should prevail.²³

Somerville v Scottish Ministers [2007]²⁴

In *Somerville*, the Law Lords examined the relationship between *Human Rights Act 1998* and the *Scotland Act 1998*.²⁵ In the case the Scottish Ministers argued that the claims in question had to be brought under the *Human Rights Act 1998* rather than the *Scotland Act 1998*. The applicants argued that only the latter applied. The Law Lords rejected both. Lord Rogers of Earlsferry explained that both Acts applied, and this means that the time limit of one year applied to claims brought under the *Human Rights Act 1998*, but did not apply to claims brought under the *Scotland Act 1998*.²⁶

The judgment in *Somerville* led to the *Convention Rights Proceedings (Amendment) (Scotland) Act 2009*, which introduced a time limit of one year for claims under the Act. This was then replaced by section 14 of the *Scotland Act 2012* which introduced a one year time limit to all convention claims brought under the *Scotland Act 1998*, other than those brought by the Law Officers.

Conclusion

Prior to the creation of the Supreme Court, the courts were not confronted with many devolution cases. One reason for the lack of referrals in this period, identified by Robert Hazell, Professor of Government and the Constitution at University College London, is that government lawyers, in both the central and devolved administrations, were determined to prevent disputes over powers and competence reaching the courts.²⁷ He cites the development of “private public law”, in the form of the opinions of the law officers on devolution matters, which have been used to resolved disputes on the boundaries of devolved power within government.²⁸ In addition to the input of the law officers, government lawyers have developed

²³ S Dimelow, ‘The interpretation of “constitutional” statutes’ *Law Quarterly Review* [2013] p501

²⁴ *Somerville (AP) (Original Appellant and Cross-respondent) v. Scottish Ministers (Original Respondents and Cross-appellants) (Scotland) Etc* [2007] UKHL 44

²⁵ C Himsworth, *Scotland’s Constitution: Law and Practice* (2009) p410

²⁶ *Somerville (AP) (Original Appellant and Cross-respondent) v. Scottish Ministers (Original Respondents and Cross-appellants) (Scotland) Etc* [2007] UKHL 44 paragraph 107

²⁷ R Hazell, ‘Out of Court: Why have the courts played no role in resolving devolution disputes in the United Kingdom’ *The Journal of Federalism* (2007) p589

²⁸ *Ibid* p590

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“extensive custom and practice about where the boundaries lie”.²⁹ A reference to a court, in the context of negotiations between Scotland and the UK, is said to be regarded as a “nuclear option”.³⁰

²⁹ Ibid p593

³⁰ Ibid

4. The Supreme Court case law on devolution

This section sets out, in chronological order, summaries of some of the Supreme Court's most significant devolution cases since its establishment in 2009.

These cases demonstrate that the Supreme Court has played a significant role in devolution, particularly in Wales. As of 2016, significant legal and constitutional disagreements over the legislative competence of the National Assembly for Wales (the Assembly) have given rise to three Assembly bills being referred to the Supreme Court.

The Supreme Court's influence on Scottish devolution has been qualitatively different from that in Wales. The Supreme Court's devolution case law has not, as of 2016, included any references of the Scottish Parliament's bills prior to receiving Royal Assent. However, there have been a number of important challenges to the legality of Acts of the Scottish Parliament. There has also been a notable human rights dimension to a number of the challenges to Acts of the Scottish Parliament that have reached the Supreme Court.

This section does not seek to cover all of the Supreme Court cases relevant to devolution, instead the focus is on those cases which involve a challenge to the legality of legislation made the devolved legislatures. As such, important cases such as *Cadder* [2010] and *Fraser* [2011] (detailed in Box 2 below) are not included in the list.

Box 2: *Cadder* [2010] and *Fraser* [2011]

Two of the most significant "devolution issue" cases decided by the Supreme Court concerned challenges to criminal procedure in Scotland: *Cadder v Her Majesty's Advocate*³¹ and *Fraser v Her Majesty's Advocate*.³² These cases both concerned challenges under Article 6 (1) of the ECHR to the treatment and conditions of individuals accused of criminal offences in Scotland. In both cases the Supreme Court found that the individual's rights had been breached. The cases caused political controversy because the cases were seen by some as the Supreme Court intruding onto Scottish criminal law via the "devolution issue" jurisdiction. Ordinarily Scottish criminal cases cannot be appealed to the Supreme Court.

The controversy generated by *Cadder* and *Fraser* eventually led to changes to the meaning of "devolution issue" being made by the *Scotland Act 2012*. In criminal proceedings, a "devolution issue" no longer includes questions of ECHR compatibility. Further, when a criminal case is referred to the Supreme Court from the High Court of Justiciary to decide a "devolution issue", the former's powers are limited to determining the

³¹ *Cadder v Her Majesty's Advocate (Scotland)* [2010] UKSC 43

³² *Fraser v Her Majesty's Advocate* [2011] UKSC 24

devolution issue alone, once that is decided the proceedings must be remitted to the latter.³³

4.1 *Martin v Most* [2010]³⁴

Mr Martin and Mr Miller were both convicted and sentenced for more than 6 months in prison for driving while disqualified. They both sought to challenge their sentence on the basis that the legislation that granted the power to impose the sentence, the *Criminal Proceedings etc (Reform) (Scotland) Act 2007*, was outside the legislative competence of the Scottish Parliament. The case came to the Supreme Court as a devolution appeal from the High Court of the Justiciary.

The Supreme Court dismissed the appeals, by a majority of 3 to 2. Lord Hope's leading judgment for the majority contains a number of important points on how the *Scotland Act 1998* should be interpreted. These pronouncements have also proved influential in subsequent consequent devolution cases relating to both Scotland and Wales.

The majority

Lord Hope began by considering the meaning of Section 29 of the *Scotland Act 1998*, which provides that an Act of the Scottish Parliament is not law if it "relates to reserved matters". In this case, the provision of the *Criminal Proceedings etc (Reform) (Scotland) Act 2007* fell under section 29 (4) of the *Scotland Act 1998*, which provides a separate regime for Scots criminal law, which is not reserved, but in practice extends across subjects that are otherwise reserved.

Lord Hope found that section 45 of the 2007 Act was a matter of Scots criminal law, and so was not a reserved matter.³⁵ The statutory test is then whether the purpose of the provision is to make the relevant criminal law apply consistently across reserved and non-reserved matters.³⁶ He explained that when considering the purpose of a provision, regard is to be had to its effect "in all its circumstances".³⁷ As the provision in question was designed to ensure that there was a consistent approach to sentencing powers across a range of statutory offences, this met the test of consistency. Therefore section 45 was not to be regarded as relating to a reserved matter under 29 (4) of the *Scotland Act 1998*.

Lord Hope also applied a test under Schedule 4 of the *Scotland Act 1998* that asks whether the rule of Scots criminal law that is to be modified by the provision under scrutiny is "special" to a reserved matter. "Special to" in this context meant that it relates only to a

³³ Brice Dickson 'Devolution' in D Oliver, C O'Cinneide and J Jowell (eds) *The Changing Constitution* (2015) 256

³⁴ *Martin v Her Majesty's Advocate* [2010] UKSC 10

³⁵ *Ibid* paragraph 31

³⁶ *Ibid* paragraph 19

³⁷ *Ibid* paragraph 25

reserved matter, in which case it will be outwith competence. If it extended to both reserved and non-reserved matters then the provision could be saved. Lord Hope explained that the rule being modified by the 2007 Act related to the procedure under which the maximum sentence could be imposed, as the effect of the modification was to increase the sentencing power of the sheriff in summary cases.³⁸ Lord Hope characterised this as a rule of procedure, as it did not seek to increase the maximum penalty for the offence, and as such was not one that was not “special to” the *Road Traffic Offenders Act 1988*. Section 45 and the 2007 Act was not therefore outside the competence of the Scottish Parliament.

Lord Walker’s judgment concurred with Lord Hope’s, but added some noteworthy comments. Lord Walker explained that the words “relates to” in this context mean “more than a loose or consequential connection”.³⁹ This has proved an influential analysis in subsequent cases.

Lord Walker offered the following explanation as to why the law being modified was not “special to” a reserved matter. The rule being modified was not something special to the reserved matter in question: road transport. The Westminster statute, *the Road Traffic Offenders Act 1988*, was “left untouched” by the provision of the Scottish Parliament’s enactment.⁴⁰ Lord Brown offered the following concluding explanation for the majority view:

Given that the Scottish Parliament is plainly intended to regulate the Scottish legal system I am disinclined to find a construction of Schedule 4 which would require the Scottish Parliament, when modifying that system, to invoke Westminster’s help to do no more than dot the i’s and cross the t’s of the necessary consequences.⁴¹

This overall judgment highlights that a judge’s view of the aim and purposes of devolution can inform the interpretation of specific provisions in such a case.

The minority

Lord Rodger’s dissenting judgment began from a markedly different starting point than the majority judgments. Lord Rodger drew attention to the nature of the Scotland Parliament’s legislative competence under the *Scotland Act 1998*. He submitted that the Holyrood Parliament’s power cannot be assessed simply by assessing whether the purpose of an enactment relates to a devolved rather than reserved matter.⁴² Even if the aims are related to a devolved matter, the means adopted by the provisions in a Bill must also be within competence.⁴³ Nevertheless, Lord Rodger agreed with majority that section 45 of the 2007 Act did not relate to a reserved matter.

³⁸ Ibid paragraph 36

³⁹ Ibid paragraph 49

⁴⁰ Ibid paragraph 59

⁴¹ Ibid paragraph 66

⁴² Ibid paragraph 76

⁴³ Ibid paragraph 77

The critical point on which Lord Rodger disagreed with the majority was on whether the amendment to the *Road Traffic Offenders Act 1988* was “special to a reserved matter” under para 2 (3) of Schedule 7. Lord Rodger explained that in his view that section 103(1) (b) of the 1988 Act was “special” to that reserved matter, in that Parliament had chosen the specific penalty provision for the particular offence. As such it is only, in his view, for Westminster to legislate to change this particular provision.⁴⁴

Lord Kerr’s dissent argued that “relates to reserved matters” should be interpreted so as to make the scheme workable in practice.⁴⁵ A further distinctive feature of Lord Kerr’s judgment was his emphasis that the evaluation of the purpose of a provision can be done by examining statements made by those responsible for the legislation.⁴⁶ After reviewing a range of sources, including parliamentary material, Lord Kerr concluded that section 45 of the 2007 Act aimed to reallocate business within the court structure. He agreed that this was not a reserved matter. On the question of whether the rule being changed was “special to” a reserved matter, Lord Kerr outlined that this phrase should mean “having a specific effect on” reserved matters.⁴⁷ Lord Kerr added that when evaluating a provision for the purpose of whether it relates to a reserved matter, its purpose should be given more weight than its effect.⁴⁸ On this basis he agreed with Lord Rodger that the section was outside competence.

4.2 *AXA General Insurance v The Lord Advocate and others* [2011]⁴⁹

This case concerned a challenge by insurance companies, through judicial review, to the legality of the *Damages (Asbestos-related Conditions) (Scotland) Act 2009*. The case reached the Supreme Court on appeal against the judgment of the Court of Session (12 April 2011) ruling that the 2009 Act was within the competence of the Scottish Parliament.

The insurance companies’ main argument was that the 2009 Act violated their right to property under Article 1 of Protocol 1 to the ECHR. Accordingly the 2009 Act would be invalid as it would not meet the conditions set out in s 29 (2) (d) of the *Scotland Act 1998*. The companies also argued that the 2009 Act represented an irrational, and therefore unlawful, exercise of the Scottish Parliament’s powers. This argument was based on the idea that there are common law, as well as statutory, limits on the Scottish Parliament’s competence.

⁴⁴ Ibid paragraph 141.

⁴⁵ Ibid paragraph 158-159

⁴⁶ Ibid paragraph 162

⁴⁷ Ibid paragraph 177

⁴⁸ Ibid paragraph 161

⁴⁹ *AXA General Insurance Limited and others (Appellants) v The Lord Advocate and others (Respondents) (Scotland)* [2011] UKSC 46

A panel of seven justices of the Supreme Court all agreed that the 2009 Act was within competence, and therefore both of the insurance companies' arguments failed. The case nonetheless raised significant constitutional questions relating to the operation of the Scotland Act 1998, and to the status of Acts of the Scottish Parliament (ASPs). Lord Hope, Lord Brown, Lord Mance and Lord Reed each gave judgments which dealt with these questions.

Convention compatibility

All the judgments given accepted that the 2009 Act constituted an interference with the insurance companies' right to property, as protected by Article 1 of Protocol 1 of the ECHR. The questions remaining for deciding compatibility with the convention were: whether the 2009 Act pursued legitimate aim; and whether the Parliament did so proportionately. Lord Hope explained that the Scottish Parliament was tackling a legitimate aim, namely social injustice, by enacting the 2009 Act.⁵⁰ This left the question of proportionality.

The insurance companies argued that the 2009 Act imposed upon them a disproportionate and excessive burden. Lord Hope rejected this argument on two grounds. Firstly, the 2009 Act was carefully crafted so as to do no more than necessary.⁵¹ Secondly, the 2009 Act's interference with the insurance companies' property was part of the risk associated with the companies' action in indemnifying the consequences of the negligence of the relevant employers.⁵²

Irrationality

The insurance companies accepted that the failure to establish that the 2009 Act was disproportionate would mean that the argument that the Act was irrational, which sets a higher threshold, would fail. As such the Justices of the Supreme Court did not strictly have to consider the irrationality argument. However, as Lord Hope noted the argument raised the issue of whether Acts of the devolved legislatures could be subject to judicial review on common law grounds. Lord Hope said this was "a matter of very great constitutional importance".⁵³

Lord Hope ultimately agreed with the judges of the Inner House that Acts of the Scottish Parliament could not be to subject to judicial review on grounds of irrationality, unreasonableness or arbitrariness.⁵⁴ The principal reason being that Parliament has set out explicit limits on the Scottish Parliament's legislative competence in the *Scotland Act 1998*, and it would be "wrong" for the courts to impose such limits unless authorised to do so by the UK Parliament.⁵⁵

Lord Hope stressed that the courts are limited in their ability to scrutinise Acts of the Scottish Parliament as a result of the

⁵⁰ Ibid paragraph 33

⁵¹ Ibid paragraph 37

⁵² Ibid

⁵³ Ibid paragraph 42

⁵⁴ Ibid paragraph 52

⁵⁵ Ibid

recognition of the “advantages that flow from the depth and width of the experience of its elected members and the mandate that has been given to them by the electorate”.⁵⁶ In other words, sovereignty is not the only reason that courts in the United Kingdom do not routinely scrutinise primary legislation on common law grounds.

Despite his conclusion on irrationality, Lord Hope explained that in principle each of the devolved legislatures are subject to the supervision jurisdiction of judicial review under the common law but on much more limited grounds than irrationality. This supervision is possible because the devolved legislatures are not sovereign, and because the Acts of Parliament which devolve them power do not exclude the possibility.⁵⁷ Lord Hope offered the following analysis of the status of Acts of the Scottish Parliament in his judgment:

The Scottish Parliament takes its place under our constitutional arrangements as a self-standing democratically elected legislature. Its democratic mandate to make laws for the people of Scotland is beyond question. Acts that the Scottish Parliament enacts which are within its legislative competence enjoy, in that respect, the highest legal authority. The United Kingdom Parliament has vested in the Scottish Parliament the authority to make laws that are within its devolved competence. It is nevertheless a body to which decision making powers have been delegated. And it does not enjoy the sovereignty of the Crown in Parliament that, as Lord Bingham said in *Jackson*, para 9, is the bedrock of the British constitution.⁵⁸

Lord Hope submitted that the rule of law represented the specific grounds, supplied by the common law, so as to limit the power of the Scottish Parliament and the other devolved legislatures.⁵⁹ The rule of law, he explained, meant that extreme legislation which sought to abolish judicial review, would represent legislation which the Court would be prepared to strike down as invalid.⁶⁰ Lord Hope referred to his conclusion in the case of *Jackson* that the rule of law is “the ultimate controlling factor upon which our constitution is based”.⁶¹

4.3 *Local Government Byelaws (Wales) Bill 2012 – Reference by the Attorney General for England and Wales [2012]*⁶²

This case was the first time the Attorney General for England and Wales used his powers under section 112 of the *Government of Wales Act 2006* to refer a Bill approved by the Assembly for Wales to the Supreme Court. Further, the judgment was also the first time that a UK court has evaluated the legality of a Bill, which has been

⁵⁶ Ibid paragraph 49

⁵⁷ Ibid paragraphs 46& 47

⁵⁸ Ibid paragraph 46

⁵⁹ Ibid paragraph 51

⁶⁰ Ibid

⁶¹ Ibid

⁶² *Local Government Byelaws (Wales) Bill 2012– Reference by the Attorney General for England Wales [2012]* UKSC 53

approved by an elected legislature, but has not yet received Royal Assent.

The case concerned the *Local Government Byelaws (Wales) Bill 2012*, which was the first Bill passed by the Assembly under the primary legislative powers granted in 2011 under the GOWA. The Attorney General, Dominic Grieve, referred sections 6 and 9 of the Bill, which were both intended to remove the need for the Secretary of State (a UK minister) to confirm byelaws.

Lord Neuberger and Lord Hope each gave concurring judgments, with which the other three judges agreed. Both judgments focused on the question of whether sections 6 and 9 were within the competence of the Assembly. Under GOWA 2006, the Assembly could legislate on a matter specified as excepted by Schedule 7 part 2, if the provision in question is “incidental to, or consequential on” a provision which is within the competence of the Assembly.

Lord Neuberger

Lord Neuberger referred to the Supreme Court’s judgment in *Martin v Most* [2010] (see section 3.1), which considered the meaning of “incidental and consequential” in the context of the *Scotland Act 1998*. He noted that courts should be wary of assuming that the words have the same meaning in different statutory contexts, and that the meaning of “incidental and consequential” will depend on the facts of each particular case.⁶³ In *Martin v Most*, Lord Hope referred to the idea that a provision was “incidental and consequential” if it raised “no separate issue of principle”, and from this Lord Neuberger concluded that section 6’s removal of confirmatory powers from the Secretary of State was incidental and consequential to the Bill’s main purpose: to remove the need for confirmation by Welsh Ministers of any byelaw made under the scheduled enactments.

This conclusion was based on six factors:

- The primary purpose of the Bill cannot be achieved without that removal;
- the Secretary of State’s confirmatory power is concurrent with that of the Welsh Ministers;
- the confirmatory power arises from what is in effect a fall-back provision;
- the scheduled enactments relate to byelaws in respect of which the Secretary of State is very unlikely indeed ever to exercise his confirmatory power;
- section 7 of the Bill reinforces this conclusion;
- the contrary view would risk depriving paragraph 6 (1) (b) of Part 3 of Schedule 7 of the GOWA of any real effect.

On section 9, Lord Neuberger rejected the Attorney General’s argument that it fell outside competence. The Attorney General

⁶³ Ibid paragraph 49

argued the section was ultra vires because it conferred power on Welsh Ministers by secondary legislation to remove or modify pre-commencement functions of UK ministers, something it cannot do according to section 108 (6) (a) and paragraph 1 (1) of part 2 of Schedule 7 of the GOWA. Section 9, Lord Neuberger outlined, is limited by paragraph 6 (1) (b) of part 3 of Schedule 7 of the GOWA. As such section 9 should be read as limited to the scope permitted under the GOWA.

Lord Hope

Lord Hope summarised the three factors that the Court has identified, in *Martin v Most* [2010], as relevant for determining issues of competence in relation to the Scottish Parliament. These can be summarised as follows:

- The judicial function in deciding whether a Bill is within competence is to apply, as a question of legal interpretation, the relevant statutory provisions enacted by the UK Parliament.
- The provisions within the devolution statutes should be interpreted like any other statute, notwithstanding their constitutional status. When help is needed to determine the meaning of the provisions, the purpose of the Acts, to achieve a working constitutional settlement through devolution of legislative and executive power, should inform the Court's interpretation.
- Despite the differences in the devolution arrangements for each of three devolved legislatures. The rules on whether measures of the devolved legislatures can be subject to judicial review, or on what grounds, are essentially the same.⁶⁴

4.4 *Imperial Tobacco Limited v The Lord Advocate* [2012]⁶⁵

This case concerned a challenge to an Act of the Scottish Parliament passed in 2010.

The *Tobacco and Primary Medical Services (Scotland) Act 2010* included provisions to prohibit the display of tobacco products, in a place of sale and to prohibit sale in vending machines. The purpose was to make cigarettes less readily available, particularly to children and young people, with a view to reducing smoking.

Imperial Tobacco Ltd brought a case arguing that sections 1 and 9 of the *Tobacco and Primary Medical Services (Scotland) Act 2010* (the "2010 Act") were outside the legislative competence of the Scottish Parliament, in relation to specific matters reserved under Schedule 5 of the *Scotland Act 1998*. A petition for judicial review was dismissed by the Scottish Court of Session in 2010. An appeal was made to the

⁶⁴ Ibid paragraphs 78-81

⁶⁵ [Imperial Tobacco Limited \(Appellant\) v The Lord Advocate \(Respondent\) \(Scotland\)](#) [2012] UKSC 61

Court of Session and was dismissed on 2 February 2012. Imperial Tobacco Ltd made a further appeal to the Supreme Court.

Their case hinged on the argument that, by reference to their purpose, sections 1 and 9 related to “the sale and supply of goods to consumers” and “product safety”. These are matters which are reserved to the UK Parliament under the *Scotland Act 1998* and on which the Scottish Parliament cannot legislate. Imperial Tobacco also argued that sections 1 and 9 modified the law on reserved matters.

The appeal was unanimously dismissed by the Supreme Court. Lord Hope delivered the judgement with agreement by Lord Walker, Lady Hale, Lord Kerr and Lord Sumption.⁶⁶

Lord Hope

Lord Hope noted that this was the first case in which provisions of an Act of the Scottish Parliament had been challenged on the basis that they related to specific reservations listed in Part II of Schedule 5 of the *Scotland Act 1998*.⁶⁷ Lord Hope remarked that the reason it had taken so long for such a case to arise was “due in no small measure to the care that is taken by officials within the Parliament to ensure that the provisions that the Scottish Parliament does enact are within competence”.⁶⁸

Lord Hope also set out the steps to be followed in determining the issue of competence in this case. The first step in the analysis that must be carried out was to examine the provisions whose legislative competence has been brought into question and to identify the purpose of the provisions according to the test that section 29 (3) of the 1998 Act lays down. Then the rules that the 1998 Act sets out, so far as relevant, must be examined in more detail in order to identify the tests that have to be applied in order to determine whether the provisions are outside competence. This, the second stage, is of critical importance and it requires to be handled with great care. The final stage will be to draw these two exercises together to reach a conclusion as to whether or not the grounds of challenge are well-founded.⁶⁹ Having followed these steps the Court dismissed the appeal based on the intention of the sections of the Act and of the Scottish Ministers.

Lord Hope concluded that the purposes of sections 1 and 9 could be identified as a way to promote public health, which was within the competence of the Scottish Parliament under the provisions of the 1998 Act. Nor were any new offences created which could impact on the sales of tobacco products.⁷⁰

The Supreme Court also rejected the argument that sections 1 and 9 amended or affected anything set out in the two sets of Regulations.

⁶⁶ [*Imperial Tobacco Limited \(Appellant\) v The Lord Advocate \(Respondent\) \(Scotland\)* \[2012\] UKSC 61](#)

⁶⁷ *Ibid* paragraph 6

⁶⁸ *Ibid*

⁶⁹ *Ibid* paragraph 18

⁷⁰ *Ibid* paragraph 45

The Court saw no connection between the purpose and effect of section 1 and the law on reserved matters. No new offences were created in relation to sales and existing offences were not modified. Neither was section 1 a provision within the scope of the *Consumer Protection Act 1987*.⁷¹

There had been discussion in the Court of Session as to whether a different approach should be taken to the interpretation of the *Scotland Act 1998* from other statutes, because it was said to be constitutional. The Supreme Court agreed that the 1998 Act should be interpreted like any other statute. This echoed the position Lord Hope had set out in his judgement in *the Local Government Byelaws (Wales) Bill 2012* case.⁷²

In the judgment in *Imperial Tobacco*, Lord Hope commented that it was unsatisfactory that there should continue to be room for doubt on this matter.⁷³ He further set out the position on interpretation:

Third, the description of the Act as a constitutional statute cannot be taken, in itself, to be a guide to its interpretation. The statute must be interpreted like any other statute. But the purpose of the Act has informed the statutory language. Its concern must be taken to have been that the Scottish Parliament should be able to legislate effectively about matters that were intended to be devolved to it, while ensuring that there were adequate safeguards for those matters that were intended to be reserved. That purpose provides the context for any discussion about legislative competence. So it is proper to have regard to the purpose if help is needed as to what the words actually mean.⁷⁴

Lord Hope's statement on the interpretation of the devolution statutes has proved influential in the Supreme Court's subsequent case law on challenges to Bills in Wales. Professor Adam Tomkins, writing in February 2015, noted that in the decision of the Inner House of the Court of Session in *Imperial Tobacco v Lord Advocate*,⁷⁵ Lords Reed and Brodie emphasised that the *Scotland Act 1998* was "not a constitution".⁷⁶ For Tomkins, Lord Hope's endorsement of this position in this case marked a distinct change approach to the devolution statutes from that taken by Lord Bingham in the House of Lords case of *Robinson* [2002] (See section 2.2). In 2014, the Rt Hon. Lady Justice Arden, currently a judge in the Court of Appeal, criticised Lord Hope's approach:

... it is, with respect, unhelpful to say that devolution statutes must be interpreted like any other statute. That might be read as suggesting that devolution statutes are not regarded in law as having similar constitutional significance to federal constitutions or as attracting special principles of

⁷¹ Ibid paragraphs 44-45

⁷² [2012] UKSC 53

⁷³ *Imperial Tobacco Limited (Appellant) v The Lord Advocate (Respondent) (Scotland)* [2012] UKSC 61 paragraph 12

⁷⁴ Ibid paragraph 15

⁷⁵ [2012] CSIH 9, 2012 SC 297

⁷⁶ *Imperial Tobacco v Lord Advocate* [2012] CSIH 9, 2012 SC 297 paragraphs 71 and 181.

interpretation... the exclusion of wider principles of interpretation may impede the determination of future cases.⁷⁷

In the same article, Lady Justice Arden made the case for the courts to develop new principles to respond to the need to decide conflicts between central and devolved institutions.⁷⁸

4.5 *Salvesen v Riddell* [2013]⁷⁹

This case was a “devolution issue” appeal, under paragraph 13 of Schedule 6 of the *Scotland Act 1998*, from the Court of Session. The case concerned a challenge to the legality of section 72 of the *Agricultural Holdings (Scotland) Act 2003* on the basis that it was incompatible with the applicant’s right to property, as protected by Article 1 of the First Protocol of the European Convention of Human Rights (A1 P1). The legislation under scrutiny sought to reform the regulation of the relationship between agricultural tenants and landlords. Section 72 of the *Agricultural Holdings (Scotland) Act 2003* sought to change the way that limited partnerships between tenants and landlords could be terminated.

The case was heard before Lord Hope, Lord Kerr, Lord Wilson, Lord Reed and Lord Toulson. Lord Hope delivered the Court’s only judgment, with which the other four justices agreed.

The case is significant as it is the first time that the Supreme Court has held that primary legislation, enacted by any of the devolved legislatures is outside of competence.

Lord Hope

Lord Hope’s judgment focused on three questions:

- Was section 72 of the 2003 Act incompatible with A1 P1?
- If so, can the section be interpreted in such a way to make it Convention compatible?
- If not, what is the appropriate remedy?

On the first question, Lord Hope noted that the Lord Advocate accepted that section 72 did engage A1 P1. The section did so by restricting the landlord’s right to terminate a tenant’s lease. Lord Hope then considered the question of the proportionality of the interference by examining relevant jurisprudence of the European Court of Human Rights. The case establishes that the interference must pursue a “legitimate aim” and that there must be a proportionate relationship between the means used and the aims pursued. In evaluating these elements, Lord Hope examined the legislative steps leading to section 72, in order to determine the nature of the balance struck between the general interests of the community and the rights of the individual. Lord Hope noted that the remarks of the deputy minister during the debate on the Scottish Parliament were hostile to

⁷⁷ *Imperial Tobacco Limited (Appellant) v The Lord Advocate (Respondent) (Scotland)* [2012] UKSC 61 paragraph 204

⁷⁸ *Ibid* paragraph 192

⁷⁹ *Salvesen v Riddell and another, Lord Advocate intervening (Scotland)* [2013] UKSC 22

landlords, and that the remarks made by the deputy minister were not “irrelevant” to the evaluation of proportionality.⁸⁰ They were important for understanding the purpose of the legislation.

Lord Hope’s evaluation of the specific impact of section 72 was that it penalised a particular group of landlords in way which was “entirely arbitrary”.⁸¹ Lord Hope emphasised the difference in treatment between landlords affected by different provisions in the 2003 Act had no logical justification and was therefore unfair and disproportionate. Further, section 72 did not pursue an aim that was reasonably related to the aim of the Act taken as a whole, and as such it was incompatible with the right to property protected by A1 P1.

On the second question, Lord Hope referred to section 101(2) of the *Scotland Act 1998*, which requires a provision of an Act of the Scottish Parliament to be interpreted narrowly, if possible, so as to be within competence. This exercise, when concerned with a Convention right, should be performed, according to the Privy Council case of *DS v HM Advocate* [2007] UKPC, according to section 3 (1) of the *Human Rights Act 1998*. Lord Hope referred to the leading case on section 3 of the HRA 1998, *Ghaidan v Godin-Mendoza*,⁸² where Lord Nicholls of Birkenhead explained that such an interpretation must not against the grain of the underlying thrust of the legislation in question. Applying this principle Lord Hope explained that no interpretation of section 72 could be adopted that is compatible with the applicant’s rights to property protected by A1 P1 of the ECHR. Lord Hope added that the finding of incompatibility was restricted to sections 72 (10) (a) and 72 (10) (b), and that the applicant’s rights under A1 P1 were breached by just section 72 (10).

On the third question of the appropriate remedy, Lord Hope made an order, under section 102 (2) (b) of the *Scotland Act 1998*, to suspend the effect of the finding that section 72 (10) of the 2003 Act was outside of competence for 12 months (or such shorter period as necessary for the Scottish Parliament to legislate). This was to enable the Scottish Government and Parliament to correct the “defect” in the legislation. In 2014 the Scottish Government produced *The Agricultural Holdings (Scotland) Act 2003 Remedial Order 2014* in response to the judgment, which was approved by the Scottish Parliament. Lord Hope explained that decisions as to how incompatibility is to be corrected “must be left to the Parliament guided by the Scottish Ministers”.

⁸⁰ Ibid paragraph 39

⁸¹ Ibid paragraph 42

⁸² [2004] UKHL 30

4.6 *Agricultural Sector (Wales) Bill- Reference by the Attorney General for England and Wales* [2014]⁸³

This case was prompted by the Attorney General's reference to the Supreme Court of the question of whether the *Agricultural Sector (Wales) Bill* was within the National Assembly's legislative competence.

The *Agricultural Sector (Wales) Bill* sought to establish the Agricultural Advisory Panel for Wales, as a replacement for the Agricultural Wages Board, which had been abolished by the UK Parliament's *Enterprise and Regulatory Reform Act 2013*. The Assembly considered the Bill within competence by virtue of section 108 and Schedule 7 of the GOWA, which states that the Assembly can legislate in the areas of:

Agriculture. Horticulture. Forestry. Fisheries and fishing. Animal health and welfare. Plant health. Plant varieties and seeds.
Rural development.

The Attorney General argued that the Bill related to employment and industrial relations, which were not devolved, rather than agriculture.

Lord Reed and Lord Thomas gave a joint lead judgment, which ruled that the Bill was within competence, with which the other three Justices agreed.

Lord Reed and Lord Thomas

The two Justices began their judgment by noting that the proper interpretation of GOWA should be guided by the three principles identified by Lord Hope in his judgment in *Local Government Byelaws (Wales) Bill 2012 – Reference by the Attorney General for England and Wales* [2012] (see section 3.3 above).

In order to determine whether the Bill was within competence, Lords Thomas and Reed examined whether the Bill could be said to fall within the meaning of agriculture in the context of Schedule 7 of the GOWA. The meaning of agriculture, their judgment submits, is not set by a dictionary definition but rather by identifying the intention of Parliament in this specific context. They explain that in the legislative context, agriculture could not be taken to refer “to the cultivation of soil or the rearing of livestock”, but instead refers to the wider industry or economic activity of agriculture.⁸⁴

The Justices turned to consider whether the Bill “relates to” agriculture, as required by section 108 (4) (a) of the GOWA. Section 108 (7) of the GOWA the judgment points out, requires that whether a provision relates to a subject to be “determined by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances”.⁸⁵ The judgment referred back to

⁸³ *Agricultural Sector (Wales) Bill – Reference by the Attorney General for England and Wales* [2014] UKSC 43

⁸⁴ *Ibid* paragraph 49

⁸⁵ *Ibid* paragraph 50

Martin v Most [2010], which stated that “relates to” means “more than a loose or consequential connection”.⁸⁶ After analysing the legislative background to the provision, and with particular reference to the Welsh Government’s consultation document *The Future of the Agricultural Wages Board*, their Lordships concluded that the Bill should be classified as relating to agriculture, largely as the Bill aims to support and protect the agricultural industry in Wales.⁸⁷

In response to the Attorney General’s argument that the Bill related to “employment” and “industrial relations”, neither of which were devolved, Lords Reed and Thomas pointed out they were not specified as exceptions to competence in Schedule 7 of the GOWA.⁸⁸ Other aspects of employment are referred to as exceptions in Schedule 7, which they explained suggests that “there was no intention to create a more general limitation on legislative competence”.⁸⁹

This raised the question of whether a Bill’s engagement with subjects, which were neither explicitly within nor outside competence, could render the Bill outside competence. The Justices rejected the Attorney General’s argument that the Bill’s engagement with subjects that were not explicitly devolved rendered the Bill outside the legislative competence of the National Assembly. This was because the subject heading “agriculture” included some exceptions, and these did not cover the employment matters in the Bill:

Where however there is no exception, as in the present case, the legislative competence is to be determined in the manner set out in section 108. Provided that the Bill fairly and realistically satisfies the test set out in section 108(4) and (7) and is not within an exception, it does not matter whether in principle it might also be capable of being classified as relating to a subject which has not been devolved. The legislation does not require that a provision should only be capable of being characterised as relating to a devolved subject.⁹⁰

The Attorney General’s argument was problematic, according to Lords Reed and Thomas, as it required the Court to add to the exceptions specified in Schedule 7 of the 2006 Act. Such an approach would “give rise to an uncertain scheme that was neither stable nor workable”.⁹¹ They explained that the Assembly could legislate for subjects not specified as exemptions, known as the “silent subjects”,⁹² as long as the Bill’s main purpose was within one or more of the subjects conferred upon the Assembly.

This judgment has had profound consequences for devolution in Wales. According to Ann Sherlock, senior lecturer in law at Aberystwith University, the ruling was “a very significant clarification”

⁸⁶ Ibid

⁸⁷ Ibid paragraph 54

⁸⁸ Ibid paragraph 59

⁸⁹ Ibid

⁹⁰ Ibid para 67

⁹¹ Ibid para 68

⁹² See for example Wales Governance Centre ‘Challenge and Opportunity: The Draft Wales Bill 2015’ (2016) p22

of the Welsh Assembly's competence.⁹³ The judgment has influenced how the Welsh Government and the National Assembly understand their legislative competence under the GOWA in their day-to-day work. Further, it has informed the Government's proposals on reforming devolution legislation in Wales.

The aims behind the Wales Bill, introduced to the House of Commons in June 2016, to provide a more certain, robust and lasting devolution settlement, also reflect a desire to reduce the potential involvement of the Supreme Court in deciding the boundaries of devolution in Wales.⁹⁴

4.7 *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill – Reference by the Counsel General for Wales [2015]*⁹⁵

This case concerned a challenge to the legality of an Assembly Bill that sought to impose new liabilities on compensators and liability insurers for victims of asbestos-related diseases. *The Recovery of Medical Costs for Asbestos Diseases (Wales) Bill*, which was a private members bill, was intended to make employers and insurers liable for the costs of medical treatment for those suffering from certain industrial diseases. It was the first time a Bill was referred to the Supreme Court by the Counsel General for Wales, the Welsh Government's chief legal adviser. It was referred, even though he argued that the Bill was within competence, because he anticipated that the legality of the Bill would be challenged through judicial review by the private parties affected after it was enacted.⁹⁶ It was in the interest of the Welsh Government and Assembly to have its legislation reviewed in order to provide a degree of legal certainty, even if neither believed that the Bill was actually outside of competence.

The case is notable as it was the first time that their Lordships found a Bill from a devolved legislature, approved but not yet enacted, to be outside of the Assembly's competence. Their Lordships were split on the questions raised, with Lord Mance, who gave the majority judgment, Lord Neuberger and Lord Hodge agreeing that the Bill was outside competence. Lord Thomas and Lady Hale dissented.

The central questions of competence considered were: whether sections 2, 14 and 15 of the Bill related to "organisation and funding of the national health service" as required by section 108 (4) of the GOWA; and whether the same sections infringed the right to property in Article 1 of Protocol No 1 of the European Convention of Human

⁹³ A Sherlock, 'The Continuing Development of Devolution in Wales', *European Public Law* (2015) p433

⁹⁴ See HC Library Briefing, [Wales Bill 2016-2017](#) CBP 7617

⁹⁵ *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill, Re Supreme Court* [2015] UKSC 3

⁹⁶ A Tomkins '[Confusion and Retreat: the Supreme Court on Devolution](#)' UKCLA Blog (19 February 2015)

Rights (A1 P1), which it must respect according to sections 108 (6) and 158 (1) of the GOWA.

The majority

Lord Mance's majority judgment examined whether the Bill's imposition of statutory liability on compensators and insurers would be covered by the phrase "organisation and funding of the National Health Service", which is the subject specified by the GOWA as a subject which the Assembly can legislate upon.⁹⁷ Lord Mance submitted that he would assume for the purposes of assessing competence that paragraph 9 of part 1 of Schedule 7 was capable of raising funds, even if the subject does not, in his view, amount to a general power to raise funds.

Another factor relevant for deciding the legality of the Bill was to determine the proper interpretation of section 108(7) of the GOWA, which stated that the Assembly could legislate for subjects which "relates to" one or more subjects listed in part 1 of Schedule 7.

Lord Mance's interpretation of "relates to" relied upon Lord Walker's analysis in the Supreme Court case of *Martin v Most* [2010], where he described the phrase as requiring "more than a loose or consequential connection".⁹⁸ This was also endorsed by Lord Hope in *Imperial Tobacco* [2012].⁹⁹

Lord Mance noted that in *Agricultural Wages*, the Supreme Court added, in the Welsh context, that section 108 (7) necessitated some evaluation of the purpose of the provision beyond the objective meaning of the words.¹⁰⁰ In the light of these authorities, Lord Mance explained that any charges permissible under paragraph 9 would have "to be more directly connected with the service and its funding".¹⁰¹

The alleged wrongdoing of those responsible for the medical conditions amounted to what Lord Mance described to be "at best an indirect, loose or consequential connection".¹⁰² The words "organisation and funding of the national health service" could not have been drafted and enacted to enable the "rewriting of the law of tort and breach of statutory duty".¹⁰³ Section 2 was therefore outwith competence.

Lord Mance argued that even if section 2 was within competence, section 14 would be outside of competence.¹⁰⁴ Lord Mance explained that section 14 was not "incidental or consequential", as set out by section 108 (5) of the GOWA, to section 2. Again reference was made to *Martin v Most*, where Lord Rodger referred to changes to the

⁹⁷ *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill, Re Supreme Court* [2015] UKSC 3 paragraph 13

⁹⁸ *Ibid* paragraph 25

⁹⁹ *Ibid*

¹⁰⁰ *Ibid* paragraph 50

¹⁰¹ *Ibid* paragraph 27

¹⁰² *Ibid* paragraph 27

¹⁰³ *Ibid*

¹⁰⁴ *Ibid* paragraph 29

law that are “necessary” but do not give rise to a separate issue of principle. This analysis was referred to in the Welsh context in *Attorney General* [2012]. Lord Mance argued that section raised separate issues of principles and therefore was not “incidental or consequential”.¹⁰⁵

Lord Mance then turned to consider, even though it was not necessary, whether the Bill was incompatible with the *Human Rights Act 1998*, as required by section 108 (6) (c) of the GOWA. Lord Mance explains that the Bill engages the right to property, A1 P1 of the ECHR, by altering the legal liabilities and imposing financial burdens arising from events “long-past”. In other words the burdens were to be imposed retrospectively. Lord Mance explained that the Bill’s compliance with the right depends upon the four stage test outlined by Lord Reed in *Bank Mellat*.¹⁰⁶

- 1 whether the legislation pursuing a legitimate aim which could justify restricting the right;
- 2 whether the measures adopted rationally connected to that aim;
- 3 whether the aim be achieved by a less intrusive measure;
- 4 whether the benefits of the measures outweigh the disbenefits of infringing the right.¹⁰⁷

After reviewing the ECtHR’s jurisprudence, Lord Mance submitted that in carrying out the assessment, “significant respect may be due to the legislature’s decision”, but that the threshold would be lower than the level of “manifest unreasonableness”.¹⁰⁸ Lord Mance noted that the Court was well placed to take into account relevant private interests, which may not have been taken into account by the legislature.¹⁰⁹

Lord Mance pointed out that the Supreme Court is not under the same disadvantages of physical and cultural distance as an international court. Comparison was made with *AXA* (see Section 4.2), where the Supreme Court found legislation, imposing retrospective liabilities for causing asbestos-related diseases, to be compatible with A1 P1. Lord Mance argued that this Bill was different. In particular the fact that it sought to rewrite historically incurred obligations to cover costs for the Welsh NHS, which required special justification under the ECHR. The lack of this justification meant the Bill was outwith competence due to its incompatibility with A1P1 of the ECHR.

On the level of deference due to the Assembly, Lord Mance appeared to criticise the Assembly’s evaluation of the retrospectivity of the Bill.¹¹⁰ However, he stated that he would arrived at the same

¹⁰⁵ Ibid

¹⁰⁶ *Bank Mellat v Her Majesty’s Treasury (No 2)* [2013] UKSC 39

¹⁰⁷ *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill, Re Supreme Court* [2015] UKSC 3 paragraph 45

¹⁰⁸ Ibid paragraph 52

¹⁰⁹ Ibid

¹¹⁰ Ibid paragraph 69

conclusion on competence even if the Assembly's scrutiny had evaluated all the relevant factors.¹¹¹

The minority

Lord Thomas' dissent, with which Lady Hale agreed, approached the central questions of interpreting the devolution statutes differently from Lord Mance. Firstly, Lord Thomas took a broader view of what was possible under para 9 of part 1 of Schedule 7. On this broader view, the purposes of the Bill were within the competence of Welsh Assembly.¹¹² Lord Thomas outlined that the Assembly could enact legislation to charge employees for treatment on the Welsh NHS, and as consequence, he could see no objection to the Bill's procedures, which sought to impose such charges upon employers.¹¹³ He concluded that section 2 was within the competence.

On the question of the right to property, Lord Thomas agreed with Lord Mance that the Bill had a retrospective element which engaged A1 P1.¹¹⁴ On the question of the legitimate aim of the Bill, Lord Thomas said that the aim of making the employer pay for the costs of treatment for the Welsh NHS is something which the Assembly "as a democratically elected legislature" is able to do.¹¹⁵ Lord Thomas emphasised, with reference to *AXA*, that the degree of deference due to the Assembly as a democratically elected legislature in making the assessment:

The judicial branch of the state should not therefore question the first and central aim of the Bill, as there are manifestly reasonable grounds for reaching the view which the Welsh Assembly has reached.¹¹⁶

On the question of proportionality, the point on the deference to the legislature was re-emphasised. Lord Thomas said that Lord Mance's judgment on proportionality did not give sufficient weight to the Assembly's status as the democratically elected legislature,¹¹⁷ which was especially significant in relation to issues concerning social and economic policy. This was a point made by the Court in *AXA*.¹¹⁸ Lord Thomas added that the Scottish and Welsh legislatures undertake the same exercise as the UK Parliament in enacting primary legislation, and should be given the same weight.¹¹⁹ As such section 2 was proportionate and was not outwith competence.¹²⁰ He disagreed with Lord Mance that reference should be made to the reports and debate of the Welsh Assembly, which he noted would give rise to "considerable constitutional dangers".¹²¹

¹¹¹ Ibid paragraph 67

¹¹² Ibid paragraph 98

¹¹³ Ibid paragraphs 100-102

¹¹⁴ Ibid paragraphs 103-104

¹¹⁵ Ibid paragraph 107

¹¹⁶ Ibid paragraph 108

¹¹⁷ Ibid paragraph 118

¹¹⁸ Ibid paragraph 131

¹¹⁹ Ibid paragraph 120

¹²⁰ Ibid paragraphs 124-125

¹²¹ Ibid paragraph 126

Lord Thomas agreed with Lord Mance that section 14 of the Bill extended liability further than section 2 to cover the employer's liability insurance policy, and as such was outwith what was permissible under section 108 (5) (a) and (b) of the GOWA.¹²² For the same reason, the section's extension of the liability of insurers beyond what was required, Lord Thomas submitted that the section also infringed A1 P1.¹²³

The majority's ruling that the Bill was beyond the competence of the Welsh Assembly has generated some critical commentary, particularly on those matters which were subject to "serious disagreements" between Lord Mance and Lord Thomas.¹²⁴

Professor Adam Tomkins criticised Lord Mance's statement that the meaning of "relates to" in the context of the *Scotland Act 1998* can be applied in the context of the GOWA. Tomkins points out that interpreting "relates to" so as to mean "more than a loose or consequential provision" provides a generous scope of competence in the Scottish context. This is because under the reserved model it means that an Act of the Scottish Parliament will have to be closely connected to a reserved matter for it be held beyond its competence. By contrast in the context of the conferred model in Wales, such a reading of "relates to" would narrow the competence of the Assembly.¹²⁵ Tomkins argued that this view of "relates to" informed Mance's analysis that the Welsh Assembly's Bill was "at best only loosely connected" to the relevant subject matter.

Lord Mance's level of deference accorded to the Assembly's constitutional position has been criticised by legal academics. Professor Rick Rawlings, of University College London, and Tomkins drew attention to the contrast between Lord Thomas, who emphasised that the Welsh Assembly should be treated in the same way as the UK Parliament, and Lord Mance who appeared to draw a distinction based on the fact that Article 9 of the Bill of Rights does not apply to the devolved legislatures. Rawlings intimated that this means that less judicial deference should be afforded to Cardiff Bay than to Westminster. For Rawlings this amounted to a "backward-looking approach" that he characterised as "unionist folly".¹²⁶ Tomkins also noted that Mance's approach to deference was very different to that taken by Lord Hope in *AXA*, and this leads him to the conclusion that "something has gone awry" with the Supreme Court's devolution jurisprudence.¹²⁷

¹²² Ibid paragraph 133

¹²³ Ibid paragraph 139

¹²⁴ R Rawlings "Riders on the Storm: Wales, the Union, and the Territorial Constitutional Crisis" *Journal of Law and Society* (2015) 471, 482

¹²⁵ A Tomkins '[Confusion and Retreat: the Supreme Court on Devolution](#)' UKCLA Blog (19 February 2015)

¹²⁶ R Rawlings "Riders on the Storm: Wales, the Union, and the Territorial Constitutional Crisis" *Journal of Law and Society* (2015) 471, 483

¹²⁷ A Tomkins '[Confusion and Retreat: the Supreme Court on Devolution](#)' UKCLA Blog (19 February 2015)

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