THE RENTON LECTURE 2020: DEVOLUTION AND THE STATUTE BOOK

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I. Introduction

It is a privilege to have been invited to deliver this year's Renton Lecture. Former Renton lecturers have spoken eloquently about Lord Renton's remarkable legal and Parliamentary career, of the seminal importance of the Report of the Committee which he chaired, of his personal qualities and of his contribution as first President of the Statute Law Society.

I understand that, as a member of the Kilbrandon Commission on the Constitution, Lord Renton opposed the proposals in the report of that Commission for devolution to Scotland[1], so I do not know what he would have made of my subject. Perhaps he would have taken some satisfaction in the recognition by the Office of Scottish Parliamentary Counsel, in its publication "Plain Language and Legislation" of the seminal importance of the Renton Committee report[2].

And I would like to think that he would have approved of the commitment of that Office both to excellence in legislative drafting and to the promotion of greater public understanding of the art and craft of the legislative drafter – a commitment which is reflected in the publication on-line of "Drafting Matters!"[3], the guidance manual of the Parliamentary Counsel Office on the drafting of primary legislation.

Lord Renton was, of course, absolutely right to recognise that excellence in legislative drafting is essential to a well-functioning democracy. In his famous

[1] John Biffen, Obituary for Lord Renton, The Guardian, 25 May 2007
[2] 2006, p. 2.
[3] https://www.gov.scot/publications/drafting-matters/.

judgment in the *UNISON* case[4], Lord Reed explained the intimate connection between the respective roles of the courts and of the legislature; and the democratic underpinning for the application by the courts of laws made by or with the authority of the legislature. That virtuous connection between democracy and law depends, critically, on the technical quality of legislation, and the technical quality of legislation depends, in turn, on the skill of the drafter.

Legislation is, after all, the embodiment of policy in text. It is intended to have legal effect – to change things in the world. It achieves its purpose by providing authoritative instructions to those who require to apply, or to comply with, its terms. If the policy intention is not accurately conveyed by the text of the statute to those who need to understand it – and, ultimately, to the courts - then the policy intention, mandated by the representative institutions which have the legitimacy to make the laws by which we live, will miscarry.

In paying tribute to Lord Renton, the first President of this Society, let me also mention its second, the late Lord Rodger of Earlsferry. I cannot match the dazzling combination of erudition and wit which Lord Rodger, so characteristically, brought to bear on the subject in his wonderful lecture on the Form and Language of Legislation[5], but I certainly share his enthusiasm and admiration for what he described as "the remarkable intellectual endeavour behind the creation of the vast body of law which makes up the statute book"[6].

In that lecture, Lord Rodger reflected the practical insight into the art and science of legislation which he had obtained when, as Lord Advocate between 1992 and 1995, he was the Government Minister responsible for the drafters who prepared Scottish legislation[7]. Although the constitutional structures within which, as today's Lord Advocate, I exercise the functions of that office are very different from those within which Lord Rodger worked, those functions continue to include significant responsibilities in relation to the statute book. Today's Lord Advocate is,

[4] *R (UNISON) v. Lord Chancellor* [2020] AC 869, para. 68.
[5] Rodger of Earlsferry, "The Form and Language of Legislation" (1999) 18 Rechtshistorisches Journal 601
[6] Ibid., p. 634.
[7] The significance of Lord Rodger's experience as a Law Officer in relation to his interest in statute law was noted by Lord Hope of Craighead in his 2016 Renton Lecture 2016, "A View from the Crossbenches".

by virtue of that office, a member of the Scottish Government[8]. The Scottish Ministerial Code recognises that the Scottish Law Officers – the Lord Advocate and the Solicitor General for Scotland – have Ministerial responsibility for the provision of legal advice to the Scottish Government[9]. In practice, much of the front-line work is undertaken on their behalf by the Scottish Government Legal Directorate[10], among other things, instruct Government Bills and draft subordinate legislation, as well as by the Parliamentary Counsel Office, who draft Acts of the Scottish Parliament.

The Lord Advocate is, with the Deputy First Minister and the Minister for Parliamentary Business, a member of the Scottish Government's Cabinet Sub-Committee on Legislation which oversees the Government's legislative programme; and either the Lord Advocate or the Solicitor General for Scotland will generally attend Ministerial Bill Management Meetings at which the readiness of Government Bills for introduction is considered. The Lord Advocate also has responsibilities which flow from the character of the Scottish Parliament, as a legislature with a competence defined and therefore limited by law: first, in assessing whether or not Bills to be introduced into, or passed by, the Scottish Parliament are within the legislative competence of that Parliament[11]; and, secondly, in responding in the courts to any legal challenge which may be brought to an Act of the Scottish Parliament[12].

It is from the perspective of those various functions of my office that it seemed to me that I should, in addressing the Statute Law Society, which draws its members from across the UK, say something about devolution and the statute book. In doing so, I cannot but acknowledge that the UK's withdrawal from the EU and the consequences of withdrawal present, and will continue to present, very significant challenges to the legal and constitutional structures of which I will be speaking.

[8] Scotland Act 1998, section 44; see also section 48.
[9] Scottish Ministerial Code, 2018 edition, para. 2.31.
[10] Ibid, para. 2.31.
[11] For the position on the introduction of a Bill, see the Scotland Act 1998, s. 31 and Scottish Ministerial Code, para. 3.4; for the position after a Bill has been passed, see the Scotland Act 1998, s. 33. This aspect of the work of the Lord Advocate's office is discussed in C McCorkindale and JL Hiebert, "Vetting Bills in the Scottish Parliament for Legislative Competence" 2017 Edin LR 319.
[12] *Adams v. Scottish Ministers* 2003 SC 171, para. 31.

Indeed, as I speak[13], the House of Lords has before it the Internal Market Bill – a Bill which contains provisions which, if enacted, would significantly constrain, both legally and as a matter of practicality[14], the exercise by the devolved legislatures of their legislative competence; provisions which would be significantly more restrictive of the powers of the Scottish Parliament than either EU law[15] or Articles 4 and 6 of the Acts of the Union[16]. The Bill is unacceptable to the devolved administrations and all three of the devolved legislatures have withheld their consent from it.

As a Law Officer, I will leave political comment on that Bill, and indeed more generally, to others. The purpose of the Statute Law Society is to educate the profession and the public about legislation and the legislative process, and I accordingly intend to focus on technical features of law-making and legislation in a devolution context. Most of what I have to say will be about the work of the Scottish Parliament, as the devolved legislature with which I am most familiar. But any discussion of devolution and legislation would be incomplete if it did not also mention the implications which devolution has for the legislative process at Westminster. The position is stated as at 15 December 2020, the date of delivery of this lecture.

II. The constitutional basics

Section 1 of the Scotland Act famously states, with striking simplicity: "There shall be a Scottish Parliament". Section 28 states, with equally striking simplicity that: "… the Parliament may make laws". From these five words, the Scottish Parliament derives its legal power to pass legislation for Scotland which, within the limits of the

[13] On 15 December 2020. At the date of this lecture, the Bill was in "ping pong". It was passed by the House of Lords on 15 December 2020, by the House of Commons on 16 December 2020, and received Royal Assent on 17 December 2020.

[14] See eg. M Dougan, *United Kingdom Internal Market Bill: Implications for Devolution,* UKIM,Briefing,Paper,-,Prof,Michael,Dougan,15,September,2020.pdf (liverpool.ac.uk), 2020.

[15] See Dougan, supra.

[16] Article 4 and 6, so far as they relate to freedom of trade, are "protected enactments", which may not be modified by Scottish legislation: Scotland Act 1998, Schedule 4, para. 1. Challenges to the Tobacco and Primary Medical Services (Scotland) Act 2010 and the Alcohol (Minimum Pricing) Scotland Act 2012 under reference to these provisions did not succeed: *Imperial Tobacco Ltd v. Lord Advocate* 2012 SC 297, paras 40, 156, 216; *Scotch Whisky Association v. Lord Advocate* 2013 SLT 776, paras. 14-25.

Parliament's legislative competence, may amend, repeal and replace, any existing law, including Acts of the UK Parliament so far as applying to Scotland[17].

Although the Parliament's power to make laws derives, juridically, from those words in the Scotland Act 1998, the laws which it passes take their legitimacy from the Parliament's democratic mandate. As Lord Hope of Craighead put it[18]:

> "The dominant characteristic of the Scottish Parliament is its firm rooting in the traditions of a universal democracy. It draws its strength from the electorate."

The legislative competence of the Scottish Parliament has two essential features.

First, it is plenary in character. As Lord Reed observed in *Axa General Insurance Company Ltd*[19], the Scotland Act:

> "… leaves it to the Scottish Parliament itself, as a democratically elected legislature, to determine its own policy goals. It has to decide for itself the purposes for which its legislative powers should be used, and the political and other considerations which are relevant to its exercise of those powers."

As Lord Reed went on to explain in *Axa*, this characteristic of the Scottish Parliament as a legislature has implications for the way in which the court approaches the Parliament's legislative output.

But, secondly, that plenary legislative competence is subject to legal limits[20]. Lord Rodger commented[21] that the Scottish Parliament joins the wider family of legislatures in the Commonwealth, and elsewhere, which owe their existence to the law, and which operate within a legal, and therefore justiciable, framework. Devolution has, accordingly, required us to become familiar with the techniques

[17] *Axa General Insurance Company Ltd v. Lord Advocate* 2012 SC (UKSC) 122, para. 145 per Lord Reed.
[18] *Axa General Insurance Company Ltd v. Lord Advocate* 2012 SC (UKSC) 122, para. 49.
[19] 2012 SC (UKSC) 122, para. 147.
[20] Scotland Act 1998 section 29.
[21] *Whaley v. Watson* 2000 SC 340, 349.

which fall to be applied whenever courts are called on to adjudicate on the legal limits within which a democratically elected legislature exercises its power to make primary legislation.

The limits on the Parliament's legislative competence are set out in section 29 of the Scotland Act. That section states that a provision in an Act of the Scottish Parliament is outside legislative competence so far as any of the following paragraphs apply—

(a) it would form part of the law of a country or territory other than Scotland, or confer or remove functions exercisable otherwise than in or as regards Scotland,

(b) it relates to reserved matters[22] – ie the matters listed in Schedule 5 which are reserved to the UK Parliament.

(c) it is in breach of the restrictions in Schedule 4. Schedule 4 prevents an Act of the Scottish Parliament from modifying specified enactments or from modifying the law on reserved matters[23].

(d) it is incompatible with any of the Convention rights or (as at the date of delivery of this lecture) with EU law[24], or

(e) it would remove the Lord Advocate from his position as head of the systems of criminal prosecution and investigation of deaths in Scotland.

Although section 29 contains five sets of competence limits, the central feature of the general scheme of the Scotland Act that it allocates policy responsibility between the UK Parliament and Government on the one hand, and the Scottish Parliament and Government on the other. In *Martin v. Most*[25], Lord Rodger observed that:

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[22] Section 29 instructs the court how it is to address the question of whether a provision in an Act of the Scottish Parliament relates to a reserve matter: see, generally, *Imperial Tobacco, Petitioner* 2013 SC (UKSC) 153

[23] Whilst Schedule 5 reserves certain policy responsibilities to the UK Parliament, Schedule 4 protects specified enactments and the law on reserved matters from modification. The analysis required in respect of each of these two limits on legislative competence is quite different: see *UK Withdrawal from the European Union (Legal Continuity)(Scotland) Bill Reference* 2019 SC (UKSC) 13.

[24] The reference to EU law will be replaced, by virtue of the European Union (Withdrawal) Act 2018, with a reference to a new section 30A, which provides that an Act of the Scottish Parliament cannot modify, or confer power by subordinate legislation to modify, retained EU law so far as the modification is of a description specified in regulations made by a Minister of the Crown.

[25] 2010 SC (UKSC) 40, para. 74.

> "Leaving aside certain matters where powers are shared … it is immediately obvious that the overall scheme was to devolve power to the Scottish Executive and the Scottish Parliament, but to except certain "reserved matters" which are identified in Schedule 5 to the 1998 Act. All other matters are devolved matters ... So far as these reserved matters are concerned, policy responsibility in respect of Scotland remains with the UK government and the UK Parliament retains the sole responsibility for legislating on them."

In relation to all other matters, policy responsibility in respect of Scotland lies with the Scottish Ministers. That policy responsibility follows from the transfer effected by the Scotland Act from Ministers of the Crown to the Scottish Ministers of executive functions, whether conferred by statute, or exercisable under the prerogative or otherwise, so far as those functions are exercisable within devolved competence.[26] That central legal effect of devolution – the transfer of executive functions from Ministers of the Crown to the territorial governments in Scotland, Northern Ireland and Wales - underpins, for example, the responsibility which each of the four Governments within the UK has for deciding how to respond to the challenges presented by coronavirus in its part of the UK; and the differing approaches which they have taken in that regard.

By contrast with that transfer of executive competence, the Scotland Act states that the grant of legislative power to the Scottish Parliament "does not affect the power of the Parliament of the United Kingdom to make laws for Scotland"[27]. But it was recognised from the outset - and is now stated on the face of the Scotland Act[28] - "that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament". This is

[26] The significance of this transfer of functions, effected by the Scotland Act 1998, is that Ministers of the Crown did not retain them. Accordingly, in the context of executive functions, and by contrast with the position as regards the legislative competence of the UK Parliament, UK Ministers generally have no functions in relation to non-reserved matters. Functions may also be conferred on Scottish Ministers by an enactment; and these may include functions in respect of reserved matters.
[27] Scotland Act 1998, s. 28(7).
[28] Scotland Act 1998, s. 28(8).

the so-called Sewel Convention, which I prefer to call the Legislative Consent Convention.

In the first *Miller* case[29], the Supreme Court observed that the "convention was adopted as a means of establishing co-operative relationships between the UK Parliament and the devolved institutions, where there were overlapping legislative competences". That comment, it seems to me, rather understates the constitutional significance of the Legislative Consent Convention, which recognises that it is normally the Scottish Parliament which has legislative primacy with regard to non-reserved matters[30].

That legislative primacy of the Scottish Parliament with regard to devolved matters supports the constitutional principle of Parliamentary accountability[31] in that it aligns with the exclusive policy responsibility of the Scottish Government, which is accountable to that Parliament, for non-reserved matters in Scotland. The devolution settlement established by the Scotland Act can, accordingly, be seen as a coherent scheme, in which Scottish Ministers, who have the policy responsibility in relation to devolved matters, are accountable to the Scottish Parliament, which has primary legislative competence in relation to such matters. The UK Parliament (to which Scottish Ministers are not accountable), for its part, does not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.

III. Lawmaking in the Scottish Parliament and the limits on legislative competence

Public Bills introduced into the Scottish Parliament are considered in three Stages[32]. Stage 1 involves consideration of the Bill's general principles and a

[29] *R (Miller) v. Secretary of State for Exiting the European Union* [2018] AC 61, para. 136.
[30] See further WJ Wolffe, "*Miller* and Scotland: the Importance of the Legislative Consent Convention in the Devolution Settlement" (2017)8 UK Supreme Court Yearbook. Consent is also sought from the Scottish Parliament for any provision which would alter the competence of that Parliament, or the executive competence of the Scottish Ministers. This is acknowledged by the UK Government in its Devolution Guidance Note 10, and is required by Chapter 9B of the Standing Orders of the Scottish Parliament.
[31] *Cherry v. Advocate General for Scotland, Miller v. Prime Minister* 2020 SC (UKSC) 1, para. 46.
[32] Public Bill procedure is regulated by Chapter 9 of the Standing Orders of the Scottish Parliament, made pursuant to section 22 of the Scotland Act 1998.

decision on whether to agree to them. Stage 2 involves consideration of the details of the Bill. Stage 3 involves final consideration of the Bill and a decision whether to pass or reject it. A Bill which has been passed by the Parliament and has received Royal Assent becomes an Act of the Scottish Parliament[33].

An important feature of Bill procedure in the Scottish Parliament is the role of the lead committee. On introduction, a Bill is allocated to the committee of the Parliament within whose remit the subject-matter of the Bill falls. That committee considers and reports to the Parliament on the general principles of the Bill. The lead committee will typically invite evidence on the Bill, receive written evidence and hold oral evidence sessions. And although a Bill may be considered at Stage 2 in a Committee of the Whole Parliament, it is usually referred back to the lead committee for Stage 2 scrutiny and amendment, before being considered by the Parliament in plenary session at Stage 3.

There are statutory and practical arrangements which seek to ensure that legislation introduced into, and passed by the Parliament respect the limits on the Parliament's legislative competence. On introduction, the member responsible for a Bill must make a statement that the Bill is within the legislative competence of the Scottish Parliament[34]. The Scottish Ministerial Code recognises that, in the case of a Government Bill, the statement by the sponsoring Minister to that effect will have been cleared by the Law Officers[35]. The Presiding Officer must also issue a statement giving his opinion as to whether the Bill is within competence[36]; although a negative statement by the Presiding Officer does not prevent a Bill from proceeding[37].

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[33] Scotland Act 1998, s. 28(2).
[34] Scotland Act 1998, s. 31(1).
[35] Scottish Ministerial Code, 2018 edition, para. 3.4.
[36] Scotland Act 1998, s. 31(2).
[37] This happened in the case of the UK Withdrawal from the European Union (Legal Continuity)(Scotland) Bill, where the Presiding Officer issued a negative certificate (Statements on Legislative Competence Withdrawal from the European Union (Legal Continuity) (Scotland) Bill (parliament.scot)) and the Scottish Government nevertheless introduced the Bill. In these exceptional circumstances, I made a statement, as Lord Advocate, to the Parliament on the introduction of the Bill: Official Report, 28 February 2018, cols. 19-22. After the Bill had been passed by the Scottish Parliament, UK Law Officers referred it to the UK Supreme Court. While the reference was pending, the UK Parliament enacted the European Union (Withdrawal) Act 2018, which inter alia, amended the Scotland Act 1998 so that the 2018 Act itself became an enactment protected by Schedule 4 to the Scotland Act 1998 from modification. The UK Supreme Court held: (i) that the Bill when passed by the

In advance of introduction, Government Bills are accordingly considered by my office and by the office of the Presiding Officer. It is also usual practice for a copy of a Government Bill to be provided to the Office of the Advocate General for Scotland, the UK Government's Scottish Law Officer. Although questions of legislative competence will have been considered in the instruction and drafting of any Government Bill, this part of the process provides a specific opportunity for competence issues to be identified and addressed before the Bill is introduced, and it also, of course, provides the basis for the required certificates by the Minister and the Presiding Officer[38].

Once a Bill has been passed by the Parliament, there is a four week period during which either the Lord Advocate, the Advocate General for Scotland or the Attorney General may refer the Bill to the UK Supreme Court to determine a question as to whether a provision would or would not be within legislative competence[39]. The Presiding Officer may not present the Bill for Royal Assent until that period has expired or has been curtailed by agreement[40], or, if there is a reference to the Supreme Court, until after the reference has been disposed of[41]. There has only been one reference to the Supreme Court of a Bill passed by the Scottish Parliament

Scottish Parliament was, apart from one section, within the competence of the Parliament; but (ii) that the change in the legislative competence of the Parliament whilst the reference was pending meant that a number of other provisions were also no longer within competence: *UK Withdrawal from the European Union (Legal Continuity)(Scotland) Bill Reference* 2019 SC (UKSC) 13.

[38] See generally C McCorkindale and JL Hiebert, "Vetting Bills in the Scottish Parliament for Legislative Competence" 2017 Edin LR 319.

[39] Scotland Act 1998, section 33. The Law Officers also have a power during this period to refer to the Supreme Court the question of whether a provision in the Bill relates to a protected subject-matter: section 32A. Provisions relate to a protected subject-matter if they modify election law in respect of the Scottish Parliament: section 31(5). Such a provision requires to be passed with at least two thirds of the Members of the Scottish Parliament voting for it. During the four week period after a Bill has been passed, the Secretary of State also has a power, under section 35 of the Scotland Act 1998, to make an order prohibiting the Presiding Officer from presenting the Bill for Royal Assent, on the ground that the Bill contains provisions (a) which the Secretary of State has reasonable grounds to believe would be incompatible with any international obligations or the interests of defence or national security, or (b) which make modifications of the law as it applies to reserved matters and which the Secretary of State has reasonable grounds to believe would have an adverse effect on the operation of the law as it applies to reserved matters.

[40] If there is a particular reason why a Bill requires to receive Royal Assent before the four week period has expired, specific confirmation may be obtained from the Lord Advocate, the Advocate General for Scotland, the Attorney General and the Secretary of State for Scotland that they are content that the Bill may be presented for Royal Assent.

[41] Scotland Act 1998, section 32.

– when the UK Law Officers referred the UK Withdrawal from the European Union (Legal Continuity)(Scotland) Bill[42].

These processes limit the scope for legislation which is not within the legislative competence of the Parliament to reach the statute book. But once an Act of the Scottish Parliament has reached the statute book it is susceptible to judicial review on legislative competence grounds. We now have quite a lot of experience of such challenges[43], and a small number have been successful[44]. The Lord Advocate is the appropriate contradictor to respond to any such challenge[45] – and that is a constitutional function, which is exercised by the incumbent regardless of whether the Bill which preceded the Act was a Government Bill or a Committee Bill or a Member's Bill; and regardless of whether the party presently in Government supported or did not support the measure at the time when it was passed.

IV. Co-ordination across the reserved/devolved divide

The delivery of a particular policy objective does not, of course, always fall neatly on one side of the reserved/devolved divide[46]. Giving full effect to a devolved policy initiative may require provision to be made in relation to reserved matters or to modify the law on reserved matters; and, equally, giving full effect to a policy initiative in relation to a reserved matter may require provision to be made with regard to a devolved matter.

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[42] *UK Withdrawal from the European Union (Legal Continuity)(Scotland) Bill Reference* 2019 SC (UKSC) 13. The equivalent power in the Government of Wales Act 2006 has been used three times: *Attorney General v. National Assembly for Wales Commission* [2013] 1 AC 792; *In re Agricultural Sector (Wales) Bill* [2014] 1 WLR 2622; *Re Recovery of Costs for Asbestos Diseases (Wales) Bill* [2015] AC 1016.

[43] *Anderson v. Scottish Ministers* 2002 SC (PC) 63; *Adams v. Scottish Ministers* 2004 SC 665; *DS v. HM Advocate* 2007 SC (PC) 1; *Friend v. Lord Advocate* 2008 SC (HL) 107; *McCarthy v. HM Advocate* 2008 SLT 1038; *Martin v. HM Advocate* 2010 SC (UKSC) 40; *BJ v. Proudfoot* 2011 SC 201; *S v. L* 2012 SC 8; *Axa General Insurance Ltd, Petitioners* 2012 SC (UKSC) 122; *Sinclair Collis Ltd v. Lord Advocate* 2013 SC 221*; Pairc Crofters v. Scottish Ministers* 2013 SLT 308; *Barclay v. HM Advocate* 2013 JC 40; *Imperial Tobacco, Petitioner* 2013 SC (UKSC) 153; *Moohan v. Lord Advocate* 2015 SC (UKSC) 67; *Ashif v. HM Advocate* 2017 JC 7; *Scotch Whisky Association v. Lord Advocate* 2018 SC (UKSC) 94; *Prior v. Scottish Ministers* 2020 SLT 762; *Queen v. Lord Advocate* 2020 SC 377; *ABC v. Principal Reporter* 2020 [UKSC] 26

[44] *Henderson v. HM Advocate* 2011 JC 96; *Cameron v. Cottam* 2013 JC 12, 21; *Salvesen v. Riddell* 2013 SC (UKSC) 236; *Christian Institute v. Lord Advocate* 2017 SC (UKSC) 29*; AB v. HM Advocate* 2017 SC (UKSC) 101.

[45] *Adams v. Scottish Ministers* 2003 SC 171, para. 31.

[46] See Lord Rodger's judgment in *Martin v. Most* 2010 SC (UKSC) 40, for a discussion drawing on his experience in the pre-devolution UK Government.

If a policy which the *devolved* Government wishes to advance would require provision to be made which would not be within the legislative competence of the Scottish Parliament, the Scotland Act contains two mechanisms whereby that may be addressed. First, the powers of the Scottish Parliament may be modified by an Order in Council under section 30 of the Scotland Act, which would allow that Parliament to enact the necessary provisions[47]. Secondly, section 104 provides for subordinate legislation to make such provision as the person making the legislation considers necessary or expedient in consequence of any provision made by or under an Act of the Scottish Parliament or devolved subordinate legislation – thereby enabling the UK Government to make provision consequential on an Act of the Scottish Parliament which cannot, for legislative competence reasons, be addressed in the Act itself[48].

On the other side of the coin, legislation before the UK Parliament in relation to a reserved matter may contain provision with regard to devolved matters. Indeed, in particular contexts, there may be good practical reasons to legislate on a UK-wide basis, in a manner which deals comprehensively both with reserved and non-reserved matters. Such legislation, of course, engages the Legislative Consent Convention. Until 2018, that convention was systematically and routinely observed; and up until that date it could, accurately, have been said that the UK Parliament had not knowingly legislated in relation to a matter subject to the Convention without the consent of the Scottish Parliament, and where consent had not been forthcoming, steps had been taken to address that before the Bill was passed[49].

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[47] Such an Order requires the approval of both Houses of the UK Parliament and of the Scottish Parliament itself: see Scotland Act 1998, Schedule 7. A number of Orders under section 30, adjusting the legislative competence of the Scottish Parliament, have been made. It is also, of course, open to an Act of the UK Parliament to modify the legislative competence of the Scottish Parliament and this has been done on a number of occasions, notably by the Scotland Acts 2012 and 2016. Consistent with the procedure for making an order under section 30, a provision in a Bill before the UK Parliament which modifies the legislative competence of the Scottish Parliament engages engages the Legislative Consent Convention: see UK Government Devolution Guidance Note 10; Standing Orders of the Scottish Parliament, Chapter 9B.

[48] As at the date of this lecture, 87 Orders have been made under section 104 of the 1998 Act.

[49] Eg the Northern Ireland (Miscellaneous Provisions) Bill contained provisions legislating in devolved areas; the Scottish Government preferred to rely on order-making powers; and the Bill was amended (Northern Ireland (Miscellaneous Provisions) Act 2006, s. 32(2)); the Scottish Government did not support provisions in the Public Service Pensions Bill concerning certain devolved public pension schemes; the UK Government amended the Bill accordingly (see Explanatory Notes for the Lords, para. 13; Explanatory Notes on Lords Amendments, para. 5).

The constitutional and practical significance of the Legislative Consent Convention is reflected in the Standing Orders of the Scottish Parliament. Chapter 9B of the Standing Orders requires the Scottish Government to lodge a Legislative Consent Memorandum in relation to any relevant Bill – which is a Bill before the UK Parliament which makes provision applying to Scotland for any purpose within the legislative competence of the Scottish Parliament, or which alters that legislative competence or the executive competence of the Scottish Ministers. The Chapter provides for the Memorandum to be referred to the Committee of the Parliament within whose remit the Bill lies, and for any legislative consent motion to be considered, following a report from that Committee, by the Parliament itself. Consideration of Legislative Consent Memoranda has, in practice, formed quite a significant element in the legislative work of the Scottish Parliament[50].

It is perhaps surprising that the procedures of the House of the Commons and the House of Lords make no explicit provision for dealing with Bills which engage the Legislative Consent Convention[51]. The consequences were illustrated by the legislative history of the European Union (Withdrawal) Act 2018. The UK Government accepted that this Bill engaged the Legislative Consent Convention. As introduced in July 2017, the Bill was unacceptable to the Scottish Government and it was clear that the Scottish Parliament would withhold consent. Very significant amendments were made to the devolution provisions of the Bill late in the day, at Lords Report stage. However, these were not sufficient to secure the consent of the Scottish Parliament, and that Parliament voted to withhold its consent[52].

When the Bill returned to the House of Commons for consideration of Lords amendments, the programme motion meant that only 15 minutes were available to debate the amendments concerning devolution. The entirety of that time was taken up with the speech (including interventions) of the then Chancellor of the Duchy of

[50] See Legislative Consent Memorandums: 2005 - present - Parliamentary Business : Scottish Parliament.
[51] Erskine May online, para. 27.6, describes practical arrangements which are made to enable MPs and peers to identify whether or not consent has been forthcoming. The House of Commons Standing Orders, rule 83J, require the Speaker to consider whether a provision in a public Bill would be within devolved competence, but only in the context of certifying the provision as an "England only" provision.
[52] For a brief account of the history, see House of Commons Research Briefing, *Legislative Consent and the European Union (Withdrawal) Bill (2017-19),* Legislative Consent and the European Union (Withdrawal) Bill (2017-19) - House of Commons Library (parliament.uk).

Lancaster. When the time allotted for debate expired, he was cut off in mid-sentence, and the amendments were passed[53]. Regardless of where one stands on the politics of that Bill, the absence of any meaningful debate in the House of Commons on the implications of the vote of the Scottish Parliament to withhold consent from that Bill was, from a constitutional perspective, rather shocking; and exposed the absence of any procedural mechanism for ensuring that the UK Parliament takes stock of the implications of a refusal of consent and specifically considers whether provisions should be passed notwithstanding the withholding of consent. The 2018 Act was only the first of a number of challenges which Brexit-related legislation has presented for the Legislative Consent Convention[54]: with a degree of understatement, a paper published by the Institute for Government in September 2020 concluded that "… the Sewel convention has been put under strain by Brexit …"[55].

V. Reading Scottish legislation

When reading Acts of the Scottish Parliament and Scottish Statutory Instruments there are some specialties of the law which should be kept in mind. In the first place, there is a distinct statutory regime which applies to this corpus of law. That regime was initially set out in transitional orders made under the Scotland Act 1998 but is now contained in the Interpretation and Legislative Reform (Scotland) Act 2010. The 2010 Act makes provision in respect of: the publication, interpretation and operation of Acts of the Scottish Parliament and instruments made under them; the making, publication and scrutiny of subordinate legislation in the form of Scottish Statutory Instruments; and empowering the Scottish Ministers, by order, to make certain amendments to enactments in order to facilitate their consolidation or codification.

[53] HC Deb Vol. 642 12 June 2018, cols 839-847.

[54] The UK Parliament passed the European Union (Withdrawal Agreement) Act 2020 and the Internal Market Act 2020 notwithstanding that, in each case, all three of the devolved legislatures had withheld consent. Whilst the Scottish Parliament consented to the Fisheries Bill and the Environment Bill, the Agriculture Bill revealed another structural weakness in the institutional arrangements which apply to the Convention – namely, the absence of any authoritative mechanism for resolving disagreements as to whether or not the Convention is engaged: the Scottish Government and the UK Government disagreed as to whether the Convention applied to certain provisions from which the Scottish Parliament withheld consent.

[55] A Paun and K Shuttleworth, *Legislating by consent: How to revive the Sewel Convention,* September 2020.

If you are dealing with Scottish legislation, you should, accordingly, be aware that the relevant statutory provisions as regards interpretation are to be found not in the Interpretation Act 1978 but, for legislation predating the coming into force of the 2010 Act, in the Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc. of Acts of the Scottish Parliament) Order 1999, and, for subsequent legislation, in the 2010 Act itself. Unsurprisingly, some of the rules of interpretation which apply are to the same or similar effect as those which apply to UK legislation[56]. For example, section 15 of the 2010 Act, which governs the effect of repeal, like the 1978 Act, provides that the repeal or revocation of an enactment does not revive Acts, instruments or rules of law which had been repealed or abolished. But other rules depart from the law applicable to UK legislation. Notably, section 20 of the 2010 Act provides that an Act of the Scottish Parliament or a Scottish instrument binds the Crown except in so far as the Act or instrument provide otherwise, thereby reversing, in this context, the effect of the *Faslane Fence* case[57].

The other specialty which needs to be borne in mind when reading Scottish legislation is the pervasive effect of the limits on the legislative competence of the Scottish Parliament. It is not usual drafting practice to replicate those limits in individual statutes. It is not necessary to say explicitly on the face of every Act of the Scottish Parliament that, for example, the provisions apply only as regards Scotland, or are subject to Convention rights. It follows that, when reading a generally worded power in an Act of the Scottish Parliament (including a power to make subordinate legislation) or indeed the provisions of a Scottish Statutory Instrument, the limits on the legislative competence of the Scottish Parliament should be kept in mind, and, if necessary, the provision may require to be "read down" [58].

This process of "reading down" is mandated by section 101 of the Scotland Act 1998, which tells us that where a provision could be read so as to be outside

[56] By which I mean, in this context, legislation of the UK Parliament, or subordinate legislation made under legislation of the UK Parliament. Such legislation may, of course, be specific to Scotland.
[57] *Lord Advocate v. Dumbarton District Council* 1990 SC (HL) 1; for comment on that case, see WJ Wolffe, "Crown Immunity from Legislative Obligations" 1990 PL 14.
[58] Cp *Joint Liquidators of Scottish Coal Co, Noters* 2014 SC 372.

competence, it "is to be read as narrowly as is required for it to be within competence, if such a reading is possible, and is to have effect accordingly". Where Convention rights are in issue, the starting point is the interpretive obligation in section 3 of the Human Rights Act 1998[59]: if the provision can be construed compatibly with Convention rights, it should be; and this will bring the provision within the Convention rights competence limit.

Quite apart from these statutory interpretive obligations, section 29(1) of the Act states

> "(1) An Act of the Scottish Parliament is not law *so far as* any provision of the Act is outside the legislative competence of the Parliament.
>
> (2) A provision is outside that competence *so far as* any of the following paragraphs apply" [and the five limits on competence are then set out]

The little phrase "so far as", which is repeated in these two subsections, is a critically important one. It tells us that a provision which is, to some extent, outside legislative competence is not law to that extent, but *only* to that extent.

Where a provision cannot be interpreted in a manner which is within competence, this may result in textual severance – in the excision of such parts of the provision as are outwith competence and difficult questions may arise about the precise text which requires to be read out or excised[60]. But, in other cases, where legislation contains provision which is "over-broad" (ie capable, as a matter of language, of extending beyond the legislative competence of the Parliament), the appropriate course will be to deploy a technique of substantial reading down.

This technique is deployed in Canada, where the Constitution states that "any law that is inconsistent with the provision of the Constitution is *to the extent of the inconsistency*, of no force or effect". In *R v Appulonappa*[61], the Supreme Court of Canada had before it an enactment which provided: "No person shall knowingly organize, induce, aid or abet the coming into Canada of one or more persons who are not in possession of a visa, passport or other document required by this Act." The Court held that the provision was inconsistent with the Canadian Charter insofar as it applied to three categories of conduct: (i) humanitarian aid to undocumented

[59] *DS v. HM Advocate* 2007 SC (PC) 1, para. 24 per Lord Hope of Craighead. Similarly, in relation to EU law, the application of the *Marleasing* approach to interpretation would, where it results in a provision being construed in a manner which is compatible with EU law, thereby also bring the provision within the EU law competence limit.

[60] Eg *Salvesen v. Riddell* 2013 SC (UKSC) 236, paras. 46-51.

[61] [2015] 3 SCR 754.

entrants; (ii) mutual aid amongst asylum seekers; and (iii) assistance to family entering without the required documents. The Court was invited to strike down the provision in its entirety. The Court rejected that provision and held that it should be read down so as not to apply to those three categories of case. The Court observed that: "This remedy reconciles the [provision] with the requirements of the Charter while leaving the prohibition on human smuggling for the relevant period in place"[62].

The technique was also deployed by the Judicial Committee of the Privy Council in *Jersey Fishermen's Association v. States of Guernsey*[63]. The case concerned The Sea Fish Licensing (Guernsey) Ordinance 2003, which applied to a twelve mile belt of waters adjacent to the Bailiwick of Guernsey. The Judicial Committee held that the Ordinance was ultra vires so far as it extended beyond the three mile belt of territorial waters. Nevertheless, the Judicial Committee held that the Ordinance remained valid and in force within the territorial waters. It concluded that it was possible to achieve this result either by a process of textual severance or, if that was not possible, by the technique of substantial severance on the basis that the terms of the Ordinance could continue to apply with equal relevance and without significantly different effect in the three mile belt.

The application of the technique in the context of devolved Scottish legislation may be illustrated by *Henderson v. HM Advocate*[64] . The Criminal Justice (Scotland) Act 2003 enacted provisions which created a new form of life sentence – an order for lifelong restriction – which included a term of imprisonment which is indeterminate in the sense that, after a punishment part has been served, the question of whether the accused is released is a matter for the Parole Board. Following the appellant's conviction for an offence under section 1 of the Firearms Act 1968, the Court made such an order. The subject matter of the Firearms Act 1968 is reserved; and that Act among other things specifies the maximum sentence which may be imposed following a conviction under section 1 – five years imprisonment or a fine or both, save where the offence is committed in an aggravated form, where the maximum term of imprisonment is seven years. The Court concluded that to impose an order for lifelong restriction following a conviction under the Act would be a modification of the law on reserved matters and, on that ground, would not be within the legislative competence of the Scottish Parliament. To that extent, the provision was not law. Relying on the interpretive obligation in section 101, the Court held that, notwithstanding the general terms of the relevant statutory provisions, those provisions should be read and have effect as not extending to a conviction under

[62] Para. 85.
[63] [2007] UKPC 30.
[64] 2011 JC 96.

section 1 of the Firearms Act; and the sentence was quashed. But the fact that the provision was, to that extent, not law did not otherwise deprive it of legal effect.

VI. The corpus of legislation

Let me, in closing, give you a flavour of the legislative output of the Scottish Parliament since 1999. In that period, it has passed 317 Acts and has scrutinised the making of over 9,000 Scottish Statutory Instruments. That, on any view, is a significant corpus of legislation, which has had a very marked impact on the law in Scotland.

It has included significant Acts reforming areas of Scots private and criminal law, including a substantial campaign of systematic reform of the law of property[65], the modernisation of the law on incapable adults[66], charity law[67] and arbitration law[68], significant reforms of the law of diligence (the mechanisms for the execution of judgments), of personal insolvency law[69] and family law[70], and a restatement of the law on sexual offences[71] as well as legislation dealing with domestic abuse[72], forced marriages[73] and human trafficking[74]. It has included reforms of the systems of civil and criminal justice, establishing the modern statutory framework for the organisation and administration of Scotland's courts and tribunals[75], effecting significant

[65] Abolition of Feudal Tenure etc (Scotland) Act 2000; Leasehold Casualties (Scotland) Act 2001; Title Conditions (Scotland) Act 2002; Tenements (Scotland) Act 2004; Land Registration (Scotland) Act 2012; Long Leases (Scotland) Act 2012.
[66] Adults with Incapacity (Scotland) Act 2000.
[67] Charities and Trustee Investment (Scotland) Act 2005.
[68] Arbitration (Scotland)_Act 2010.
[69] Abolition of Poindings and Warrant Sales (Scotland) Act 2001; Debt Arrangement and Attachment (Scotland) Act; Bankruptcy and Diligence (Scotland) Act 2007; Home Owner and Debtor Protection (Scotland) Act 2010; Bankruptcy and Debt Advice (Scotland) Act 2014; Bankruptcy (Scotland) Act 2016.
[70] Marriage (Scotland) Act 2002; Adoption and Children (Scotland) Act 2007; Marriage and Civil Partnership (Scotland) Act 2014; Children and Young People (Scotland) Act 2014.
[71] Sexual Offences (Scotland) Act 2009.
[72] Domestic Abuse (Scotland) Act 2011; Domestic Abuse (Scotland) Act 2018.
[73] Forced Marriages (Protection and Jurisdiction)(Scotland) Act 2011.
[74] Human Trafficking and Exploitation (Scotland) Act 2015.
[75] Judiciary and Courts (Scotland) Act 2008; Tribunals (Scotland) Act 2014; Courts Reform (Scotland) Act 2014.

innovations in the field of criminal procedure[76], modernising the children's hearings system[77] and the system of fatal accident inquiries[78].

It has included major structural reforms to the institutional arrangements for the delivery of public services[79], including reform of local government[80] and local government finance[81], a coherent regime for the regulation of care services[82], reforms of the arrangements for the supply of water and sewerage services[83], measures relating to health [84], education[85] and housing[86], the establishment of a single national police force and fire service[87], freedom of information legislation[88] and legislation establishing the Scottish Public Services Ombudsman[89], the Scottish Commission for Human Rights[90], the Children's Commissioner for Scotland[91], and

[76] Bail, Judicial Appointments etc (Scotland) Act 2000; Criminal Procedure (Amendment)(Scotland) Act 2002; Criminal Justice (Scotland) Act 2003; Criminal Procedure (Amendment)(Scotland) Act 2004; Police, Public Order and Criminal Justice (Scotland) Act 2006; Criminal Proceedings etc (Reform)(Scotland)_ Act 2007; Criminal Justice and Licensing (Scotland) Act 2010; Criminal Procedure (Legal Assistance Detention and Appeals)(Scotland) Act 2010; Criminal Cases (Punishment and Review)(Scotland) Act 2012; Victims and Witnesses (Scotland) Act 2014; Criminal Justice (Scotland) Act 2016; Vulnerable Witnesses (Scotland) Act 2019.
[77] Children's Hearings (Scotland) Act 2011.
[78] Inquiries into Fatal Accidents and Sudden Deaths (Scotland) Act 2016.
[79] Public Services Reform (Scotland) Act 2010; Procurement Reform (Scotland) Act 2014.
[80] Local Government (Scotland) Act 2003.
[81] Non-domestic Rates (Scotland) Act 2020.
[82] Regulation of Care (Scotland) Act 2001.
[83] Water Industry (Scotland) Act 2002; Water Environment and Water Services (Scotland) Act 2003; Water Services etc (Scotland) Act 2004; Water Resources (Scotland) Act 2013.
[84] National Health Service Reform (Scotland) Act 2004; Primary Medical Services (Scotland) Act 2004; Public Health etc (Scotland) Act 2008; Health Boards (Membership and Elections)(Scotland) Act 2009; Tobacco and Primary Medical Services (Scotland) Act 2010; Patient Rights (Scotland) Act 2011; Health (Tobacco, Nicotine and Care)(Scotland) Act 2016.
[85] Education and Training (Scotland) Act 2000; Standards in Scotland's Schools Act 2000; Education (Graduate Endowment and Student Support)(Scotland) Act 2001; Education (Disability Strategies and Pupils' Educational Records)(Scotland) Act 2002; School Education (Amendment)(Scotland) Act 2002; Education (School Meals)(Scotland) Act 2003; Education (Additional Support for Learning)(Scotland) Act 2004; School Education (Ministerial Powers and Independent Schools)(Scotland) Act 2004; Further and Higher Education (Scotland) Act 2005; Scottish Schools (Parental Involvement) (Scotland) Act 2006; Schools (Health Promotion and Nutrition)(Scotland) Act 2007; Graduate Endowment Abolition (Scotland) Act 2008; Education (Additional Support for Learning)(Scotland) Act 2009; Education (Scotland) Act 2016; Higher Education (Governance)(Scotland) Act 2016; Seat Belts on School Transport (Scotland) Act 2017.
[86] Housing (Scotland) Act 2014; Housing Amendment (Scotland) Act 2018.
[87] Police and Fire Reform (Scotland) Act 2012.
[88] Freedom of Information (Scotland) Act 2002; Freedom of Information Amendment (Scotland) Act 2013.
[89] Scottish Public Services Ombudsman Act 2002.
[90] Scottish Commission for Human Rights Act 2006.
[91] Commissioner for Children and Young People (Scotland) Act 2003.

the Scottish National Investment Bank[92]. The Parliament has enacted legislation directed to tackling climate change[93], child poverty[94] and fuel poverty[95].

And we have seen legislation responding to the changes in the powers of the Scottish Parliament effected by the Scotland Acts 2012 and 2016 – the establishment of a statutory framework for the administration of devolved taxes[96] and the devolved social security system[97], and statutes responding to the devolution of forestry[98] and of responsibility for the management of the Crown estate in Scotland[99].

Devolution enables the devolved legislatures to respond to the specific circumstances of different parts of the UK and to reflect, in legislation, different policy concerns and different, and sometimes novel, policy and drafting approaches to common problems. So, for example, the Land Reform (Scotland) Act 2003 introduced a community right to buy and a right to roam – provisions which had no precedent and which required creative policymaking and legislative drafting. And there is a Bill currently before the Scottish Parliament to incorporate the UNCRC into domestic law. If enacted, this Bill will go well beyond the existing Scottish and Welsh legislation which require public authorities to consider how they may better implement the UNCRC; and will impose a duty not to act incompatibly with that Convention, modelled generally along the lines of the duties in the Human Rights Act 1998. Devolution also allows different parts of the UK to lead; and to learn from one another. Wales pioneered an opt out organ donation scheme, which provided a model for the Scottish Parliament's legislation on the subject[100]. And for its part, the

[92] Scottish National Investment Bank Act 2020.
[93] Climate Change (Scotland) Act 2009; Climate Change (Emissions Reductions Target)(Scotland) Act 2019.
[94] Child Poverty (Scotland) Act 2017.
[95] Fuel Poverty (Targets, Definition and Strategy)(Scotland) Act 2019.
[96] Land and Building Transactions Tax (Scotland) Act 2013; Landfill Tax (Scotland) Act 2014; Revenue Scotland and Tax Powers (Scotland) Act 2014; Scottish Fiscal Commission (Scotland) Act 2016; Air Departure Tax (Scotland) Act 2017.
[97] Social Security (Scotland) Act 2018.
[98] Forestry and Land Management (Scotland) Act 2018.
[99] Scottish Crown Estate Act 2019.
[100] Human Tissue (Authorisation)(Scotland) Act 2019.

Scottish Parliament passed legislation banning smoking in public places in 2005[101], ahead of the other parts of the UK.

I would like to leave you with a specific example of novel legislation which was tailored to the specific circumstances of Scotland: the Alcohol (Minimum Pricing)(Scotland) Act 2012. This Act responded to a social problem which is not unique to Scotland, but which has certain particular features there. The policy was grounded in data which disclosed the particularly damaging health impact in Scotland of the excessive consumption of low cost high strength alcohol. The policy response identified to address that health problem was a prohibition on the sale of alcohol below a specified minimum price per unit. The legislation achieved that policy aim, in technical terms, by amending the Licensing (Scotland) Act to insert a mandatory condition into premises licences.

The Act was challenged in the courts principally on the basis of its impact on EU law free movement rights. The petitioners contended that the measure was disproportionate, because an alternative measure (namely a tax regime) which would achieve the aim would be less restrictive of EU free movement rights than the proposed compulsory minimum unit price. I defended the Act in the UK Supreme Court. That defence was supported by the quality of the underlying policy analysis which justified the Court's conclusions that the measure was justified in the interests of the protection of health and that the alternative of a tax regime would, in fact, be less well-targeted on the specific problem which had been identified than the proposed minimum unit pricing measure[102].

But the successful defence of the legislation, in the context of the EU law on proportionality, was also supported by provisions in the Act which explicitly recognised that the effects of the measure – both in terms of its impact on health, and its impact on trade - could not be predicted with certainty. Those provisions required the Scottish Ministers to evaluate and report on the effect of the legislation after five years, and a sunset provision, terminating the minimum unit pricing regime

[101] Smoking, Health and Social Care (Scotland) Act 2005.
[102] *Scotch Whisky Association v. Lord Advocate* 2018 SC (UKSC) 94.

after six years unless it is continued in force by an order of Ministers affirmed by the Scottish Parliament. In the Supreme Court, Lord Mance observed[103]:

> "The system will be experimental, but that is a factor catered for by its provisions for review and 'sunset' clause. It is a significant factor in favour of upholding the proposed minimum pricing regime."

This Act illustrates that the "remarkable intellectual endeavour behind the creation of the vast body of law which makes up the statute book"[104] of which Lord Rodger spoke and which we can all, I think, admire, is not the province of policy-makers alone, nor is it solely the work of lawyers. Rather, it is a collective endeavour, which calls for good policy-making, sound legal analysis and skilled legal drafting, as well as the engaged consideration of Parliamentarians, from which, ultimately, legislation derives its democratic legitimacy.

Thank you for your attention.

[103] Para. 63.
[104] Ibid., p. 634.