THE SOVEREIGNTY OF SCOTLAND AND OF THE UNITED KINGDOM

At the time it was done, an implication of the devolution of important competences to newly created layers of government in Scotland and Wales received inadequate debate. Devolution would all but inevitably mean that a court would be tasked with determining the boundaries of the competences, and after the Constitutional Reform Act 2005 the Supreme Court became charged with one of the functions of a constitutional court. In *Reference by the Lord Advocate of Devolution Issues Under Paragraph 34 of Schedule 6 of the Scotland Act 1998* [2022] UKSC 31, a five member panel of the Supreme Court, on which sat Lord Reed PSC, unanimously affirmed a limitation on the competence of the Scottish Parliament regarding a matter which could not be more fundamental: a referendum about Scottish independence. But the legal issues were in truth facile, and far more constitutionally important than this obvious demarcation of competences is that the *Reference* marks a further stage in the subordination of the sovereignty of Parliament to judicial supremacy.

Addressing the Scottish Parliament on 28 June 2022, Ms. Nicola Sturgeon, the Leader of the Scottish National Party and the First Minister of Scotland, announced "that the Scottish Government is today publishing the Scottish Referendum Independence Bill". It is of great significance that this did not constitute the actual introduction of a Bill, but expressed a wish to introduce one. For cl.2 of the Bill, which provided for a "referendum" on the question "Should Scotland be an independent country?", was bound to encounter difficulty. The Scotland Act 1998, s.29(2)(b) listed certain "reserved matters" "outside the legislative competence of the [Scottish] Parliament", and Sched.5, para.1(b) placed "the Union of the Kingdoms of Scotland and England" on that list. As there was no prospect of the UK Government using its power under the Scotland Act 1998, s.30(2) to "make … modifications" to this list in the way it had done to

enable the Scottish Parliament to legislate for the 2014 Referendum, the 2022 Bill purported to convey *ultra vires* powers.

The reader unaware of the detail of the devolution settlements may think it axiomatic that the Supreme Court could have become concerned with this only in the following way. Had a 2022 Act received the Assent and the Scottish Government acted upon its s.2, such action inevitably would have been challenged in the Scottish courts, and the review might have reached the Supreme Court. However, as Ms. Sturgeon made clear when announcing the Bill, "rather than wait" for legal proceedings, the Scottish Government availed itself of a further constitutional innovation under the Scotland Act. Sub-section 31(1) requires the Scottish Government to be of the "view" that any Bill it introduces be within the Scottish Parliament's legislative competence, and para.3.4 of the Scottish Ministerial Code specifies that this view must be expressed in "a statement … cleared with the Law Officers". The Scotland Act ss.33(1) allows the Lord Advocate to refer "the question of whether a Bill … would be within … legislative competence" to the Supreme Court, and under Sched.6, para.1(f) the question was also listed as one of the "devolution issues" about which the Lord Advocate might make a "direct reference" to the Supreme Court under Sched.6, para.34.

One cannot see any useful purpose to the overlap of these provisions, which unarguably could give rise to the "questionable" (at [24]) possibility that a devolution issue, the only legal significance of which in this respect is that it may be outside the Scottish Parliament's competence, could be treated differently than other competence issues. The Supreme Court did not find, however, that this "bifurcation point" had caused difficulty on this occasion (at [20]). But whilst it was right that s.33 issues having to be raised after a Bill was introduced or passed whereas Sched.6 issues have to be raised prior to a Bill's introduction did not prevent

consideration of the current reference, which the Lord Advocate made prior to introduction (at [23]), we shall see that the waters ran deep.

Having been asked by the First Minister to consider making a reference, the Lord Advocate decided to seek the assistance of the Supreme Court because "she did not have the necessary degree of confidence that the Bill does not relate to a reserved matter to clear a Ministerial statement that the Bill is within … legislative competence" (at [10]). Had the referendum been found to be within competence, the Bill would then have been introduced. But there was no prospect of this at all, and it is, with respect, impossible to perceive the legal difficulty which could cause perplexity over a question which must be described as facile. The Supreme Court addressed a number of points, but the weight of those points is indicated by the "central issue" (at [56]) or the "critical question" (at [57]) which the Court believed to be raised by "consideration of the question referred" (at [55]) being itself insubstantial. This question was, with reference to the wording of the Scotland Act 1998, s.29(3), whether "legislation providing for a referendum on Scottish independence *would relate* to a reserved matter", and "whether the proposed Bill *would relate* to the Union of the Kingdoms of Scotland and England" (at [57]). The Supreme Court discussed previous cases in which the meaning of "would relate" was debatable (at [57-71]).

Let us leave it aside that s.29 properly bears only on "legislative competence" rather than on "devolution issues". Can there be any sensible question whether a proposal to hold *a referendum on Scottish independence* "would relate" to the Scottish Parliament's legislative competence or to a devolution issue? It is unsurprising that the Supreme Court's answer to the Lord Advocate's reference must be as straightforward as any ever given to a question which has reached the UK's highest court. The question referred was:

> "Does the provision of the proposed Scottish Independence Referendum Bill that provides that the question to be asked in a referendum would be 'Should Scotland be an independent country?' relate to reserved matters? In particular, does it relate to: (i) the Union of the Kingdoms of Scotland and England (paragraph 1(b) of Schedule 5); and/or (ii) the Parliament of the United Kingdom (paragraph 1(c) of Schedule 5)"?

The Supreme Court was "in no doubt about the answer[, which was] plain" (at [82]):

> "The scope of the reservation of the Union is sufficiently clear for the purposes of this case *from its terms*: the Union of the Kingdoms of Scotland and England" (at [76] emphasis added).

It is, with respect, nevertheless difficult to grasp the Advocate General for Scotland's aim in arguing at length that the Supreme Court should not have accepted the reference at all. The shortcomings of the Scotland Act 1998 provided ample opportunity for the Advocate General to raise obstacles to the reference of varying degrees of difficulty, and the majority of the judgment is occupied with them (at [15]-[54]). But what would have been achieved had the Lord Advocate faulted so badly at one of these obstacles as not to have been able to avail herself of the opportunity to obtain the assistance of the Supreme Court which it is the undeniable purpose of the Scotland Act to provide? Previous cases cited by the Advocate General were, with respect, readily distinguishable because they did not raise the basic issue four square (at [49]-[53]), which the Lord Advocate's reference certainly did.

The way the Supreme Court cleared perhaps the most substantial of the Advocate General's obstacles requires, however, close attention. He argued that the UK Parliament "would not have intended the resources of the court to be taken up with references by the Lord Advocate of provisions which she herself cannot confirm to be within legislative competence" (at [43]). The Supreme Court's answer to this was:

> "Law Officers perform an important role in providing legal advice to government, but they are not infallible[, nor] is the person in charge of a Bill who has to form and state the opinion [that a Bill is within competence] infallible … They … may believe that there is a reasonably arguable case that a Bill is within legislative competence,

> while not being sufficiently confident to state positively that it is, being mindful that this ultimately is a question of law which only a court of law can resolve" (at [44]).

The Advocate General's argument that the more questionable a provision is the clearer the words needed to show that it was Parliament's intention to pass it is of course generally sound, but there is a limit beyond which one is rewriting the legislation being interpreted, and this argument ran up against what the Scotland Act provided on its face, which, however wisely or otherwise, does allow (or fails to prevent) a reference made on the basis the Supreme Court describes. But the reason the Supreme Court gives for its answer itself gives rise to concern. Politicians and officials are indeed not infallible. The substance of their reasoning is in principle always open to criticism. By contrast, a court *is* infallible, but only if infallibility is understood in a specially procedural sense. The Supreme Court did not, however, have infallibility in this sense in mind.

In *Omychund v Barker* (1744) 1 Atk. 22, 33; 26 E.R. 15, 23, Mr. Solicitor-General Murray, later Lord Mansfield, told us that:

> a statute very seldom can take in all cases, therefore the common law, *that works itself pure* by rules drawn from the fountain of justice, is for this reason superior to an Act of Parliament".

After the political question whether a law should be passed is settled *pro tem* by legislation, that law is then worked pure by interpreting it in concrete circumstances which the legislature could not possibly anticipate. It is necessary to legal order that the court procedurally be held infallible over the application of the law, but this necessity is not regarded as a mere imposition as it is generally acknowledged that substantive wisdom emerges from the abrasion with the concrete.

No such wisdom can, of course, emerge from making a reference, for this substitutes the Supreme Court for the preparation of legislation by the Scottish Government and the Scottish Parliament. Judges *qua* distinguished lawyers doubtless could usefully advise both bodies on

legal issues arising from their legislative intentions; but what has this got to do with adjudication by a court? It might be regarded as "a question of law which only a court of law can resolve", but only if "a question of law" means, not a question to be resolved by adjudication, but a legislative question to which the answer is infallible only because it has been given by a body called "a court of law".

The pages of this journal should be the last place in which to discuss the considerations of political advantage which led Ms. Sturgeon to request the Lord Advocate to consider making a reference. The *Reference* cannot, however, be understood without doing so. The Scottish Government's tabling of the business of the Scottish Parliament was bound, in light of the way Sched.6 works, to give no opportunity to debate either the Scottish Referendum Bill, which the Scottish Parliament never saw, or the reference, which the Lord Advocate never appeared before Parliament to defend. The real question which would have been the subject of debate was not the facile question of whether the devolution settlement allowed the proposed referendum, but whether the Scottish Government should hold an *ultra vires* "referendum" because the political party holding a majority which allows it to form that Government believes that the devolution settlement is itself illegitimate. That this question was considered in the Supreme Court rather than the Scottish Parliament does not alter its political nature, far less settle that question. Though the First Minister "respect[ed] and accept[ed] the Supreme Court's judgment", she immediately told the Scottish Parliament that that judgment "raise[d] profoundly uncomfortable questions about the basis and future of the United Kingdom[, which is] not voluntary or even a partnership", and declared her intention to bring forward just the same referendum in future should political circumstances permit, though those circumstances will not change the legal position one jot.

The possibility of the *Reference* being heard was of course created by the passage of the relevant provisions of the Scotland Act, and the Supreme Court is hardly responsible for those provisions or the constitutional thinking behind them, which has now drawn the Court into a continuing political failure. Devolution was undertaken to preserve the unity of UK. But this is just what the Scottish Government does not accept, and devolving competences to units of government based on perceived national identities within the UK was bound, in this writer's opinion, to encourage such non-acceptance. The Scotland Act thereby most unwisely created a situation in which the Supreme Court would in the fullness of time become enmeshed in something like Ms. Sturgeon's political question. But, to repeat, the obstacles raised by the Advocate General should not defeat the intention expressed in the Act.

The *Reference* is notable, however, for the fulsome way in which the Supreme Court embraced that intention. Though the Court required 41 paragraphs to decide whether the principal Law Officer of Scotland could make a reference to it, it did not take that many words for the Court to allow a political party to canvass its political views before it:

> The Scottish National Party has exceptionally been permitted to intervene, notwithstanding that it is the party forming the Scottish Government in which the Lord Advocate is a minister, so that the court can consider a wide range of arguments (at [3]).

With standing itself now all but a nullity, this attitude towards intervention is to be expected, but the *Reference* illustrates the hazards of that attitude. Though allowing the intervention gave the Scottish National Party a second bite of the cherry, the argument of the intervention had to be different from the argument of the Advocate General, and it was couched in terms of "the right … in international law" of the "self-determination of peoples" (at [84]-[85]). In an exaggeration of the shortcomings of the reference itself, the intervention thereby argued, behind a façade of international legal terminology, the domestic political question

whether “Scotland” should be a “self-determining”, i.e. independent, “people”, i.e. nation. And again, judges as persons of intellectual distinction doubtless could contribute to the discussion of this question; but this should not be seen as the contribution of a domestic ‘court of law’. The Supreme Court cannot escape the major part of the responsibility for Mr. Donald Cameron, the Scottish Conservative Shadow Cabinet Secretary for the Constitution, receiving the *Reference* by saying that the Supreme Court “could not have been clearer in its total dismissal of the SNP’s absurd claim that Scotland is some kind of oppressed colony … rightly, and comprehensively, demolished by Lord Reed”.

By very extensively addressing a question of negligible weight, and opening up the consideration of “a wide range of arguments” of no cogency, the Supreme Court has extended the scope created by the Scotland Act for purporting to give legal answers to political questions. Most importantly, some sense that a decision by the Supreme Court would, just because it was by the Supreme Court, be an infallible improvement on the fallibility of politicians and officials underlay this extension. But if the rule of law requires that there be no political interference in the application of the law, it also requires that a court should not pass purportedly legal judgements on political issues, for one reason because this must undermine respect for infallibility in adjudication proper.

Surely one of the most forceful statements of this position in recent times was given by Lord Reed in his dissent in *R. (Miller and another) v The Secretary of State for Exiting the European Union* [2017] UKSC 5; [2017] 2 W.L.R. 583, 621 at [240], where he told us that:

> “It is important for courts to understand that the legalisation of political issues is not always constitutionally appropriate, and may be fraught with risk, not least for the judiciary”.

In *Miller*, the recognition of constitutional statutes was consolidated, and therefore judicial supremacy extended, in circumstances which could hardly have been more politically fraught. In the *Reference*, judicial supremacy has been extended in a legally distinct, if related, way, in circumstances not of a qualitatively different kind. Like Mrs. Gina Miller after her first case, Ms. Sturgeon may have been disappointed in the outcome of her recourse to the Supreme Court. But their aims became springboards for the very important constitutional change contributed to by the legal hearing of their cases. Like Mrs. Miller, Ms. Sturgeon has been left unknowing of the role she has played in the ongoing creation of judicial supremacy, and in this they are joined by the other citizens of the UK.

The Supreme Court's involvement in cases such as those of Mrs. Miller and Ms. Sturgeon has so far been in a strong sense successful because of the public's confidence in the law. But the constitutional achievement represented by this confidence was the product of a legal and political culture expressed in the sovereignty of Parliament which made cases like *Miller* and the *Reference* all but unthinkable. The consequences threatened by their now being entirely thinkable loom just behind Ms. Sturgeon's mere show of respect for the decision in the *Reference*. Her clear statement of an intention to do all this again should political circumstances permit is of concern.

After *Miller*, the political vetting of appointments to the Supreme Court received a worrying degree of support. And perhaps it is of greater concern that political and media comment *favourable* to the Supreme Court's judgment has taken it for granted that Lord Reed's being Scottish greatly strengthens that judgment. Postulating what would have been said by those unfavourable to the judgment were Lord Reed English does not tax one's imagination.

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