

Legal Wales 2012

The Supreme Court in the UK Constitution

Rt Hon the Baroness Hale of Richmond

Justice of The Supreme Court

12 October 2012

I swear that it was not a put-up job, that I should be talking to you this morning about the role of the Supreme Court in the Constitution of the United Kingdom in the very week when the Court has heard the first challenge to an Act of the Welsh Assembly. Fortunately, I was not on the panel which heard the case, so you can draw no conclusions about the outcome from anything which I may later say about it.

Constitutional adjudication is a new animal for us. The House of Lords did not do it, except occasionally in a case from Northern Ireland raising questions under the Government of Ireland Act 1920 before direct rule took over in the 1970s. But of course the Law Lords also sat in the Judicial Committee of the Privy Council, which did from time to time have to decide constitutional questions from the Commonwealth. While federations such as Canada and Australia still brought appeals to the Privy Council, there were some cases about the distribution of powers between the federal and provincial Parliaments. But in recent years the Privy Council cases have been about whether the acts of the national Parliament or Government of a comparatively small country were compatible with their Constitution. All of the Commonwealth countries which retain the Privy Council as their final court of appeal do, of course, have a written Constitution, often one which was written for them by the United Kingdom and on the Westminster rather than the Washington model.

These cases can be fascinating. In one case from Jamaica, for example, we had to decide whether it was constitutional for the Jamaican Parliament to legislate by ordinary Act of Parliament to do away with the right of appeal to the Privy Council and substitute a right of appeal to the Caribbean Court of Justice¹. The right of appeal to the Privy Council was not entrenched in the Jamaican Constitution, so at first sight the answer seemed obvious. But the structure of the higher courts in Jamaica, including the independence of their judiciary, was entrenched. So, the argument ran, how can it possibly be consistent with the Constitution to provide for a court which had none of the constitutional protection of those courts to be able to overturn their decisions? Such a change could only be made by a constitutional amendment with the required special majority. Somewhat to our surprise, we accepted that argument. The result is that we are still the final court of appeal in both Jamaica and Trinidad and Tobago. There is a move in both countries to replace us with the Caribbean Court of Justice, but at present they do not have the required majorities. We would, of course, be sorry to see them go, but it is a matter for them and not for us.

Another striking example came from Mauritius, although in the end it was something of a damp squib². Mauritius has one of the most complicated electoral systems imaginable. It was carefully designed to ensure that each community - Hindu, Muslim, Chinese and the rest, in practice the Christian creoles – was represented roughly in proportion to their share of the population, but at the same time to produce a clear majority in Parliament so that a Government could be formed. This meant departing from ‘one man, one vote’. It

¹ *Independent Jamaica Council for Human Rights (1998) Ltd & Ors v Marshall-Burnett & Anor (Jamaica)* [2005] UKPC 3, [2005] 2 AC 356.

² *Dany Sylvie Marie and Dhojaven Vencadsamy and others v The Electoral Commissioner, The Electoral Supervisory Commission and The State of Mauritius* [2011] UKPC 45.

also meant that candidates had to declare to which community they belonged. Some people were reluctant to do this, either because they had no religion or did not want to associate themselves with any of the communities. They objected to the residual 'other' category because in practice it was understood to mean the creoles. So they argued that the electoral system, which was set up in the Constitution itself, was inconsistent with the first section of the Mauritian Constitution, which declares Mauritius to be a 'sovereign democratic State'. Does democracy demand one man one vote? After hearing some fascinating argument, however, we declined to decide the question on procedural grounds.

I mention these cases because they are good examples of what constitutional adjudication under the United Kingdom constitution is not. We are not concerned with whether Acts of the UK Parliament or Government are compatible with the UK Constitution, because we do not have one written down. We *are* concerned with whether those Acts are compatible either with European Union law or with the European Convention on Human Rights. But that is because the UK Parliament has told us so. No referendum or special majority would be required for Parliament to take those powers away from us.

However, as every Law student knows, we have had one case in which we did have to grapple with whether an Act of the UK Parliament was a valid Act of Parliament. I mention it only because there are clear echoes of it in a recent devolution case from Scotland. I refer, of course, to *R (Jackson) v Attorney-General*³ which concerned the validity of the Hunting Act 2004. The first curiosity was that the whole saga had involved

³ [2005] UKHL 56, [2006] 1 AC 262.

a bitter battle between the House of Lords and the House of Commons. The challenge was directed, not to the contents of the Bill, but to the manner of its passing. How could nine members of the House of Lords decide this? Were they not being judges in their own cause? Luckily, no-one took the point. Perhaps, as promoters of the Constitutional Reform Act 2005, setting up the new Supreme Court, the Government were glad of a cast-iron demonstration of how necessary it was to separate us from Parliament.

The challenge resurrected an old argument about whether the Parliament Act 1949 could validly amend the Parliament Act 1911 and whether, therefore, Bills passed under the amended procedure were valid. Section 2 of the 1911 Act provided that if a Bill passed through the Commons in three successive sessions, and was rejected three times by the Lords, it would be presented to the King and become an Act of Parliament on receiving the royal assent, so long as two years had elapsed between its second reading in the first of those three sessions and the date of its passing the Commons in the third. This did not apply to a Bill to prolong the life of a Parliament beyond five years. Part of the package was to reduce the maximum length of Parliament between elections from seven to five years. A Bill would have to start its progress in the Commons quite soon after a general election if it was to get through under the new procedure, so the Government would still have a democratic mandate.

The 1949 Act reduced the timetable in the 1911 Act from three sessions to two and the delay from two years to one. It was passed under the 1911 Act procedure. So the argument was that 1911 Act had delegated the power of Parliament as lawfully constituted – King, Lords and Commons – to the King and Commons alone. Legislation passed by the modified body was delegated rather than primary legislation. It is a general

principle that a delegate cannot use his delegated powers to enlarge those powers unless expressly authorised to do so. He cannot pull himself up by his own bootstraps.

None of us had much difficulty in rejecting that argument. The 1911 Act was not delegating power. It was creating a new way of passing Acts of Parliament. The language was quite explicit: Bills passed under that procedure would become Acts of Parliament. The legislature had redefined itself. A distinction has to be drawn, as Lord Steyn put it, between what Parliament can do by legislation and what Parliament has to do to legislate.

The other question is whether there are any limits to what can be done under the Parliament Act procedure. A very strong Court of Appeal (Lord Woolf, then Lord Chief Justice, Lord Phillips of Worth Matravers, then Master of the Rolls, and Lord Justice May) thought that it would not be possible to make fundamental constitutional changes to the relationship between Lords and Commons, such as abolishing the House of Lords, using the Parliament Act procedure⁴. None of us agreed with that. After all, the Parliament Act 1911 had been passed in order to do two very fundamental and very controversial things – to establish home rule for Ireland and to disestablish the Church in Wales. But most of us (apart from Lord Bingham) thought that the prohibition on using it to prolong the life of a Parliament could not be got round by using two Bills – one to amend the Parliament Act and then one to extend the life of Parliament. An Act designed to reinforce democracy by preventing the unelected House from thwarting the will of the electorate ought not to be used to enable the elected House to do so.

⁴ *R (Jackson) and Ors v HM Attorney General* [2005] EWCA Civ 126, [2005] QB 579.

Lord Steyn thought that there might be other limits to what Parliament can legislate about:

‘In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish.’⁵

And Lord Hope was prepared to say that:

‘The rule of law enforced by the courts is the ultimate controlling factor upon which our constitution is based. The fact that your Lordships have been willing to hear this appeal and give judgment upon it is another indication that the courts have a part to play in defining the limits of Parliamentary sovereignty.’⁶

Later on, Lord Hope appeared to accept that there might be other implied limits on the use of the Parliament Act, as did Lord Carswell, but not the one which the appellants proposed. Lord Bingham later commented, in his book on the rule of law, that there was no authority for these propositions, which he regarded as heretical.

So, at last, to devolution. Under the modern arrangements which began in 1998, devolution issues are about whether the acts of the national Parliaments and

⁵ At [102].

⁶ At [107].

governments of Scotland, Wales and Northern Ireland are within the scope of the powers which the UK Parliament has given them. Such issues were at first given to the Judicial Committee of the Privy Council because it was thought they would mostly involve demarcation disputes between the UK and the national Parliaments. It would not be right for members of the UK Parliament to adjudicate. This was, Lord Bingham thought, one of the reasons for setting up a Supreme Court for the United Kingdom, separate from the United Kingdom legislature. Since 2009, therefore, they have come to us in the Supreme Court, rather than to us in the Privy Council (we do try and keep the branding separate, even though we now share a building and administration: we have, for example, a Privy Council rug, which covers up the Supreme Court symbol on the carpet in the court room). In fact, demarcation disputes of the kind contemplated have only recently begun to reach us. The devolution issues which have reached us fall into three broad categories.

The first and much the most numerous is incompatibility with human rights. The devolved Parliaments and Governments are not empowered to act incompatibly with the Convention rights. This sort of challenge will normally arise in a real, concrete case. Some-one will say that his Convention rights have been violated as a result of the acts of, say, the Scottish Parliament or the Scottish Ministers. If such a case arises in Wales or Northern Ireland, it would come up to us by the usual appellate route. We have not, so far, had any case challenging the Acts (as opposed to the inaction) of the Welsh or Northern Ireland Assemblies on this ground. But we have, of course, had cases challenging the compatibility of existing laws with the Convention rights. Perhaps the best-known example was the ban on joint adoptions by unmarried couples, which

persisted in Northern Ireland after being abolished in England and Wales and Scotland.⁷ The Northern Ireland Government knew that it ought to do something about it, but found it politically very difficult to do so. We held that the blanket ban (such a common phrase in Convention jurisprudence) was unjustifiably discriminatory, so the couple had to be allowed to present their joint application.

As I say, that case came up to the House of Lords on appeal from the Court of Appeal in Northern Ireland. The same is true of civil cases from Scotland, where there is an unrestricted right of appeal to the Supreme Court. So, for example, we held that the restricted rights of unmarried fathers to take part in children's hearings were incompatible with their Convention rights.⁸ But the same is not true of criminal cases from Scotland. The Acts of Union of 1707 (if you are Scottish) or 1706 (if you are English)⁹ did not affect the right of Scottish litigants to petition the House of Lords in civil matters but at that time there was no such right in criminal cases. The English and Welsh were eventually given one by statute but the Scots were not. So in ordinary circumstances we have no jurisdiction over the criminal law and procedure of Scotland. Then came devolution and the Privy Council now had power to rule upon whether acts of the Scottish Ministers and Parliament in the field of criminal law were compatible with the Convention rights. This has, to say the least, proved controversial in Scotland.

⁷ *In re P and Ors (Northern Ireland)* [2008] UKHL 38, [2009] 1 AC 173.

⁸ *Principal Reporter v K and others (Scotland)* [2010] UKSC 56, [2011] 1 WLR 18.

⁹ The Scottish Parliament in fact passed the Union with England Act before the English Parliament passed the Union with Scotland Act, but the Scots had already adopted the Gregorian calendar in which the new year began in January. Both Acts came into force on 1 May 1707.

The Convention rights are, by and large, not concerned with the content of the substantive criminal law, so we have not had cases about that. The cases have concerned criminal procedure and evidence. Mostly they have attacked, not an Act of the Scottish Parliament, but the conduct of a prosecution by the Lord Advocate. Sometimes they have challenged long-established aspects of Scottish criminal procedure, such as the practice of not disclosing initial police statements and other information to the defence.¹⁰

The most notorious, however, is the case of *Cadder v HM Advocate*¹¹. Under the Criminal Procedure (Scotland) Act 1995 (an Act of the UK Parliament), the police have power to detain a suspect for up to six hours. Suspects can be questioned and must be cautioned beforehand. They are entitled to have a solicitor informed of their detention but the Act gives them no right to have the solicitor present while they are questioned. The Grand Chamber of the European Court of Human Rights, in *Salduz v Turkey*,¹² had held that questioning detained suspects without access to a lawyer was a violation of article 6(1) and (3)(c) of the Convention. The Scottish High Court of Justiciary (sitting with seven judges) had held, in *HM Advocate v McLean*,¹³ that this was not a violation because the other guarantees in Scottish criminal procedure were enough to provide for a fair trial. The Supreme Court in *Cadder*, also sitting with seven judges including Lord Hope and Lord Rodger, unanimously held that there was a violation. *McLean* did not address the Strasbourg court's concern, which was with self-incrimination. There was 'not the

¹⁰ Examples are *McInnes v HM Advocate*¹⁰, where the appeal was dismissed, and *Fraser v HM Advocate*¹⁰, where the appeal was allowed, to considerable consternation in Scotland.

¹¹ [2010] UKSC 43, [2010] 1 WLR 2601.

¹² (2008) 49 EHRR 421.

¹³ [2009] HCJ 97.

remotest chance' that Strasbourg would hold that the safeguard of access to legal advice before questioning could be omitted in the light of the other safeguards of Scottish law¹⁴.

It was otherwise with the next case, *Ambrose v Harris*.¹⁵ This raised the question of whether *Cadder* applied to police questioning before the suspect had been taken into police custody. Mr Ambrose, for example, had been questioned at the road side for suspected drink-driving. This time the High Court of Justiciary itself referred the case to the Supreme Court. It raised the difficult issue of what we should do with a question that the Strasbourg court has not yet decided. Is it, as Lord Bingham famously said in *R (Ullah) v Special Adjudicator*,¹⁶ to keep pace with the Strasbourg jurisprudence as it evolves over time, 'no more but certainly no less'? Does this also mean, as Lord Brown said in *R (Al-Skeini) v Secretary of State for Defence*,¹⁷ 'no less, but certainly no more'? It is one thing to do this where we think that Strasbourg has clearly drawn a line in the sand, as we did in *Al-Skeini* (wrongly, as it turned out later).¹⁸ It is another thing entirely to do so when Strasbourg has not had occasion to consider the issue. There are a great many questions which Strasbourg has not yet decided. So the alternative view is that we should make up our own minds, consistently with the principles underlying the Convention jurisprudence.¹⁹

¹⁴ At [93].

¹⁵ [2011] UKSC 43, [2011] 1 WLR 2435.

¹⁶ [2004] UKHL 26, [2004] 2 AC 323.

¹⁷ [2007] UKHL 26, [2008] AC 153.

¹⁸ *Al-Skeini and others and Al-Jedda v United Kingdom* – 55721/07 [2010] ECHR 858.

¹⁹ See, eg, Lord Irvine of Lairg, 'A British Interpretation of Convention Rights', Speech given on 14 December 2011 for the Bingham Centre on the Rule of Law, hosted by the Judicial Institute of University College. London.

In *Ambrose*, Lord Hope (and Lord Matthew Clarke, brought in ad hoc from Scotland after the death of Lord Rodger) took the more cautious line and Lord Brown and Lord Dyson reached the same result. Lord Kerr, on the other hand, took the alternative view and would have held the pre-arrest questioning to be inadmissible in all three cases.

These cases may have come before us as devolution issues from Scotland, but in reality they are no different from any other adjudication challenging the acts of a public authority under the Human Rights Act. Where an act of the executive is in question, the devolution context will probably make no difference. But it might well make a difference where an Act of the Scottish Parliament or the Welsh or Northern Ireland Assemblies is challenged. As it happens, just as the first Act of the Welsh Assembly has been challenged (although for different reasons and under a different procedure), the first Act of the Scottish Parliament was challenged for incompatibility with the Convention rights.

The Scottish Parliament was formally opened on 1 July 1999 and met to conduct business for the first time on 1 September. The Mental Health (Public Safety and Appeals) Bill was introduced on 31 August and passed so swiftly through the Parliament that it received the Royal Assent on 13 September. The Act required a sheriff hearing an appeal from a restricted hospital order patient who wished to be discharged from hospital (and the Secretary of State considering whether to discharge a restricted patient) to refuse the appeal if satisfied that the patient was then suffering from a mental disorder 'the effect of which is such that it is necessary, in order to protect the public from serious harm, that the patient continue to be detained in a hospital, whether for medical

treatment or not'. In *Anderson v HM Advocate*²⁰, three patients argued unsuccessfully that it was incompatible with their right to liberty under article 5(1) of the Convention to require a person to be detained in hospital on account of his mental disorder when there was nothing that the hospital could do for him. In the High Court of Justiciary, Lord President Rodger (not yet a Law Lord) prefaced his discussion with some remarks about the general approach which the courts should take to such challenges²¹. The whole Convention was about striking a fair balance between the interests of the community and the fundamental rights of the individual. In deciding whether the Scottish Parliament had struck a fair balance between the need to protect the public from serious harm and the patients' right to liberty, 'it is right that the court should give due deference to the assessment which the democratically elected legislature has made of the policy issues involved'. Lord Bingham later took the same approach to the justifications for banning hunting with hounds²² and political advertising in the broadcast media.²³

So human rights challenges are the first and by far the most numerous of the devolution issues that have come up so far. But there are other reasons why an Act of the Scottish Parliament or Welsh or Northern Ireland Assemblies may be outside their legislative competence as defined in the Scotland Act, the Government of Wales Act or the Northern Ireland Act. This is the second category of devolution issue. Under the

²⁰ *Anderson, Doherty and Reid v The Scottish Ministers and the Advocate General for Scotland* [2002] UKHRR 1.

²¹ [2000] UKHRR 439.

²² *R (on the application of the Countryside Alliance and others) v Attorney General and Anor* [2007] UKHL 52, [2007] 1 AC 719.

²³ *R (on the application of Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15, [2008] 1 AC 1312.

Scotland Act, everything which is not reserved is devolved. But of course this can lead to tricky questions of overlap or demarcation.

*Martin v Most*²⁴ concerned provisions in the Criminal Proceedings etc (Reform) (Scotland) Act 2007. The object of these was to relieve pressure on the higher courts by increasing the sentencing powers of Sheriffs hearing cases summarily from six to 12 months' imprisonment. This was done across the board for all offences, some common law, some falling within non-reserved areas and some falling within reserved areas. In particular, road traffic is a reserved area. The UK Road Traffic Act provided that the penalty for driving while disqualified was up to six months if tried summarily and up to 12 months if tried on indictment. So the effect of the 2007 Scottish Act was to increase the maximum penalty for the offence laid down in a UK Act of Parliament on summary conviction. Was that within the powers of the Scottish Parliament? Three Justices thought yes and two thought no, with a Scot in each camp.

Aside from human rights, there are two main reasons why an Act maybe outside the legislative competence of the Scottish Parliament. One is that it 'relates to reserved matters' (Scotland Act 1998, s 29(2)(b)). This is to be determined by reference to its purpose, having regard to (among other things) its effect in all the circumstances (s 29(3)). All the Justices thought that the Scottish Act did *not* relate to a reserved matter. Its purpose was to relieve the pressure on the higher courts in all kinds of criminal cases, not only or even mainly in those relating to reserved matters. But another reason why a provision might be outwith legislative competence is that it is 'in breach of the restrictions in schedule 4' of the Act (s 29(2)(d)). One of those restrictions is that an Act

²⁴ [2010] UKSC 10, 2010 SLT 412.

of the Scottish Parliament cannot modify the law, including the common law, on reserved matters (Schedule 4, para 2(1)). This only applies to a rule of Scots private or criminal law insofar as it is 'special to' the reserved matter (para 2(3)). Lord Hope thought that the rule of Scottish law being modified was the rule of procedure and this was not 'special to' the reserved matter of road traffic. Lord Walker and Lord Brown reached the same conclusion. Lord Rodger thought that the rule of Scottish criminal law being modified was the rule about the maximum sentence on summary conviction for driving whilst disqualified. This in his view was clearly 'special to' the reserved matter of road traffic. As Chris Himsworth has commented²⁵ he 'pulled no punches' in his criticism of the majority's reasoning. He talks of Lord Hope's 'assertions' and 'unstated reasons'; of 'eagerly awaiting' Lord Walker's conclusion; and of his great friend Lord Brown's 'having bowed politely in the general direction of the argument but then resting his conclusion on simple assertion'.

Chris Himsworth drily comments that 'it is evident that the conditions for measured engagement with the issues were simply not present in *Martin*'. Several questions were unanswered, which are also relevant to devolution issues more generally:

(i) Do the general rules of statutory construction, such as that penal statutes are to construed strictly against the Crown apply to this sort of exercise?

(ii) Is there room, in the interpretation of the powers of a Parliament, for a starting generosity of approach towards those powers?

²⁵ 'Nothing Special about that? *Martin v HM Advocate* in the Supreme Court' [2010] Edin L.R. 487.

(iii) Allied to that, should the approach be akin to that of the Privy Council in cases under the British North America Act, of looking for the ‘pith and substance;’ of the challenged measure rather than its incidental effects?

That was the approach adopted by the House of Lords in *Gallagher v Lyon*,²⁶ when considering whether an Act of the Parliament of Northern Ireland which regulated the sale of milk within the Province was outside its power to ‘make laws for the peace, order and good government of Northern Ireland’ because it fell within the exception made for trade with any place outside their jurisdiction. If, said Lord Atkin, ‘on a view of the statute as a whole, you find that the substance of legislation is within the express powers, then it is not invalidated if, incidentally it affects matters which are outside the authorised field’. The true nature and character, or ‘pith and substance’ of this legislation was to protect the health of the inhabitants of Northern Ireland. It was not intended to prohibit trade with the Republic. The fact that it had a devastating effect upon the cross-border trade with dairy farmers in Donegal was incidental.

Lord Hope made reference to this principle in *Martin*. Lord Walker was more sceptical, I think because he drew a distinction between cases dealing with compatibility with the Constitution and cases dealing with demarcation between federal and devolved legislatures. In any event, all the Justices thought that the Act, in itself, did not ‘relate to’ a reserved matter.

(iv) How relevant to the assessment of competence is the decision-making process which may – or may not – have gone on between the UK and Scottish governments leading up

²⁶ [1937] AC 863.

to the legislation? Lord Rodger discussed this at some length, no doubt drawing in his experience as Lord Advocate before devolution, and possibly revealing his irritation that the matter in hand had not been resolved in a similar way. But, come devolution, is that relevant?

Lord Rodger might have felt the same about this week's case, *HM Attorney-General v National Assembly of Wales*.²⁷ It comes before the Court, not in a concrete case, but as pure constitutional review along continental lines. This is, as far as I know, the first case in which this has happened.²⁸ We are not used to deciding cases in the abstract, without reference to a particular set of facts. This may not be a problem in this particular case, but it is not difficult to imagine cases in which it might be.

As you know, since the coming-into force of Part 4 of the Government of Wales Act 2006, following the referendum last year, the Assembly can legislate within its competence without the approval of Westminster. The Attorney-General has four weeks from the date when the Welsh Assembly passes a Bill to raise an objection and refer it to the Supreme Court. (s 112). If he does not do so, it would be open to a person who was later affected by an Act of the Welsh Assembly to complain that it was not law, because not within competence, in a concrete case. If he does do so, the result will (presumably) be conclusive either way. So he is taking a risk.

²⁷ Listed as *Local Government Byelaws (Wales) Bill 2012 – Reference by the Attorney General for England and Wales*.

²⁸ The Attorney General for Northern Ireland did lodge a reference in 2011 in respect of the Damages (Asbestos Related Conditions) Bill but decided to withdraw it and intervene in the AXA case (p 20 below) instead.

The Local Government (Byelaws) (Wales) Bill was introduced into the Assembly in November 2011 and passed on 3 July 2012. Unlike Scotland, where a matter is within competence unless it is reserved (in unless it is out), in Wales a matter is only within competence if it relates to one of the listed subjects (out unless it is in). But similar demarcation disputes can arise in either case. The listed subjects include the powers and duties of local authorities. So the subject matter of the Bill, which streamlines the procedures for local authorities to make bye-laws, is within competence. But even on such matters there is a general restriction, that the Assembly cannot remove or modify any pre-commencement function of a Minister of the Crown, unless he consents or the provision is incidental to or consequential on any other provision in the Act of the Assembly.²⁹ Pre-commencement, bye-laws had to be confirmed by the confirming authority.³⁰ After the 1998 devolution, this function was exercised by the Assembly (and now the Welsh Ministers) concurrently with the relevant Secretary of State. The Attorney-General argues that this meant that the Secretary of State still retained that function.

The Attorney General objects to clauses 6 and 9 of the Bill. Clause 6 removes the need for certain kinds of bye-law to be confirmed by anyone. So this will remove the Secretary of State's concurrent power to confirm (or refuse to confirm) such bye-laws. Clause 9 of the Bill is a Henry VIII clause, conferring power on the Welsh Ministers to add to or subtract from the list of bye-laws not requiring confirmation. So this would give the Welsh Ministers power to remove the Secretary of State's concurrent confirmation power without his consent. The Secretary of State has not consented either to clause 6 or

²⁹ Schedule 7, part 2, para 1(1), and part 3, para 6(1).

³⁰ Local Government Act 1972, s 236.

to clause 9 (such consent would bring them within the competence of the Assembly).³¹

She has indicated that she will agree to clause 6 only if clause 9 is modified so as to require her consent to the use of that power by the Welsh Ministers. The Attorney General argues that removing the Secretary of State's confirmation power is not 'incidental to' or 'consequential on' removing the Welsh Ministers' power. The question of whether the Secretary of State should retain that power is 'logically distinct;' from whether the Welsh Ministers should do so.

The Welsh Assembly, who were advised that it was within their competence, and the Counsel General for Wales, are of course arguing that it is, for three reasons: first, because the Bill does not, in fact, remove any (or many) pre-commencement functions of the Secretary of State (the greater part of the Assembly's written submissions is devoted to this, but the Counsel General concentrates on the other arguments); second, if it does, clause 6 is incidental to and consequential on the new procedure for making bye-laws; and third, clause 9 does not empower the Welsh Ministers to remove or modify any pre-commencement functions of the Secretary of State. This is because the section 154 of the Government of Wales Act requires any provision in an Act of the Assembly which could be read in such a way as to be outside competence, if possible, to be read as narrowly as is required for it to be within competence.

It may seem a storm in a tea-cup to some, because the subject matter is so technical. But of course it will not seem a technicality to the parties on either side. Although essentially a matter of statutory construction, it raises all the same sort of questions that the *Martin* case raised in Scotland. The Attorney-General for Northern Ireland has intervened in

³¹ Para 6(1)(a) of Part 3 of Schedule 7.

support of the Welsh, arguing that the Constitution of Wales should be interpreted as generously and purposively as any other constitution.³²

There is perhaps another point. At least in a Scottish case, there are bound to be Scottish Justices sitting. This is supposed to increase the confidence of the Scots in the judgment of the Court – although this does not seem to have worked in the cases of *Cadder* and *Fraser*.³³ Presumably the reason for this is that their nationality and sensitivity to the issues north of the border will have an influence upon their thinking. I leave it to you to ponder whether, in the Scottish examples I have given, that may have been so. But in a Welsh case, there is no requirement to have even one Welsh Justice sitting. The Constitutional Reform Act requires us only to have at least one Justice with experience of the law and practice in each of Scotland and Northern Ireland. It says nothing about Wales. Unlike the House of Lords, we can appoint other judges to sit ad hoc in the Supreme Court. But that has not been done in this case, and I am not aware that any of the Justices who are sitting on the case has the sort of experience of legal Wales as is required of Scotland and Northern Ireland. I think that this raises some really interesting questions about why it is thought important that national judges are involved. We are not mainly talking about esoteric questions of Scots (or Welsh) law, but about the construction of an Act of the United Kingdom Parliament. But, in law, context is everything.

³² Citing Lord Bingham in *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32, [2002] NI 390 (on the validity of the Assembly's elections of a first and deputy first minister two days after the statutory deadline), at [11].

³³ See, for example, the report of the remarks of First Minister Alex Salmond and Justice Minister Kenny MacAskill at www.holyrood.com/2011/06/supreme-court/.

So we have human rights devolution cases and we have subject matter devolution cases. Both of these stem from the devolution statutes themselves. But is there a third category of case, where the legislation may on the face of it be within scope but is 'not law' for some other reason? This is the really interesting constitutional question. Are the devolved Parliaments simply grand and glorified local authorities or are they something different?

The issue was raised in *AXA General Insurance Ltd v HM Advocate*,³⁴ although in the end it did not fall for decision. The background is asbestos. In *Rothwell v Chemical and Insulating Co Ltd*,³⁵ the House of Lords held that asymptomatic pleural plaques resulting from exposure to asbestos were not actionable damage. In England and Wales, the Government's response was to set up a modest compensation scheme from public funds. In Scotland, the Government's response was to make the insurance companies pay. The Damages (Asbestos-related Conditions) (Scotland) Act 2009 provided (with retrospective effect) that pleural plaques, pleural thickening and asbestosis constituted actionable harm.

The insurance companies argued that this was a violation of their property rights under article 1 of the first protocol to the European Convention. They failed. The Supreme Court agreed that the interference was a proportionate means of achieving a legitimate aim. In doing so, it recognised that this was a matter of social and economic policy in which weight should be given to the judgment of the democratically elected legislature as to how the balance between the various interests should be struck. So the Scottish

³⁴ [2011] UKSC 46, [2012] 1 AC 868.

³⁵ [2007] UKHL 39, [2008] AC 281.

Parliament was being treated like a Parliament, in the same way that the UK Parliament had been treated, for example in the Hunting Act cases.

So far, this was nothing new. But the insurance companies had also challenged the Act on the grounds of irrationality – in other words, applying the ordinary principles of judicial review to the Acts of the Scottish Parliament. By the time the case got to the Supreme Court, they had accepted that if the interference with their property rights was legitimate and proportionate, they could not succeed in arguing that it was irrational (well, counsel had perhaps been driven by the court to concede this). So the issue did not strictly arise. Nevertheless, both Lord Hope and Lord Reed dealt with it at some length, no doubt out of deference to the arguments which had been presented to them. These included interventions both from Northern Ireland and from the first Minister in Wales. On behalf of the latter, Theo Huckle and Clive Lewis mounted a vigorous argument that the extent and limits of the legislative competence of the Welsh Assembly were as set out in the Government of Wales Act 2006 and there was no room for any further limitations. That Act contemplates that Acts of the Assembly are different in nature from subordinate or delegated legislation (see s 158). They were to be equated with primary legislation.

Both Lord Hope and Lord Reed agreed that Acts of the Scottish Parliament were not amenable to judicial review on grounds of irrationality, unreasonableness or arbitrariness. However, neither of them ruled out the possibility that they might be subject to review in exceptional cases on grounds other than non-compliance with the terms of the Scotland Act. Lord Hope reasoned that the Scottish Parliament was not sovereign and section 29 of the Scotland Act did not purport to be an exhaustive list of the limitations upon its powers. Because the Parliament was not sovereign, he did not have to grapple with how

the conflicting views about the relationship between the rule of law and the sovereignty of the United Kingdom Parliament (which had emerged in *Jackson*) might be reconciled. As he had said in *Jackson*, 'the rule of law enforced by the courts is the ultimate controlling factor upon which our constitution is based'. So, after pointing to the control which a government elected with a large majority has over a single-chamber Parliament, he continued:

'It is not entirely unthinkable that a government which has that power may seek to use it to abolish judicial review or to diminish the role of the courts protecting the interests of the individual. Whether this is likely to happen is not the point. It is enough that it might conceivably do so. The rule of law requires that the judges must retain the power to insist that legislation of that extreme kind is not law which the courts will recognise.'³⁶

Lord Reed's approach was rather different, but he reached the same conclusion. The 'principle of legality' meant that the UK Parliament could not itself override fundamental rights or the rule of law by general or ambiguous words, nor could it confer upon another body, by general or ambiguous words, the power to do so. The UK Parliament could not be taken to have intended to establish a body which was free to abrogate fundamental rights or to violate the rule of law³⁷.

The English Justices agreed with them. Lord Mance added that a blatantly discriminatory law, for example one aimed at red-headed people, would be 'capable of challenge, if not

³⁶ At [51].

³⁷ At [153].

under the Human Rights Convention, then as offending against fundamental rights or the rule of law, at the very heart of which are principles of equality of treatment'³⁸.

Of course, this leaves many questions unanswered and perhaps they never will be. The important point is that, as long as they keep within the express limits of their powers, the devolved Parliaments are to be respected as democratically elected legislatures and are not to be treated like ordinary public authorities. The United Kingdom has indeed become a federal state with a Constitution regulating the relationships between the federal centre and the component parts. As a proud Yorkshirewoman, perhaps I should be campaigning for home rule for Yorkshire, or at least for the ancient Kingdom of Northumbria of which we were once part.³⁹

³⁸ At [97].

³⁹ Grateful thanks to my judicial assistant, Penelope Gorman, for her help in researching this talk.

The errors and opinions are all my own.