THE LEGAL AUTHORITY TO HOLD A REFERENDUM

4.3

While it may be open to any government to promote the idea of a referendum in the pursuit of its overall policy objectives, it is almost inevitable that the actual holding of a referendum requires a legal basis deriving from legislation made by parliament. The referendum rules need to be formally adopted. In the Scottish context, this offered the choice of an Act passed by either the UK or the Scottish Parliament. But it was the very strong preference of the SNP Government that it should be the Scottish Parliament. As well as keeping the symbolic ‘ownership’ of the process within Scotland, rather than having it appear to be driven primarily from Westminster, this would keep most of the rule-making within the direct control of the Scottish Government and Parliament.

A further question was, however, bound to arise. Whatever the strategic preference of the Scottish Government, did the Scottish Parliament have the legal authority, the legal competence, to pass the necessary legislation? To understand this question and the answer to it, it is necessary, first, to understand that the Scottish Parliament is a Parliament of defined legislative competence1. It may pass Acts only if they are within its competence and it may not pass Acts outwith that competence. An attempt to do so may be prevented by the courts2 and it was more than likely that, given the SNP’s political dominance of the Parliament, in this case, the Unionist parties (or other opponents of independence) would have sought to challenge the terms of a referendum Bill devised by the SNP alone.

The rules on legislative competence are complex but, in a nutshell, the Scottish Parliament is prohibitedfrom making laws which ‘relate to’ matters reserved to the Westminster Parliament3 which include, among many other things, ‘the Constitution’, which, in turn, is defined as including ‘the Union of the Kingdoms of Scotland and England’4. During 2012, different views emerged as to whether the Scottish Parliament was thereby excluded from enacting a law providing for an independence referendum5. There were those, including the UK Government itself, who argued that such a referendum law would clearly ‘relate to’ the constitution and would be illegal6. There were, on the other hand, those, including the Scottish Government, who argued that a referendum Bill would survive any challenge7. In the event, the issue was never tested or finally resolved by a court. Instead both Governments were persuaded that a compromise position on the legislative route to be taken should be adopted.

#FootnoteB

1 See ch 6.

2 See chs 6 and 14.

3 SA 1998, ss 28, 29.

4 SA 1998, Sch 5, Part 1, para 1.

5 For a (not at all impartial) discussion, see House of Lords Select Committee on the Constitution, *Referendum on Scottish Independence* 24th Report (2010-12) HL Paper 263, ch 2.

6 *Scotland’s Constitutional Future* Cm 8203 (2012).

7 In the second edition of this book, it was suggested that a referendum Act would ‘almost certainly’ be within the competence of the Parliament (see p 133). In 2020, in the context of the debate on a second independence referendum, an action for declarator was raised in the Court of Session by an individual seeking to establish that the power to pass an Act authorising a referendum on independence was within legislative competence. In her consideration of the pursuer’s motion for a protective expenses order (see para 14.13), the Lord Ordinary concluded that ‘In the circumstances, having regard to the dicta that I should not look at this matter too closely and that the hurdle (even in a permission context where arguability is not enough) is not intended to be a high one, I find that the case has real prospects of success’ (*Keatings v Advocate General for Scotland* [2020] CSOH 75 at para 20).

#FootnoteE

THE EDINBURGH AGREEMENT

4.4

That compromise position was at the heart of a document signed by First Minister Salmond and Prime Minister Cameron on 15 October 2012 – a document which came to be known as the ‘Edinburgh Agreement’1. The principal purpose of the Agreement (and its attached memorandum) was to record the parties’ joint commitment to the promotion of an Order in Council under s 30 of SA 1998 – the mechanism used to amend Sch 5 to the 1998 Act to enable the Scottish Parliament to pass a law providing for a ‘referendum on the independence of Scotland from the rest of the United Kingdom’. The referendum should thus be given ‘a clear legal base’; it should also be ‘conducted so as to command the confidence of parliaments, governments and people; and deliver a fair test and a decisive expression of the views of people in Scotland and a result that everyone will respect.’ The referendum ‘should meet the highest standards of fairness, transparency and propriety, informed by consultation and independent expert advice.’ The poll had to be held no later than 31 December 2014. The Order in Council was also to make some other (limited) provision about the holding of the referendum and the memorandum recorded the Governments’ agreement about some of the further rules to be laid down in the legislation to be passed by the Scottish Parliament. They should be in accordance with the principles underpinning the existing (UK) framework for referendums which regulates campaign finance and fairness. The referendum question itself was not determined by the Agreement but had to be ‘fair, easy to understand and capable of producing a result that is accepted and commands confidence’. The wording of the question would be decided by the Scottish Parliament in a Bill introduced by the Scottish Government, and subject to the Electoral Commission’s review process. In addition to anticipating the principal rules, the Agreement contained a commitment ‘to working together on matters of mutual interest and to the principles of good communication and mutual respect’. The two Governments were further committed, in words which resonated strongly in the referendum’s aftermath, ‘to continue to work together constructively in the light of the outcome, whatever it is, in the best interests of the people of Scotland and of the rest of the United Kingdom’ (para 30).

#FootnoteB

1 Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland (2012).

#FootnoteE

LEGISLATING FOR THE REFERENDUM

4.5

In the course of 2013, the legislation anticipated in the Edinburgh Agreement was passed. In the first place, the Order in Council, a draft of which had been approved by both Houses of the UK Parliament1 and the Scottish Parliament2, was made3. It duly amended Sch 5 to SA 1998 by excluding from the Act’s ‘constitution’ reservation (and thus eliminating any doubt that the Scottish Parliament could pass a law) a referendum on the independence of Scotland, provided that three conditions were met: the date of the poll was not to coincide with the date of any other referendum to be held under the Parliament’s authority; the date had to be no later than 31 December 2014; and the referendum’s ballot paper had to be restricted to only two responses4. This paved the way for the Scottish Parliament’s own legislation and, because there was a degree of urgency formally to determine who would be entitled to be voters in the referendum, the first Act was directed towards that. The right to vote remained a controversial issue throughout the referendum process. There were those who argued that, as a matter so crucial to the future of Scotland and also of the United Kingdom, the franchise should, for instance, extend across the whole of the United Kingdom to include all resident citizens5. Others sought a vote for all ‘Scots’ (by birth or heritage) whether resident in Scotland, the rest of the United Kingdom or indeed anywhere in the world and challenges to the eventual rules laid down were thought possible. However, the SNP was committed to a referendum based on residence in Scotland, a position which could be grounded both in principle (‘civic nationalism’ rather than anything suggesting an ethnic basis for qualification) and in pragmatism. The use, as far as possible, of existing voters’ rolls would be administratively very attractive and, by the time of the Edinburgh Agreement, it was settled (paras 9–11) that those entitled to vote in the referendum would be those already entitled to vote in Scottish parliamentary and local elections6 – with one potential adjustment. The Scottish Government had been consulting on reducing the voting age to include 16 and 17 year-olds and, when the time came for legislation, this was the principal contribution of the Scottish Independence Referendum (Franchise) Act 2013 (SIR(F)A 2013)7. It was a radical innovation in UK practice but was only lightly contested in the Scottish Parliament, in large measure on the grounds that the franchise should not be extended in this way on a one-off basis8. Another of the Act’s provisions specifically excluded convicted prisoners from voting – a provision later unsuccessfully challenged in the courts9.

#FootnoteB

1 HC Deb 15 January 2013 cols 742-840; HL Deb 16 January 2013 cols 694-756. See also the report of the HC Scottish Affairs Committee HC 863 (2012–13), *The Referendum on Separation for Scotland: The Proposed Section 30 Order – can a player also be the referee?*.

2 SPOR 5 December 2012 cols 14376-14398 and 14410. See also the report of the Parliament’s Referendum (Scotland) Bill Committee, SP Paper 221 (23 November 2012). The Committee had been established to scrutinise all the legislation implementing the referendum.

3 SI 2013/242, 12 February 2013.

4 The Order also extended to the referendum certain provisions of the Political Parties, Elections and Referendums Act 2000 (PPERA 2000), which regulate the holding of UK referendums and elections.

5 There was a prominent campaign by James Wallace (from Dumfries, but resident in London) given publicity by Elaine Murray MSP in a debate in the Scottish Parliament on 18 January 2012.

6 See para 5.6.

7 See s 2(1).

8 SPOR 27 June 2013 cols 21824-5.

9  *Moohan v Lord Advocate* 2015 SLT 2.

#FootnoteE

4.6

The other referendum legislation anticipated in the Edinburgh Agreement was enacted in a second Act of the Scottish Parliament – the Scottish Independence Referendum Act 2013 (SIRA 2013)1. Its most important provisions were s 1(4) which finalised the date of the referendum as 18 September 20142 and s 1(2), (3) and sch 1 which prescribed the content and form of the referendum ballot paper, with the instruction ‘**Vote (X) ONLY ONCE**’ with **YES** and **NO** boxes for answering the question: ‘Should Scotland be an independent country?’. That question was proposed by the Scottish Government after its earlier suggestion – Do you agree that Scotland should be an independent country? – had been criticised by the Electoral Commission3 as insufficiently neutral. Even with the change made, however, the framing of the question in this way helped to characterise the Yes campaign as positive, in contrast with the No campaign’s negativity ̶ a phenomenon which, combined with other aspects of the No campaign, framed its presentation as inevitably much less radically progressive than the Yes campaign.

The Act then made administrative provision for the conduct of the referendum, including the appointment of the Chief Counting Officer4 and her staff, and voting arrangements (s 4 and sch 2). The Chief Counting Officer was required to take whatever steps she considered appropriate to encourage participation in the referendum (s 26(1)). Section 34 of the Act confined any legal challenge (by judicial review5) to the counting of votes to a period of six weeks.

Potentially of greatest significance were the rules laid down by the Act (s 11 and sch 4)6 to govern the conduct of the campaign (under the general supervision of the Electoral Commission) and especially those which governed campaign expenditure during the ‘campaign period’ of 16 weeks prior to the poll7 – ie from 30 May 2014. In the event, despite the possibility of disputes over funding sources and levels during or after the referendum, this never became an area of contention.

#FootnoteB

1 It received royal assent on 18 December 2013.

2 Subject to the possibility of its deferral (to no later than 31 December 2014) by the Scottish Ministers.

3 *Referendum on Independence for Scotland: Advice of the Electoral Commission on the Proposed Referendum Question* (2013).

4 Defined by s 5 as the Chair of the Electoral Management Board for Scotland who was, at the time of the referendum, Ms Mary Pitcaithly.

5 See ch 14.

6 Substantially derived from PPERA 2000. See para 5.12.

7 Section 35 and sch 8.

#FootnoteE

THE REFERENDUM CAMPAIGN1

4.7

We have seen that the Edinburgh Agreement and the Referendum Acts of the Scottish Parliament which followed sought to lay down the ground rules for the referendum campaign. In doing so, however, they told only a very small part of a very much more complex story. In defining the period subject to campaign spending limitations, they failed to explain that the campaign was not waged over a mere 14 weeks but had begun, in effect, in 2007. Even if its start was defined by the launch of the ‘Yes’ and ‘No’/’Better Together’ campaigns in May and June 2013, this was a long period of contention. Campaign participants were not confined to those directly regulated by SIRA 2013 Nor were the campaign issues pre-defined. Although all were targeted on the question to be posed on 18 September 2014, the actual issues raised during the campaign period ranged very widely. The modern politics of Scotland and of the United Kingdom as a whole had experienced nothing like it. For constitutional lawyers, it was a period of rich debate. Most campaign issues had a built-in constitutional aspect.

This is not the place for a blow-by-blow account of the referendum campaigns – the most prominent aspect of which were the two TV debates conducted by the two campaign leaders (Alex Salmond and Alistair Darling) on 5 and 25 August 2014 but in which there were also hundreds of meetings and debates across the country. Instead, there will be a brief listing of the principal participants and of their publications; and then of the principal constitutional issues raised in (and by) the campaigns.

#FootnoteB

1 For a valuable early analysis, see T Mullen ‘The Scottish Independence Referendum 2014’ (2014) 41 Jo Law and Soc 627.

#FootnoteE

Campaign participants and their publications

4.8

Taking a broad view, participants in the campaigns may be taken to have included not only the core contenders – the Yes and No campaigns, the Scottish and UK Governments, the political parties, and the more loosely-defined groups in civil society which aligned themselves with one or other side in the debate; but also others who, while deliberately avoiding taking sides on the issues, nevertheless contributed to, and thus participated in, the referendum process.

By far the largest single documentary contribution to the referendum debate was that of the SNP Government’s White Paper *Scotland’s Future: Your Guide to an Independent Scotland*. It was published in November 2013 and, at over 650 pages, was available online but also free, on application, in print to any UK address. Like almost all the other documents produced in relation to the referendum, *Scotland’s Future* was a campaigning document. Prefaced by a statement from the First Minister and concluding with 70 pages of annexes and endnotes, its meat was in Parts 1 (the case for independence), 2 (Scotland’s finances), 3 (seven chapters on SNP policy proposals on the economy, health, education and others), and 4 (constitutional aspects under the heading of ‘building a modern democracy’). Part 5 (Questions and answers) contained over 200 pages of 650 answers to ‘questions about independence that have been asked of us’. A precise assessment of the document’s impact would, of course, be elusive but its publication did herald a narrowing of the polls in favour of the Yes campaign. If *Scotland’s Future* made an impact on public opinion, it may be because it succeeded in contributing information and ‘facts’ to the debate. It was also, of course, a document of conviction and belief and, in this mode, relied principally upon the notion of independence bringing the opportunity for the people of Scotland to decide for themselves who should govern and formulate policies on their behalf. It very deliberately straddled the divide between the general advantages that independence would bring and then, on the other hand, the benefits of an SNP Government, were it to continue in power after independence.

On specifically constitutional matters, *Scotland’s Future* was important for its identification of 24 March 2016 as a ‘realistic independence date’ (pp 51 and 338), its account of what would occur in the transitional period between September 2014 and March 2016, and its proposals for constitution-making thereafter. The ‘realism’ of the independence date became controversial, especially as to the claim that it would permit sufficient time for negotiations with the UK Government, the European Union and other international partners and organisations. In due course, the constitutional proposals were to be fleshed out in a further Government paper1 but *Scotland’s Future* contained a sketch of the process whereby, in reliance on the Edinburgh Agreement, legislation by both the Scottish and UK Parliaments would establish a ‘constitutional platform for independence’ (pp 52 and 338) – although ‘[a]s with the referendum, independence will be made in Scotland’ (p 338). There would also be the necessary transitional provision for Scottish institutions (including a Supreme Court) and laws in advance of the drafting in the post-independence period of a permanent written constitution by an independent, appointed convention. The Scottish Government declared its own commitment to the sovereignty of the Scottish people and the retention of the monarchy, but also to a ban on Scotland-based nuclear weapons. A commitment to local government and to reformed public services was asserted. Just about retaining the normal modulated tone of a Government White Paper, *Scotland’s Future* also documented, with an eye to opponents in the campaign, the perceived disadvantages of a No vote (p 60) – the continuing control by Westminster and the lack of assurance of any increased powers for the Scottish Parliament. The risk would remain of a forced departure from the European Union, if a UK-wide referendum were held.

#FootnoteB

1 See para 4.14 below.

#FootnoteE

4.9

The UK Government’s formal contribution took the form of a series of 15 documents published between February 2013 and June 20141 under the general heading of the ‘Scotland Analysis Programme’, opening with *Scotland analysis: devolution and the implications of Scottish independence*2which included a substantial Annex on international law aspects and closing with *United Kingdom, united future: Conclusions of the Scotland Analysis Programme*3*.* Documents in the series included the UK Government’s views on currency and monetary policy, security, borders and citizenship, energy and work and pensions. The ‘Conclusions’ emphasised the success of the 300 years of Union and urged the merits of having ‘the best of both worlds’.

#FoontoteB

1 www.gov.uk/government/collections/scotland-analysis.

2 Cm 8554, 2013.

3 Cm 8869, 2014.

#FootnoteE

4.10

The other principal campaign documents came from the Unionist parties. An early feature of the campaign had been an absence of proposals from them as to Scotland’s constitutional future in the event of a No vote1. They may have assumed that, whereas the Yes campaign had to make its case for change, the No campaign could content itself with simply opposing those arguments. In due course, however, political pressure compelled the No parties to describe their own versions of the future. It was already apparent that merely arguing for the status quo, even as already amended by SA 2012, simply would not suffice.

Following an interim report in April 2013, Scottish Labour’s Devolution Commission produced its *Powers for a Purpose – Strengthening Accountability and Empowering People* in March 2014. There was a principal focus on the funding of devolution with a proposal to widen the Scottish Parliament’s (then) power to vary income tax levels from the ten pence of the Scotland Act 2012 to 15 pence. The need for the core matters reserved by SA 1998 to be kept at the UK level was reaffirmed but certain powers (notably over housing benefit and attendance allowance) should be devolved. ‘Double devolution’ – the promise of greater powers for local authorities (and for the island authorities in particular) – was to be assured.

Also in March 2014, the Scottish Liberal Democrats published a brief follow-up (‘Campbell II’) to their (‘Campbell I’) Report of the Party’s Home Rule and Community Rule Commission: *Federalism: the best future for Scotland* (October 2012). It sought to address perceived weaknesses, at that stage, in the No campaign’s case. On the one hand, it stressed the high degree of consensus among No campaigners as to what should follow a No vote. Even with the Conservatives yet to report formally, it was possible to claim agreement on the expansion of the Scottish Parliament’s tax-raising powers to enable it to fund a majority of devolved expenditure; and, deriving support from Gordon Brown’s call for the Scottish Parliament to be ‘indissoluble’2, that the Scottish Parliament should be permanently ‘entrenched’. The other need was to commit to a rapid response to a No vote (rather than the inactivity predicted in *Scotland’s Future*), according to a timetable laid down. The Secretary of State for Scotland should convene a broadly-composed planning meeting within 30 days of the referendum, with a view to all parties including commitments to the implementation of strengthened devolution in their manifestos for the 2015 UK general election.

The Scottish Conservatives were the third of the main Unionist parties to declare their position by adopting the proposals of their (Strathclyde) Commission on the Future Governance of Scotland. That Commission’s principal recommendations (published in May 2014) once again focused on funding, with a proposal that all the rates and bands of income tax in Scotland be decided by the Scottish Parliament. It acknowledged a case for devolving housing benefit (and attendance allowance) and a power to supplement welfare benefits. But the state pension should remain a UK matter. It also proposed reform of the scrutiny powers of the Parliament and of the senior civil service; greater decentralisation to local government; and the notion of a ‘Committee of all the Parliaments and Assemblies of the United Kingdom’.

#FootnoteB

1 But see para 4.13.

2 See G Brown *My Scotland, Our Britain* (2014).

#FootnoteE

4.11

A complete list of other (institutional) participants in the campaign(s) would be extremely long, but selectively:

(a) Other political parties included the Scottish Green Party and the Scottish Socialists who campaigned under the Yes Scotland banner.

(b) Existing NGOs engaged in the debate, either to take sides or in a more impartial mode. So, for instance, the Electoral Reform Society produced its *Democracy Max: A Vision for a Good Scottish Democracy* (2013); the Institute for Public Policy Research (IPPR) promoted the concept of ‘devo more’1 through publications such as *Funding Devo More* (2013), *Devo More and Welfare* (2014), *Financing Devolution and the More or Less Federal Model* (2013) and *Divorcing a Nation: What Happens if Scotland Separates?* (2014).

(c) Other (partisan) organisations spontaneously emerged. ‘Lawyers for Yes’, to which a number of academic and practising lawyers signed up, took a particular interest in legal and constitutional aspects of the Yes campaign. On the other side was ‘Lawyers Together’.

(d) A special category of participant comprised those whose primary concern was reconciliation after the event – see especially ‘Collaborative Scotland’2.

(e) In another special category of ‘participant’ were the two Parliaments and their Committees. The House of Commons Scottish Affairs Committee and the House of Lords Constitution Committee intervened strongly on the No side. The Scottish Parliament’s Referendum (Scotland) Bill Committee3 was, of course, SNP controlled and the European and External Relations Committee also intervened on the matter of EU membership4.

The UK perspective and the consequences of a Yes vote for the continuing United Kingdom were a particular focus of the House of Lords Constitution Committee’s Report on *Scottish Independence: Constitutional Implications of the Referendum* of May 20145. The report laid an early emphasis on its conclusion, based on expert evidence that, in the event of separation6, the United Kingdom would continue (as ‘continuator state’) while Scotland would have become a successor state, a fact that would have shaped the implications of independence. A Bill would need to be introduced to establish a negotiating team for the United Kingdom and to devolve a new power to the Scottish Parliament to establish Scotland’s team.

One special intervention came from the independent Electoral Commission itself. In its 12-page *The 2014 Scottish Independence Referendum: Voting Guide* the Commission offered guidance on the voter registration and voting processes. It also offered brief statements from the two sides and then a joint statement from the two Governments – based on the anticipated consequences of a Yes or No vote and with a focus on the formal consequences for the powers of the Scottish Parliament and Government.

#FootnoteB

1 As opposed to ‘devo max’ – taken to mean the devolution of all powers except defence and foreign affairs.

2 http://collaborativescotland.org/

3 From 29 October 2014, redesignated the Devolution (Further Powers) Committee. The Committee ceased to exist at the end of the Parliament’s 4th session on 24 March 2016.

4 www.scottish.parliament.uk/S4\_EuropeanandExternalRelationsCommittee/Reports/euR-14-02w-rev.pdf

5 8th Report (2013-14) HL Paper 188.

6 ‘Separation’ was the terminology preferred by the No campaign.

#FootnoteE

Campaign issues

4.12

Those statements from the Electoral Commission may have captured the formal anticipated consequences of the vote. But they conceal both the richness and extent of other issues and also their relative prominence in the minds of voters. It was impossible to know how far issues of the heart – questions of belonging or identity – prevailed. Or whether issues of the mind – those which might have depended for their resolution upon the facts and figures of independence, as opposed to more devolution – were dominant. Or how far any issues at all, of either type, swayed voters over the referendum period. Until the closing stages, opinion polls moved little. There was a media assumption that the public wanted more ‘facts’ but how far these were ultimately relevant, even if forthcoming, is not easily knowable. Looming large in the course of the campaign were the issues of the future health of Scotland’s economy, the future Scottish currency, access to the European Union – but with an emphasis (from the Yes side) on the freedom of the Scottish people to decide their own future, rather than governments (especially Conservative governments) elected from other parts of the United Kingdom.

The campaign issues discussed below can, with necessary adjustments, be expected to recur if there were to be a rerun of the campaigns in an Indyref2.

Independence versus enhanced devolution

4.13

At the heart of the whole referendum process was, of course, the question put to the voters about their wish, or not, that Scotland be ‘an independent country’. This apparently simple choice concealed other, more complex, considerations. In the first place, there was a widely felt regret that the vote offered no ‘middle way’. Although, in the early stages of the process, it had appeared that a stronger form of home rule would be the preferred choice of most voters – rather than either independence or the status quo – this was not to be on offer. The SNP had originally preferred a straight yes/no choice but had subsequently been persuaded that a third option should be made available. The UK Government had, however, insisted, at the time of the Edinburgh Agreement, that a clear two-way choice had first to be made. However, retaining a simple dichotomy in the question asked did not produce simplicity in debate. The prospects for independence and, on the other hand, for continued devolution had to be interrogated. Three features dominated.

First, the meaning of ‘independence’ turned out to be not as simple as might have been imagined. Scotland would take its own place on the international stage with its own seat in the United Nations. It would have its own constitution. But Scotland’s would be an independence (sometimes categorised in derogatory terms as ‘independence-lite’) which, for the SNP, would have retained strong (and not merely social) ties to the United Kingdom – the Queen as head of state, the pound sterling as Scotland’s currency (see paragraph 4.17 below) and many services (initially at least) shared with the United Kingdom, especially, for instance, in relation to energy markets and power transmission networks1.

Second, even if enhanced devolution was not itself to be an option on the voting paper, it came to be recognised by all the No political parties that their case depended on the coherence of their proposals for the strengthening of devolution in the event of a No vote and the credibility of the prospects for their adoption. Their broadly parallel offerings of more powers were followed, on the eve of the first television debate on 5 August 2014, by a consolidated undertaking to expand the powers of the Parliament, and then, in the closing days of the campaign (and at a time when the polls had briefly narrowed to give the No campaign only a very slight lead or no lead at all), by a joint ‘Vow’ published in a Scottish daily newspaper2. This was an agreement signed by the leaders of the three main UK political parties, *inter alia*, that the Scottish Parliament is permanent and that extensive new powers would be delivered. The ‘Barnett allocation of resources’3 would continue. It was a curiosity of a referendum in which a ‘middle-way’ question had been denied that a promised compromise of expanded powers came to be offered as the core element of the No package. As we shall see below, the ‘Vow’ had a profound post-referendum impact.

Third, the meeting of the two campaigns on a shared middle-ground of better governance produced many overlapping issues. The best example is that of local government (including governance arrangements for the islands). Local government would continue, whatever the referendum result, but campaigners expressed views nevertheless (see para 4.15).

#FootnoteB

1 Also eg DVLA.

2 *Daily Record*, 16 September 2014.

3 See ch 11.

#FootnoteE

Constitutional design

4.14

But, returning to the core question of independence, a primary focus (although not on the streets!) was on the resulting need, if there were a Yes vote, for a written constitution for Scotland – uncharted waters in a UK context. The SNP had always made it clear that, in the event of independence, Scotland should have a new written constitution, a policy reiterated (see para 4.8) in *Scotland’s Future*. These views were, however, expanded in a green paper – *The Scottish Independence Bill: A Consultation on an Interim Constitution for Scotland* – published in June 2014. The principal content of the paper was a draft Bill. The Independence Bill proper would be published and passed by the Scottish Parliament (by its normal process) with a view to its being in force from 24 March 2016 until replaced by a permanent constitution. The Act would not itself be entrenched but would be expected to have ‘constitutional status’1. The draft Bill’s principal content lay in Part 2, designated the interim constitution of Scotland. This made skeletal provision for the institutions of the new state, its territory, and citizenship. The draft also included reference to the court system, the EU, and the ECHR as well as equality, children’s well-being, and nuclear disarmament. It also provided for the establishment of a Constitutional Convention to produce a new substantive constitution for independent Scotland.

Importantly, the proposed Independence Act would ‘sit alongside’ (pp 22 and 50) the Scotland Acts (SA 1998 and SA 2012) which would be ‘refreshed and rewritten’. Together they would be the ‘constitutional platform’. While many of the current rules establishing the Scottish Parliament and Government would be retained, it was anticipated that all those provisions enabling legislation for Scotland by the Westminster Parliament or a role for the UK Government or the UK Supreme Court would be removed. The modifications required would be enacted at Westminster, in the spirit, it was assumed, of the Edinburgh Agreement. Both the revised Scotland Act and the Independence Act would remain in force, along with other continuing laws, until subsequently modified by the (independent) Scottish Parliament and the constitution-making process itself (s 34).

What, of course, had to be recognised at the time of the publication of these proposals was that, although they were presented in the style of a legislative consultation with all the appropriate technicality of phrasing, they were nonetheless serving principally as a campaigning tool2. The emphasis on the Scotland Act ‘restrictions’ on the Scottish Parliament, and the incorporation of the ‘sovereignty of the people’ into the new constitutional dispensation prioritised change, while the insistence nevertheless on a degree of continuity of laws and institutions (notably the monarchy) sought to maintain a non-threatening approach. The inclusion of policy imperatives on child welfare, nuclear disarmament, and equality served clear campaigning purposes.

#FootnoteB

1 See para 6.10.

2 A strategy set to be repeated by the current SNP Scottish Government in advance of the 2021 general election with a draft bill for an independence referendum: see para 4.22 below.

#FootnoteE

Double devolution, local government and the islands

4.15

It is not surprising that the referendum process triggered interventions by other interested parties seeking solutions to problems of their own, whichever way the vote went on 18 September. Prominent among them were Scotland’s local authorities and, as a special case within them, the Scottish islands authorities of Orkney, Shetland, and the Western Isles. The Convention of Scottish Local Authorities (COSLA)1 established a Commission on Strengthening Local Democracy which reported in August 20142. The Commission made no specific proposals for reform but offered a strong plea for real subsidiarity and for an end to central domination of local government. Meanwhile, the islands authorities combined to publish their *Our Islands – Our Future* in June 20133 seeking a special status for their areas, whatever the referendum outcome, which attracted undertakings by the Scottish Government in the form of its Lerwick Declaration of the following month4. These were issues which were given a higher profile on the ‘No’ side, since a significant part of their case for a continued Union became a critique of ‘centralism’ by the SNP5 and the need for much stronger decision-making at the local level.

#FootnoteB

1 See para 8.6.

2 *Effective Democracy: Reconnecting with Communities*.

3 There was also a petition in the Scottish Parliament (PE 01516).

4 For subsequent developments leading to the Islands (Scotland) Act 2018, see para 8.7

5 Especially the impact of the arrival of the national police force, Police Scotland. See para 13.19.

#FootnoteE

Membership of the European Union1

4.16

It might, at first sight, seem strange that Scotland’s future membership of the European Union became a seriously contested issue in the referendum process. Polls suggested a more favourable view of EU membership in Scotland than in the United Kingdom as a whole. The issue would be unlikely to divide opinion in the principal campaigning groups. Complications arose, however, from two sources.

First, the independence referendum process was being conducted against a background of a referendum on EU membership itself, promised by the UK Conservative Party, if it won the 2015 UK general election. Arguably, for Scotland to be sure of remaining in the European Union, Scots should first vote for independence2.

But, second, EU membership achieved its high profile mainly because of a dispute about an independent Scotland’s probable route to EU accession. Concerned to downplay any possible difficulties, the SNP initially claimed that Scotland’s membership would either be ‘automatic’ (because of Scotland’s existing membership as a part of the United Kingdom and/or because of Scots’ status as EU citizens) or (principally because of the presumed attractions to the European Union of Scotland’s oil and other resources) at least unproblematic. Significant difficulties were, however, anticipated by the No side, producing a fierce debate, exacerbated by a row over the existence and content of legal advice, apparently relied on by the First Minister in a TV interview3. Muddying the debate further were conflicting views presented by legal experts as to the precise route to access that Scotland would be obliged to follow4, an intervention by Jose Manuel Barroso, then President of the EU Commission5; and an awareness that, whether Scotland might be generally welcomed or not, a procedure which, on any view, would require the assent of all other EU member states might take time. If an agreement were not, in fact, to be negotiated by March 2016, a membership ‘gap’, however short, might be very uncomfortable.

The debate in these terms preceded, of course, the EU referendum of 2016 and the UK departure from the European Union of January 2020. In the continuing debate about Indyref2, those events have taken on the role of an asserted ‘material change’ justifying an early second independence referendum and have produced a different context in which the question of (a regained) EU membership for Scotland is framed.

#FootnoteB

1 Although of lower political profile than the EU, it was also acknowledged that an independent Scotland would need to renegotiate treaties regulating other international relationships. See *Scotland’s Future* ch 6. And see the UK Government’s *Scotland Analysis: Devolution and the Implications of Scottish Independence* (Cm 8554, February 2013), *Scotland Analysis: EU and International Issues* (Cm 8765, January 2014).

2 *Scotland’s Future* pp 216-7. A further specific matter of contention was the Scottish Government’s declaration (at p 199) of its intention to continue its practice of charging fees for students from other parts of the United Kingdom at Scotland’s universities.

3 For the First Minister’s own explanation of the confusion, see SPOR 23 October 2012.

4 The question was about whether the use of art 48 or art 49 TEU was appropriate.

5 16 February 2014.

#FootnoteE

The Scottish currency1

4.17

It had to be a part of the SNP’s campaign to demonstrate not only the positive case for independence but also that it had a clear vision of the consequences of independence and a strategy for handling them to Scotland’s advantage, or at least with the avoidance of any significant disadvantages. One such consequence of independence would be the need for a Scottish currency and the options available were set out in *Scotland’s Future* (pp 109-111). Drawing on the recommendations of its Fiscal Commission, the Scottish Government concluded that, rather than for example the creation of a new Scottish currency, membership of the euro or simply an (informal) continued use of sterling, the pound sterling should be retained (arguably also for the benefit of the United Kingdom as well) within a continuing formal monetary union. Avoiding here the merits of the economic arguments themselves (and also arguments about Scotland’s future obligation to join the euro if admitted to the EU), the reason the currency issue became so hotly contested (including, most prominently, in the TV debates) was that the SNP’s stance, requiring the consent of the United Kingdom to a continuing monetary union, was one which the United Kingdom appeared able to veto, raising questions about its viability. And the UK Government did indeed produce a response in *Scotland Analysis: Currency and Monetary Policy* (2013) which naturally expressed a preference for the current arrangements within the United Kingdom and ruled out their continuation if Scotland became independent. Thus, even if the currency proposed for an independent Scotland was unlikely to be a primary basis for the referendum decision of many voters, it may be that the prospect of an impasse (without, as Mr Darling demanded of Mr Salmond in the TV debates, a ‘Plan B’) and any resulting confusion may have been an issue for some.

#FootnoteB

1 For a brief discussion of this complex issue, see eg A Armstrong and M Ebell in C Jeffery and R Perman *Scotland’s Decision* (2014) at pp 14-17. *Scotland’s Decision* was a publication funded by philanthropist Sir Tom Hunter which offered ‘16 Questions’ to think about for the referendum, on the assumption that more ‘facts’ were required.

#FootnoteE

4.18

That listing of the principal participants, of their documentary contributions and of the principal political and constitutional issues on the referendum agenda, while they may provide a backdrop, can give no impression of the extent to which the referendum dominated the Scottish political scene during 2012–2014. ‘Normal’ politics was very substantially suspended and the referendum took over. To the (sometimes bemused) observer, there was a tendency for all aspects of political life (within Scotland and the United Kingdom but also, for alert campaigners, extending much more widely) to take on a referendum twist.

THE REFERENDUM RESULT AND THE DEVOLUTION SETTLEMENT1

4.19

Just as devolution had been embarked upon in 1999 with different motivations – Scottish Nationalists and Unionists had quite different constitutional projects in mind – so, in relation to the independence referendum, there were different ambitions. The SNP wanted a wholly new constitutional future for Scotland. The UK Government wanted to close down the constitutional debate for a generation.

In the result, neither side achieved its ambition. The Yes vote did not prevail and there was not immediately to be a separate Scottish state. On the other hand, four features of the referendum outcome had ensured that there was to be no constitutional peace. First, although there had not been a Yes victory, the fact that 1.6 million people (nearly 45 per cent of all those voting) had voted for independence meant that the question of radical constitutional change was not going to leave the political agenda. Second, the voter turn-out had been very high, at nearly 85 per cent (much higher than normal general election figures), which might not only assist in keeping the cause of independence alive but also transform Scottish (and UK) politics more generally. The SNP claimed a substantial leap in membership after the vote. Third, the UK political establishment was, as a result of the ‘Vow’ to strengthen devolution, on a very tight timetable and under substantial pressure to deliver on the promises made. And fourth, the promise of more powers for the Scottish Parliament accompanied by a promise, also contained in the ‘Vow’, of a sustained level of funding for Scotland by the UK Government and the retention of the Barnett formula prompted a fierce response from other parts of the United Kingdom (including the regions of England) to demand fairer treatment for them. Above all, it prompted demands for the immediate revisiting of the ‘West Lothian Question’ and, in particular, a demand from Conservative MPs, under pressure from the UK Independence Party (UKIP), for a guarantee of ‘English Votes for English Laws’ (EVEL) – ie the exclusion of extraneous Scottish MPs from voting in the House of Commons on domestic English issues.

#FootnoteB

1 For an early assessment, see I McLean, J Gallagher, G Lodge *Scotland’s Choices: The Referendum and What Happens Afterwards* (2nd edn, 2014).

#FootnoteE

4.20

The actual process for the ‘implementation’ of the ‘Vow’ was launched by the Prime Minister in Downing Street at 7am on Friday 19 September 2014. In addition to welcoming the referendum result, the Prime Minister offered a recommitment to the undertakings of the three pro-Union parties to a ‘new and fair settlement for Scotland’ and to additional powers for the Scottish Parliament over ‘tax, spending and welfare’. The timetable proposed was abrupt. The process of reaching agreement (to be overseen by Lord Smith of Kelvin) on the devolution commitments was to be concluded by November 2014, with draft legislation to be published by January 2015. Enactment of legislation would be deferred until after the UK general election of May 2015, but, even so, the overall timetable for the implementation of major constitutional change (in contrast, for instance, with the Kilbrandon Royal Commission, the Scottish Constitutional Convention or the Calman Commission) was extraordinarily compressed. As the process came to be fleshed out, the Commission (consisting of Lord Smith and two representatives from each of the five Holyrood political parties – the SNP, Scottish Labour, the Scottish Liberal Democrats, the Scottish Conservatives and the Scottish Green Party)1, after receiving written submissions from the UK Government2, the Scottish Government3 and others4 was to report by St Andrew’s Day, with the promised draft legislation to follow by Burns Night 2015.

If the work of the Smith Commission5 and the subsequent stages of implementation were to be intense, the position was further complicated by two other principal factors. In the first place, the Prime Minister threw into the ring, from the start, an insistence that a new and fair settlement for Scotland be accompanied by a new and fair settlement for all other parts of the United Kingdom as well. Without great difficulty (except perhaps in relation to funding levels) this would include further attention to devolution in Wales and Northern Ireland. But, much more problematically, he insisted that the ‘West Lothian Question’ (restated as ‘English Votes for English Laws’) required a ‘decisive answer’ and furthermore that ‘all this must take place in tandem with, and at the same pace as, the settlement for Scotland’. The West Lothian Question, as a highly contested consequence of the asymmetric system of devolution across the United Kingdom, is treated more fully later in this book6. It is an issue worthy of serious consideration but, in the context of the aftermath of the referendum result, it was also seen as a mischievous contribution by the Prime Minister, concerned as much by placating his own party’s right wing and providing a response to the threat from UKIP. In so far as the conjunction of the two distinguishable processes of implementing the ‘Vow’ and the resolution of the ‘English votes’ question as projects to be undertaken in tandem might have been fatally disruptive of the Scottish devolution project, that threat appeared to have been averted. The Smith Commission timetable would be maintained. However, as a wider contribution to an already messy constitutional and political environment, the insistence on ‘English votes’ made its presence felt.

And it is that political backdrop to the process which provided the second complicating factor, the second reason why the implementation of the ‘Vow’ would not be a merely technical exercise in constitutional redesign. In brief, the political opportunities and threats produced in Scotland by the referendum result, the divided population, the soaring membership claimed by the SNP, the unpromising fortunes of the Labour and Liberal Democrat parties, and the change in leadership of both the SNP (with Nicola Sturgeon succeeding as party leader on 14 November 2014 (and as First Minister on 20 November) Alex Salmond who resigned suddenly on 19 September) and of Scottish Labour (with Jim Murphy succeeding Johann Lamont on 13 December) all contributed. And, in the United Kingdom at large, the imminence of the general election of May 2015, the political vulnerabilities of all the major parties and the specific threat from UKIP made for an unsettled climate in which to produce new settlements of fraught constitutional issues. The prospect of a referendum on EU membership was disruptive – both at the general UK level, and also in respect of Scotland – following Ms Sturgeon’s call on 29 October 2014 for a requirement that any overall vote to leave the EU be conditional on a vote to leave in all four constituent parts of the United Kingdom. For the actual voting outcomes in the EU referendum of 2016, see paragraph 4.24.

#FootnoteB

1 With terms of reference including to convene cross-party talks and to facilitate an ‘inclusive engagement process’ to produce Heads of Agreement, with recommendations for further devolution and more financial, welfare and taxation powers for the Parliament.

2 *The Parties’ Published Proposals on Further Devolution for Scotland* Cm 8946 (Oct 2014) – a summary of the UK Government’s commitments to the process and of the proposals previously made by the pro-Union political parties.

3 *More Powers for the Scottish Parliament* (October 2014).

4 In due course, the Commission reported that they had received ‘407 submissions from civic institutions, organisations and groups, and 18,381 from members of the public’ (para 11 of the Report, see para 4.21 below).

5 See A Page ‘[The Smith Commission and further powers for the Scottish Parliament’](https://uk.westlaw.com/Document/I3636FA60FDB811E4ABD6CBDDF2736E09/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad6ad3e00000173517cd1bd1d34b4ed%3FNav%3DUK-JOURNALS-PUBLICATION%26fragmentIdentifier%3DI3636FA60FDB811E4ABD6CBDDF2736E09%26parentRank%3D0%26startIndex%3D251%26contextData%3D%2528sc.Default%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=be1b5af7fb6c457939919594c4f6d01d&list=UK-JOURNALS-PUBLICATION&rank=261&sessionScopeId=7974469eee66e4bb4d8480e8f301f7693b9b5f4c53d21b0efdd061d043d077a5&originationContext=Search+Result&transitionType=SearchItem&contextData=%28sc.Default%29&comp=wluk) (2015) 19 Edin LR 234.

6 See para 5.9.

#FootnoteE

4.21

There is a return to the EU referendum itself below and the turbulence that it brought to the aftermath of the independence referendum. In the meantime, however, the Smith Commission published its proposals1 on 27 November 2014. Although the consensus immediately began to unravel thereafter, all five political parties had agreed2 to an extensive package of reforms, organised as three ‘pillars’ of their Heads of Agreement. Dominant was ‘pillar 3’, under which the Commission offered measures to strengthen the financial responsibility of the Scottish Parliament by devolving several tax-raising powers, including, most prominently most aspects of (non-savings and non-dividend) income tax; air passenger duty; and the aggregates levy (paras 75–91). The Barnett formula (for quantifying the block grant payable to the Scottish Government by the UK Government) would continue to apply (with adjustments to be agreed) and the Scottish Government would have strengthened borrowing powers. Under ‘pillar 1’ (to provide a durable but responsive settlement for the governance of Scotland), UK legislation would state that the Scottish Parliament and the Scottish Government are permanent and the Sewel Convention3 would be put ‘on a statutory footing’ (paras 21, 22). The Scottish Parliament would have additional powers in relation to its own composition and functioning, including the power (if possible, with effect from the election of May 2016) to lower the voting age to 16. The machinery for inter-governmental relationships would be strengthened. Under ‘pillar 2’ were the Commission’s proposals for the devolution of many ‘welfare’ benefits to the Scottish Parliament, along with the management of Scottish tribunals and with consideration to be given to the devolution of the power to legislate in relation to abortion4. Although not included in the Heads of Agreement, Lord Smith added some recommendations of his own: he supplemented the agreement on inter-governmental machinery with a plea for a stronger relationship between Governments led by the Prime Minister and First Minister; he urged further devolution of powers *from* the Scottish Parliament to local communities; he encouraged the further improvement of the Scottish Parliament’s oversight of the Government; and he urged the achievement of greater public awareness of the powers of the Parliament.

On 16 December 2014, William Hague, to whom, as First Secretary of State and Leader of the House of Commons, the Prime Minister had given the task of producing proposals on ‘English Votes for English Laws’, published a consultation paper5. This set out the then state of decentralisation in England, followed by a summary of the options for further devolution and decentralisation in England and of the impact of devolution across the United Kingdom on the Westminster Parliament and its implications. It referred to the possibility of a Convention to consider how to address these implications. Thereafter, the paper included two entirely separate sets of proposals on how each of the Coalition parties intended to proceed and, after inviting responses to the early sections of the paper, went on to propose, extraordinarily for a government publication, that responses to the party proposals to be submitted to the political parties themselves. The paper offered no timetable according to which responses might be made6.

The next stage of the post-’Vow’ developments came on 22 January 2015 (a few days ahead of the Burns Night target) when the UK Government published *Scotland in the United Kingdom: An Enduring Settlement* (Cm 8990)7, a consultation on proposals to implement the Smith Commission report to which were appended the promised ‘Draft Scotland Clauses’. These included clauses (amending SA 1998 and other statutes) to recognise the Scottish Parliament and the Scottish Government as permanent; to recognise the Sewel convention; to amend existing provision for the arrangements for the Scottish Parliament and Government and for elections; to expand the Parliament’s powers over income tax; and (immediately controversial between the parties) to devolve some benefits and employment support as well as to adjust other aspects of legislative and executive competence.

The further stages of the process towards the implementation of the Smith and Hague proposals – including, above all, the passing and implementation of the Scotland Act 2016 (SA 2016) – are documented at many later stages of this book. The structure, powers and operation of both Parliaments (Chapters 5 and 6) were at the centre of implementing Smith and the resolution of the ‘English Votes’ question. The powers of the two Governments and their inter-relationships (Chapter 7) and the position of local government in Scotland (Chapter 8) continued to be scrutinised. Lord Smith’s call for the improvement of the Parliament’s accountability machinery is the subject matter of Chapter 10. Public finance (Chapter 11) was at the heart of the Smith Commission recommendations and of their implementation.

#FootnoteB

1 Report of the Smith Commission for further devolution of powers to the Scottish Parliament.

2 Members of the Commission explicitly agreed to refer to their proposals as ‘the Smith Commission Agreement’ (para 16).

3 See para 6.23.

4 Although ‘abortion’ was reserved to Westminster by SA 1998 as originally enacted, the Secretary of State’s functions under ss 1(3) and 2 of the Abortion Act 1967 (power to approve places where treatment for termination of pregnancy can take place and power to make regulations concerning notification of terminations) were transferred, so far as exercisable in or as regards Scotland, to the Scottish Ministers by virtue of the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 SI 1999/1750. For a challenge to the exercise of those functions, see *SPUC Pro-life Scotland Ltd v Scottish Ministers* 2019 SC 588.

5 *The Implications of Devolution for England*, Cm 8969.

6 For subsequent developments, see para 9.6.

7 See also HL Constitution Committee, *The Union and Devolution (2015-16)* HL Paper 149.

2010 to 2015: successful challenges

14.28

A finding that provisions of an ASP were outside legislative competence was, finally, made in *Salvesen v Riddell*1. The Inner House of the Court of Session, endorsed by the Supreme Court, concluded that s 72 of the Agricultural Holdings (Scotland) Act 2003 was incompatible with the Convention rights (specifically, the right to peaceful enjoyment of possessions conferred by art 1, protocol 1 ECHR) of certain landlords of agricultural holdings.

Of particular significance was the fact that the challenge to s 72 came several years after the 2003 Act had come into force and in circumstances in which landlords and tenants had organised their affairs relying on the validity of that provision. A declaration, in April 2013, that s 72 was ‘not law’ had the potential to cause significant disruption. In light of that potential disruption, the Supreme Court invoked s 102 of SA 19982 which provides that where a court finds that an ASP, or part of it, is outside legislative competence: ‘The court or tribunal may make an order (a) removing or limiting any retrospective effect of the decision, or (b) suspending the effect of the decision for any period and on any conditions to allow the defect to be corrected.’ Lord Hope was unwilling to limit the retrospective effect of the decision – ‘Any adverse effect on rights arising from tenancies…will need to be provided for’3 – but considered that it was for the Parliament to determine precisely how that should be done. He accepted that any resolution would require time and consultation with those affected and concluded that ‘the court should do what it can to enable it to be conducted in as fair and constructive a manner as possible. So I would suspend the effect of the decision that sec 72(10) is not law for a period that will be sufficient to enable the defect to be corrected.’4. In the event, the relevant remedial provisions were contained in the Agricultural Holdings (Scotland) Act 2003 Remedial Order 20145.

In a different context, the Appeal Court of the High Court of Justiciary in *Cameron v Cottam (No 1)*6 declared that an amendment to the bail provisions of the Criminal Procedure (Scotland) Act 1995 made by s 58 of the Criminal Justice and Licensing (Scotland) Act 2010 (and which would have included standard conditions of bail requirements to participate in an identification parade or other identification procedure, and to provide prints and samples) was ‘not law’ because it was not compatible with art 5 ECHR (among other reasons, because it removed all judicial discretion as to the imposition of the conditions). Thereafter, in *Cameron v Cottam (No 2)*7, the Appeal Court held, by reference to s102 SA 1998, that the retroactive effect of its declarator was limited to cases (in which bail had been granted) which had not proceeded to trial or in which the trial was still in progress and appeals that had been brought timeously and had not yet concluded. This would have been the outcome in terms of the common law8, but an express ruling was sought, and given, in the interests of clarity and certainty.

#FootnoteB

1 2013 SC (UKSC) 236.

2 See para 14.32 below.

3 2013 SC (UKSC) 236 at para 57.

4 *Ibid.*

5 SSI 2014/98.

6 2013 JC 12.

7 2013 JC 21.

8 *Cadder v HMA* 2011 SC (UKSC) 13.

#FootnoteE

2015 to 2020

14.29

 A number of further challenges have been disposed of over the last five years raising questions of compatibility with Convention rights, EU law, reserved matters and the restrictions contained in SA 1998, Sch 4.

Those most significant of those are the unsuccessful challenge to the Alcohol (Minimum Pricing) (Scotland) Act 2012 (AMP(S)A 2012); the successful challenge to Part 4 of the Children and Young People (Scotland) Act 2014 (CYP(S)A 2014); and the pre-assent challenge to the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill (‘Legal Continuity Bill’), each of which is discussed below.

There have also been unsuccessful challenges to the Antisocial Behaviour etc. (Scotland) Act 20041, the Court of Session Act 19882 and the Children’s Hearings (Scotland) Act 20113.

AMP(S)A 2012: This Act empowers the Scottish Ministers, by subordinate legislation, to set a minimum price at which a unit of alcohol can be sold by retailers in Scotland. The minimum unit pricing (MUP) scheme introduced by AMP(S)A 2012 was challenged by the Scotch Whisky Association and by European spirits and wine producers on the grounds that it constituted a breach of EU law (and was therefore outside legislative competence in terms of SA 1998, s 29(2)(d))4 because it contravened art 34 TFEU, being an unjustifiable interference with free movement of goods. The petitioners’ challenge was dismissed at first instance5, the Lord Ordinary concluding that MUP could be justified in terms of art 36 TFEU, as a measure which had a legitimate aim (tackling alcohol misuse and overconsumption) and which was proportionate. On appeal, the Inner House was persuaded, in the course of the hearing of the appeal, that the EU law questions raised by the challenge justified the making of a preliminary reference to the ECJ6.

The reference was heard in May 2015 and the ECJ’s judgment was delivered in December 20157. It concluded that the effect of imposing a minimum price was that it would be impossible for the retail selling price of wines, produced locally or imported, to be lower than the obligatory minimum price, and that such a measure was therefore liable to undermine competition (by preventing some producers or importers from taking advantage of lower costs to offer more attractive selling prices). Nevertheless, a member state could rely on the objective of the protection of human life and health in order to justify a measure which undermined the system of ‘free formation of prices’ (that was a manifestation of the principle of free movement of goods) – but such a measure had to be proportionate. It should be an appropriate means of securing the objective of the protection of human life and health and should not go beyond what was necessary to attain that objective. On the latter point, the ECJ referred to its earlier case law that demonstrated a preference for the use of fiscal measures (eg increased excise duties) rather than price-fixing mechanisms, but left the final assessment of the proportionality question to be determined by the national courts.

When the case returned to Edinburgh8, the Inner House allowed new material to be put before it by the Scottish Government supporting the MUP scheme; and held that Ministers were entitled to conclude that there was a link between the price of alcohol and its consumption, and that there was evidence that tax was a less effective measure (in reducing the consumption of high-strength alcohol) than MUP. The Supreme Court agreed with the Inner House that the legislation was proportionate9 – not least because of the sunset clause in AMP(S)A 2012 providing for a review after five years10.

CYP(S)A 2014: A third successful challenge to an ASP was that brought by the Christian Institute and others to Part 4 of CYP(S)A 2014, which provided for the appointment of a ‘named person’ (expected in most cases to be a health visitor or school teacher) to every child in Scotland. The named person was to have a range of functions in respect of each child, including the gathering and in some cases sharing of information likely to be relevant to the child’s wellbeing.

The seven petitioners comprised four ‘corporate’ petitioners – the Christian Institute, the Family Education Trust, the Young ME Sufferers Trust and CARE – and three individuals (all parents of children to whom a named person would be appointed). They contended that the named person provisions of CYP(S)A 2014 were incompatible with the Convention rights of the three parents, arguing breaches of arts 8 (private life, family and home) and 9 (freedom of thought, conscience and religion), and art 2 of protocol 1 (right to respect for parents’ religious and philosophical convictions in the delivery of education). In addition, it was argued that the information-sharing provisions of CYP(S)A 2014 were contrary to the Data Protection Act 1998 and the Data Protection Directive, and as such constituted an unlawful trespass into the reserved matter of data protection11. Finally, the petitioners claimed that the fundamental constitutional rights of the fifth to seventh petitioners (the parents) had been infringed.

As noted above (para 14.11, n 17), at first instance Lord Pentland concluded that the first to fourth petitioners lacked sufficient interest entitling them to bring a judicial review of Part 4 of CYP(S)A 201412. On the substance of the challenge, he concluded that the fifth to seventh petitioners’ case ‘fails on all points’ – in essence, because their complaint about the legislation was premature, given that it was not yet in force and no ‘named person’ had in fact been appointed or had exercised any of the functions conferred by CYP(S)A 2014. In addition, the provisions of Part 4 of CYP(S)A 2014:

‘do not constitute a free-standing scheme in terms of which the named person service can be established and operated. Part 4 contains merely the basic legislative framework under which the named person system will work, but it will be filled out in important respects by subordinate legislation, statutory guidance and advice from appropriate agencies’.

Only when these other elements were in place would it be possible to make a proper assessment of the compatibility of CYP(S)A 2014 with Convention rights. The Lord Ordinary also concluded that the information-sharing provisions of CYP(S)A 2014 would have to be operated in a manner compatible with both the Data Protection Act 1998 and the Data Protection Directive, and that those provisions did not make any modification of the law on reserved matters. The Inner House reversed the Lord Ordinary on the issue of standing, but otherwise rejected the petitioners’ reclaiming motion13.

The Supreme Court took a different view14, holding that the relevant provisions of CYP(S)A 2014 were outside legislative competence, albeit on relatively narrow grounds. The data protection challenges were rejected in their entirety: the Data Protection Act 1998 envisaged that other legislative provisions might affect its operation and Part 4 of CYP(S)A did not relate either to the Act or to the Data Protection Directive so as to render it outside of legislative competence (and it was not in breach of EU law). The complaints under art 9 and art 2 of protocol 1 were not discussed in any detail by the Court because the meat of its judgment was in relation to art 8 ECHR. It concluded that the information-sharing provisions of Part 4 would involve interference with the art 8 rights of the individuals (children, parents and possibly others) to whom the information related. That being so, the interference required to be ‘in accordance with law’ and proportionate. Part 4 failed the first of those tests. There was clearly a legal foundation for the interference – CYP(S)A itself – but that formal basis was not enough. The law needed to be accessible to the person concerned and foreseeable as to its effects (para 79); and for a long list of reasons (in particular, the difficulties of understanding how CYP(S)A would interact with the Data Protection Act 1998), Part 4 was not. It might be possible to create an information regime that was in accordance with law (and one that was proportionate in art 8 terms), but radical surgery would be required.

In response to the Court’s ruling, the Scottish Government introduced in 2017 the Children and Young People (Information Sharing) Bill; but the Bill foundered after the Education and Skills Committee refused to produce a Stage 1 report until the Government had also produced a draft Code of Practice15. The expert panel appointed to prepare the Code of Practice failed to do so16, and in September 2019 the Government withdrew the Bill and announced the repeal of the named person provisions of CYP(S)A 2014.

LEGAL CONTINUITY BILL: The significance of the Legal Continuity Bill in the wider political and legal context of the United Kingdom’s departure from the European Union is discussed in Chapter 417. The Bill represented an attempt by the Scottish Parliament to make provision for the continuity of EU law in Scots law in ways that in some respects mirrored and in other respects departed from the provision being made by the UK Parliament in what became the EU(W)A 2018.

As also explained in Chapter 4, a highly relevant factor in the Bill’s eventual treatment by the Supreme Court was the timing of its passage in combination with the timing of the passage of EU(W)A 2018. The Legal Continuity Bill was introduced in the Scottish Parliament on 27 February 2018. At that time18, the Presiding Officer made a statement that he considered the Bill to be outside of legislative competence because it was in breach of EU law:

‘the Bill anticipates the impact of the withdrawal of the United Kingdom from the European Union and the removal of the obligations of the UK under the EU Treaties which the EU law restriction in section 29(2)(d) imposes on the Parliament. It assumes that the Parliament can make provision now for the exercise of powers which it is possible the Parliament will acquire in the future’19.

The Presiding Officer’s view was that the assumption was wrong in law. On 28 February 2018 the Lord Advocate made a statement in the Scottish Parliament explaining his view that the Bill was within legislative competence. The Bill was passed by the Parliament on 21 March 2018. In a 'first' under SA 1998, it was referred to the Supreme Court by the Attorney General and the Advocate General (‘the UK Law Officers’) within the four-week period provided for such references by SA 1998, s 33. EU(W)A 2018 was passed by both Houses of Parliament on 20 June 2018 and received royal assent on 26 June 2018. It contained a provision (Sch 3, para 21(2)(b)) amending SA 1998, Sch 4 to include EU(W)A 2018 as one of the protected enactments which cannot be modified by an ASP. Importantly, by an amendment moved by the UK Government on 2 May 2018 (after the reference to the Supreme Court had already been made), the inclusion of EU(W)A 2018 in the Sch 4 list of protected enactments came into force on royal assent (and so was in force by the time the Supreme Court heard the reference in July 2018). The Court concluded that ‘when addressing the questions in the reference as to whether the Scottish Bill would be within legislative competence, this court must have regard to how things stand at the date when we decide those questions’20.

The questions referred were numerous and on many of them the Court found in favour of the Scottish Parliament. Leaving aside for a moment the limits on competence set out in SA 1998, s 29, the UK Law Officers argued that the Bill in its entirety was outside competence on the grounds that it was contrary to the rule of law because it infringed the principles of legal certainty and legality. The essence of the argument was that the Bill:

‘cuts across the attempts of the UK Parliament and government to deal in a way that applies coherently and consistently across the whole of the UK with a matter within their reserved competence, namely the legal consequences of withdrawal from the EU. It is also said that the existence of parallel legislation on the same subject-matter in Scotland and in the UK as a whole, undermines legal certainty’21.

This aspect of the challenge was given short shrift. The Court drew a distinction between the availability of review of an ASP on common law grounds (which availability had been established in *AXA* (see para 14.27)), and the availability of such review in reference proceedings under SA 1998, s 33. In the latter proceedings, the limits set out in s 29 were ‘exhaustive’22. Questions of consistency with the rule of law or the constitutional framework underpinning the devolution settlement were not independent grounds of review in a s 33 reference: those factors were relevant only so far as they assisted in resolving the issue of the Bill's legislative competence by reference to s 29.23

The UK Law Officers also argued that the Bill, as a whole, related to the reservation provided for by SA 1998, Sch 5, Pt 1, para 7: ‘International relations, including relations with territories outside the United Kingdom, the European Union (and their institutions)…’ That contention was also rejected. Having discussed the structure and content of the reservation, the Court observed that the Bill was concerned with ‘the purely domestic rules of law which at that point [ie after the United Kingdom’s departure from the European Union] will replace EU law’24. It concluded that:

‘the Scottish Bill does not ‘relate to’ relations with the EU. It will take effect at a time when there will be no legal relations with the EU unless a further treaty is made with the EU. The Scottish Bill does not purport to deal with any legal rule affecting the power of Ministers of the Crown to negotiate such a treaty or otherwise to conduct the UK’s relations with the EU. It does not purport to affect the way in which current negotiations between the UK and the EU are conducted. It simply regulates the legal consequences in Scotland of the cessation of EU law as a source of domestic law relating to devolved matters, which will result from the withdrawal from the EU already authorised by the UK Parliament. This is something that the Scottish Parliament is competent to do, provided (i) that it does it consistently with the powers reserved in the Scotland Act to the UK Parliament, and with legislation and rules of law protected under sch 4, and (ii) that its legislation does not relate to other reserved matters. Parts of the argument of the UK Law Officers appear to suggest a wider objection that separate Scottish legislation about the consequences of withdrawal is legally untidy, politically inconvenient or redundant in the light of the corresponding UK legislation. But we are not concerned with supposed objections of this kind, which go to the wisdom of the legislation and not to its competence’25.

The Court then dealt with a specific objection to s 17 of the Legal Continuity Bill. Section 17 represented an attempt to create a ‘veto’ for the Scottish Ministers in relation to subordinate legislation made by UK ministers where that subordinate legislation contained ‘devolved provision’ (ie provision that would be within the legislative competence of the Scottish Parliament) which modified retained EU law and was made under an Act of Parliament passed after s 17 would come into force. Such subordinate legislation, ‘to the extent that it contains devolved provision, is of no effect unless the consent of the Scottish Ministers was obtained before it was made, confirmed or approved’26. The Court concluded that this was an impermissible modification of SA 1998, s 28(7) (prohibited by SA 1998, Sch 4)27:

‘An enactment of the Scottish Parliament which prevented such subordinate legislation from having legal effect, unless the Scottish Ministers gave their consent, would render the effect of laws made by the UK Parliament conditional on the consent of the Scottish Ministers. It would therefore limit the power of the UK Parliament to make laws for Scotland, since Parliament cannot meaningfully be said to “make laws” if the laws which it makes are of no effect. The imposition of such a condition on the UK Parliament’s law-making power would be inconsistent with the continued recognition, by sec 28(7) of the Act, of its unqualified legislative power’28.

A further argument that s 17 related to the reserved matter of ‘the Parliament of the United Kingdom’29 was rejected.

Another specific objection of the UK Law Officers, and rejected by the Court, was to s 33 of, and sch 1 to, the Bill, which in combination would have amended ss 29 and 54 of SA 1998 to remove the references in those provisions to ‘EU law’, and would have repealed a number of other provisions of SA 1998 ‘which are spent as a consequence of the UK’s withdrawal from the EU’30. These provisions were held to be within the Parliament’s legislative competence by virtue of SA 1998, Sch 4, para 7, which creates a carve-out from the general prohibition in Sch 4 against modifying protected enactments: ‘Part I of this Schedule does not prevent an Act of the Scottish Parliament (a) restating the law (or restating it with such modifications as are not prevented by that Part), or (b) repealing any spent enactment, or conferring power by subordinate legislation to do so.’

The next of the UK Law Officers’ challenges to the Bill was that it was incompatible with EU law (and so in breach of SA 1998, s 29(4)) and impermissibly modified ECA 1972 (another of the enactments protected from modification by SA 1998, Sch 4). The parts of the Bill attacked under this head were those that incorporated or empowered the Scottish Ministers to incorporate into Scots law directly applicable EU law; disapplied mandatory principles of EU law; empowered the Scottish Ministers to make regulations to modify retained (devolved) EU law; or were ‘parasitic’ upon such provisions. The challenge was founded ‘on the premise that the Scottish Parliament does not at present have legislative competence to pass an Act containing provisions which cannot be brought into effect until current restraints on legislative competence are removed at a future date’31. The Lord Advocate’s submission was that:

‘the impugned provisions are not incompatible with EU law because they will not come into force until the TEU and the TFEU cease to apply to the UK, thereby removing the supremacy of EU law…it is not contrary to EU law and it is consistent with legal certainty for a Member State, such as the UK, to pass anticipatory legislation to address the consequences to its statute book of the proposed withdrawal from the EU, provided that that is done in a way which respects the supremacy of EU law until withdrawal. A devolved legislature, such as the Scottish Parliament, may likewise enact such legislation consistently with EU law’32.

The Court agreed: the postponement of the legal effect of the provisions until after Brexit saved them from being outside of legislative competence.

Finally, however, came the question of modification of EU(W)A 2018. Having accepted that it was bound to have regard to that Act, notwithstanding that its passage post-dated that of the Legal Continuity Bill, the Court considered it necessary to examine the provisions of the Legal Continuity Bill individually to ascertain which purported to modify EU(W)A 2018. Those parts that merely replicated provisions of EU(W)A 2018 did not involve modification33. However, a number of other provisions would involve impermissible modification, including s 2(2) (to the extent that it would purport to retain ECA 1972, which was to be repealed by EU(W)A 2018); s 5 (which would retain the European Charter of Fundamental Rights in Scots law, in clear contradiction of the express provision of EU(W)A 2018 that the Charter was not to be retained); parts of ss 7 and 8 that made more generous provision for accrued rights of action than EU(W)A 2018; and s 11, to the extent that it would confer on the Scottish Ministers wider powers to remedy deficiencies in retained EU law than the similar powers conferred by EU(W)A 2018.

The Court having decided that ‘the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill would be partly outwith the legislative competence of the Scottish Parliament’34, the Bill could not receive royal assent as passed and was returned to the Scottish Parliament for reconsideration. In the event, the Scottish Government did not attempt to bring forward amendments to the Bill and, instead, introduced the UK Withdrawal from the European Union (Continuity) (Scotland) Bill on 18 June 2020, which reinstates, in updated form, what has been described as a ‘keeping pace’ power (the earlier incarnation of which in the Legal Continuity Bill was held to be within competence)35.

#FootnoteB

1 *Queen v Lord Advocate* 2020 SLT 467: compatibility with art 6 ECHR of regime for fixed penalty notices for minor offences.

2 *Burns v Lord Advocate* 2019 SLT 337 and *Prior v Lord Advocate* 2020 SLT 762: compatibility with art 6 of the provisions on permission for judicial review introduced by CR(S)A 2014 (see para 14.8).

3 *ABC v Principal Reporter* 2020 SLT 679: compatibility with art 8 ECHR of the provisions of the 2011 Act that exclude siblings from the category of ‘relevant persons’ for the purposes of compulsory supervision orders.

4 It was also contended that the making of an order imposing a fifty pence minimum price breached EU law and therefore constituted a breach of SA 1998, s 57. An additional ground of complaint, that AMP(S)A infringed the Articles of Union between Scotland and England, was dropped after the first instance hearing of the challenge.

5 *The Scotch Whisky Association, Petitioners* 2013 SLT 776.

6 [2014] CSIH 38. Although not specifically referred to by the Court, such a reference is provided for in terms of SA 1998, s 34. See para 9.18.

7 *Scotch Whisky Association v Lord Advocate* [2016] 2 CMLR 27. The ECJ heard interventions from the Governments of Bulgaria, Finland, Ireland, Italy, the Netherlands, Norway, Poland, Portugal, Spain and Sweden; the European Commission; and the European Free Trade Association Surveillance Authority.

8 *Scotch Whisky Association v Lord Advocate* 2017 SC 465.

9 *Scotch Whisky Association v Lord Advocate* 2018 SC (UKSC) 94.

10 Although the Act was brought into force only in 2018, so the statutory review would not be required until 2023, the Scottish Government undertook to review the 50 pence MUP after two full years of operation. That review is underway. For other similar review requirements, see para 9.28.

11 The reservation, set out in SA 1998, Sch 5, S B2, is: ‘The subject-matter of (a) the Data Protection Act 1998, and (b) Council Directive 95/46/EC (protection of individuals with regard to the processing of personal data and on the free movement of such data).’

12 *Christian Institute v Lord Advocate* 2015 SLT 72.

13 2016 SC 47.

14 2017 SC (UKSC) 29.

15 At its meeting on 6 December 2017: see ES/S5/17/31/M.

16 Practice Development Panel, *Getting It Right For Every Child*, Final Report, March 2019.

17 See para 4.31.

18 Also discussed at para 4.31.

19 SP Bill 28–LC.

20 *UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* 2018 SC (UKSC) 13 at para 92.

21 *Ibid*, at para 25.

22 *Ibid*, at para 26.

23 The Court also observed, in distinguishing between the statutory limits on competence under s 29 and common law constraints on the Parliament's legislative powers, that while an ASP that was outside competence by reference to s 29 was a nullity, an ASP held to be unlawful on more general common law grounds would not necessarily be so. See para 14.32.

24 *UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* 2018 SC (UKSC) 13 at para 31.

25 *Ibid*, at para 33.

26 Section 17(2).

27 Section 28(7) is, of course, the provision that explicitly provides that the Westminster Parliament retains the power, notwithstanding devolution, to legislate for Scotland. See para 6.12.

28 Para 52.

29 SA 1998, Sch 5, para 1.

30 Section 33(3).

31 *UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* 2018 SC (UKSC) 13 at para 81.

32 *Ibid*, at para 83.

33 *Ibid*, at para 100.

34 *Ibid*, at para 125.

35 See para 4.40.