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Continuity and Confusion: Legislating for Brexit in Scotland and Wales

Introduction

On 27 February, the Scottish Government introduced the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill (the Scottish Continuity Bill) into the Scottish Parliament. A similar Bill – the Law Derived from the European Union (Wales) Bill (the Welsh Continuity Bill) - has been presented by the Welsh Government to the LLywydd (the Welsh Assembly Presiding Officer), although at the time of writing, it has not yet been published. These Bills are intended to be alternatives to the application of the European Union (Withdrawal) Bill's (the Withdrawal Bill) provisions on continuity of EU law and ministerial powers to adjust the statute book in the light of Brexit to matters within the competence of the Scottish Parliament and Welsh Assembly. As such, they represent the latest skirmish in the ongoing battle between the UK and devolved governments as to the implications of EU withdrawal for the devolution arrangements.

As the devolved legislatures are legislatures of limited competence, procedures exist under the devolution statutes to try to ensure that legislation is not enacted which exceeds that competence. As required by section 31(1) of the Scotland Act 1998, the Scottish Continuity Bill was accompanied by a statement by the sponsoring minister (John Swinney MSP) that the Bill would be within the legislative competence of the Scottish Parliament. The reasons for reaching this conclusion were later amplified in a written answer and subsequently an oral statement by the Lord Advocate.

However, under section 31(2) of the Scotland Act, the Parliament's Presiding Officer is also required to make a statement about the legislative competence of the Bill. For the first time in the history of the Scottish Parliament, the Presiding Officer felt unable to agree with the Scottish Government's conclusion that the Bill was within competence. Adding to the constitutional complexity, the Llywydd stated that, in her view, the equivalent Welsh Continuity Bill *would be* within the competence of the Welsh Assembly.

Although the UK Government has as yet made no formal statement about the competence of these Bills, it has been reported that it will invoke its powers to make pre-enactment references to the Supreme Court – which would be another constitutional first in the context of the Scottish (though not the Welsh) devolution settlement. Alternatively, the Scottish Conservative leader, Ruth Davidson, has stated that she would support a post-enactment challenge to the Scottish Continuity Bill. Either way, if the legislation is not withdrawn and – as seems likely – is passed by the devolved legislatures – it is almost certain that one or both Bills will end up before the courts.

In this post, we attempt to do four things. First, we explain why the Scottish and Welsh Governments have introduced these Bills, and their political and legal

significance. Second- we outline the content of the Scottish Continuity Bill, highlighting where it differs from the Withdrawal Bill. Third, we discuss the competing arguments about the legislative competence of the Bill, and the significance of the disagreement as to competence. Finally, we consider what is likely to happen next.

The Significance of the Continuity Bills

The significance of the devolved legislatures presenting their own Continuity Bills is at least three-fold. First, the concurrent introduction of these Bills at Holyrood and Cardiff Bay is the culmination of a co-ordinated approach that has been taken by the Scottish and Welsh Governments to negotiations with the UK Government over the contested devolution aspects of the Withdrawal Bill. This approach has been punctuated by high level talks between the Scottish and Welsh First Ministers; by their publication of a joint letter to the UK Prime Minister that described the Bill in its present form as a "naked power grab" and that outlined the amendments necessary, in their view, to "respect the hard-won devolution settlements"; and, by the concurrent publication in Scotland and in Wales of Legislative Consent Memorandums recommending to the Scottish Parliament and Welsh Assembly that consent be withheld to the Withdrawal Bill in its current form.

Second, and following from this, the introduction of the Continuity Bills serves the *political* purpose of maximising pressure on the UK Government to make the concessions necessary to the Withdrawal Bill in order to achieve consent from the devolved legislatures. In this regard the introduction of bespoke Bills in Scotland and Wales is a concession of failure by the devolved governments – a failure shared, and perhaps attributable to the approach taken, by the UK Government – so far to arrive at the still preferred option of a mutually agreeable Withdrawal Bill enacted by the UK Parliament. Nevertheless, the unlikely alliance between an SNP Government in (Remain-voting) Scotland and a Labour Government in (Leave-voting) Wales has created an effective bulwark against those critics for whom objections to the Withdrawal Bill are too easily dismissed as manufactured "grievance and division", and so strengthens the hand of the devolved governments at the negotiating table.

Third, at a more *practical* level, the introduction of the Continuity Bills marks a logical next step from any decision by the devolved legislatures to refuse consent to the Withdrawal Bill in its final form. Absent any measures being taken to convert relevant EU law in devolved areas it is likely that the UK Government would by necessity seek to exploit the conditionality of the Sewel Convention and to legislate notwithstanding the absence of consent from the devolved legislatures. It is for this reason – as Mike Russell has said, the need to "assert, if it has to, the right to legislate for itself the devolved consequences of EU withdrawal" – that the Continuity Bills will proceed as emergency Bills. Against the argument put by the Scottish Conservatives that there is no emergency that justifies legislation made in haste – that (if needed at all) the powers contained in the Bill will have no legal *effect* until Brexit Day, in a little more than a year's time – the Scottish Government has taken the view that without this legislation in place *before* the passage of UK legislation the Scottish Parliament will be vulnerable to the centralising tendencies of the Withdrawal Bill as it stands. The passage of legally valid continuity legislation by the

devolved legislatures would therefore remove the sting from that necessity argument and would, at the same time, present problems for the safe passage of the Withdrawal Bill in the UK Parliament itself. As Andrew Tickell has said, it is "increasingly doubtful that the House of Lords would support [the Withdrawal Bill] with the democratic assemblies of Wales and Scotland in open dissent."

The Content of the Scottish Continuity Bill

The main aims of the Scottish Continuity Bill are to provide for continuity of effect of EU law in devolved areas in Scotland (termed "retained (devolved) EU law") and to confer powers on the Scottish Ministers to adjust the devolved statute book in the light of Brexit. The structure and content of the Scottish Bill closely mirror the Withdrawal Bill in order to ensure that they can work together. However, there are some important differences, reflecting criticisms made by the Scottish Ministers and others of the Withdrawal Bill.

As regards the continuity provisions, the key differences relate to the status of the general principles of EU law and the Charter of Fundamental Rights (see section 5 of the Bill). First, unlike under the Withdrawal Bill, the Charter *is* to form part of post-Brexit Scots law in relation to devolved matters. Second, the Scottish Continuity Bill preserves rights of action based on failure to comply with the general principles of EU law or the Charter, including the ability to disapply or quash enactments or other rules of law, or to quash executive acts. Like the Withdrawal Bill, however, it does not (subject to limited exceptions) permit challenges to the validity of retained (devolved) EU law itself (section 7). Third, there is a limited difference in relation to actions for *Francovich* damages; as a general rule such actions are not permitted, but this does not apply in relation to any right of action accruing before exit day (section 8).

The differences in relation to ministerial powers are more extensive. The Scottish Continuity Bill seeks to replicate the powers to correct deficiencies arising from Brexit and to comply with international obligations contained in clauses 7 and 8 of the Withdrawal Bill (sections 11 and 12). It does *not* reproduce the powers to implement the Withdrawal Agreement currently contained in clause 9 of the Withdrawal Bill. However, it does confer a new power on the Scottish Ministers to keep pace with changes in EU law post-Brexit (section 13). This is subject to a five-year post-Brexit sunset clause (extendable for further periods of up to five years).

The scope of the regulation-making powers is also different. For one thing, the restrictions in the Withdrawal Bill preventing the Scottish Ministers from amending retained direct EU legislation or directly effective EU law are removed. Second, use of the powers is subject to a necessity rather than merely an appropriateness test. Third, there are additional restrictions on the use of the powers. They cannot be used to amend equalities legislation, or the Scotland Act 1998, or any of the protected subject matters listed in section 31(5) of the Scotland Act 1998 (i.e., issues subject to the special majority requirement). Nor can they be used in a manner which interferes with the independence of the judiciary, or confer a function on a Scottish public authority that is not broadly consistent with its general objects and purposes.

Finally, there are differences in relation scrutiny of ministerial powers (sections 14 to 16). First, there is an enhanced scrutiny requirement for regulations subject to the affirmative procedure. These must be laid in draft for 60 days rather than the usual 40 days, and ministers must also consult the Parliament and other interested parties on the draft regulations. Second, Ministers must publish explanatory statements equivalent to those required from UK Ministers, but not devolved ministers, under the Withdrawal Bill. However, the Scottish Continuity Bill does not reproduce the sifting requirement, whereby a House of Commons committee can recommend a higher level of parliamentary scrutiny for regulations made by UK ministers. Third, section 17 of the Scottish Continuity Bill contains a novel provision placing an obligation on *UK Ministers* making regulations under *UK legislation* to obtain the consent of the Scottish Ministers prior to making the regulations. This section applies to regulations which are within devolved competence, which affect retained (devolved) EU law, and which are made under powers conferred or modified by an Act of the UK Parliament enacted after the Scottish Continuity Bill comes into effect. The provision is, in other words, aimed at preventing the ministerial powers in the Withdrawal Bill or other Brexit legislation being exercised in devolved areas without the consent of the Scottish Ministers.

The extent of the differences between the Scottish Continuity Bill and the Withdrawal Bill may increase or reduce depending on what amendments (if any) are made to the two Bills as they complete their respective parliamentary passages. But even where the approach is the same, the existence of two separate pieces of legislation raises the possibility that further differences may arise as a consequence of judicial interpretation. Whatever the substantive merits of different approaches, from a purely technical perspective, *any* variations as between reserved and devolved areas must be regarded as unwelcome since they will further complicate the legal difficulties and uncertainties that will inevitably arise as a consequence of Brexit.

Are the Bills Within Devolved Competence?

There are differences in the competences of the Welsh Assembly and Scottish Parliament – most significantly that the former, for now, still operates on a conferred powers model, while the latter operates on a reserved powers model – and there may also be differences in the detail of the Welsh and Scottish Continuity Bills. However, these do not seem to explain the different conclusions as to competence by the Welsh and Scottish Presiding Officers. Rather, the key difference concerns *how to approach* the assessment of legislative competence – an issue on which there is still relatively limited judicial guidance.

Prior to their publication, the Institute for Government suggested that devolved Continuity Bills might be outwith legislative competence on the basis that relations with the EU and its institutions are matters reserved to the UK Parliament. This argument was unpersuasive because such Bills – like the Withdrawal Bill itself – concern the *domestic consequences* of Brexit rather than relations with the EU *per se*. In principle, the devolved legislatures are not precluded from taking account of the implications of decisions made regarding reserved matters insofar as these affect devolved matters. They can, for example, legislate to implement international

agreements made by the UK Government, although they have no power to enter into such agreements themselves. In any case, the UK Government has accepted that aspects of the Withdrawal Bill, including the key continuity provisions, are within devolved competence for the purpose of application of the Sewel Convention. The argument that it is outwith devolved competence to make *any* provision relating to the post-Brexit status of EU law must therefore be a non-starter.

Rather, the issue at the heart of the disagreement between the Scottish Presiding Officer, on the one hand, and the Scottish and Welsh Governments and the Llywydd, on the other hand, is different. It concerns whether legislation *which contemplates departing from* EU law (either as regards the post-Brexit status of retained (devolved) EU law, or as regards ministerial powers to amend retained (devolved) EU law) is compatible with the obligation in section 29(2)(d) of the Scotland Act and section 94(6)(c) of the Government of Wales Act 2006 not to legislate contrary to EU law. For the Lord Advocate and the LLywydd, the Continuity Bills are not incompatible because any inconsistency with EU law is expressly stated not to take effect until after the UK ceases to be bound by EU law. For the Scottish Presiding Officer, however, validity is to be determined at the time legislation is enacted, not at the time it takes effect. Even if, by the time the provisions of the Scottish Continuity Bill come into effect, the EU law constraint will have disappeared, the Scottish Parliament cannot, in his opinion, legislate in anticipation of an expansion of its competences.

The dispute can be broken down into a number of sub-issues:

1. What is the correct approach to the determination of legislative competence?
2. Is the assumption that the EU law constraints on devolved competence will fall away post-Brexit correct?
3. Is it, in any case, contrary to EU law to take preparatory measure in anticipation of withdrawal?

As regards the first of these issues, the Scottish Presiding Officer argues that: “To date, the courts have taken a strict approach to interpretation of the Scotland Act and specifically rejected the proposition that the UK’s internal constitutional arrangements should be interpreted differently to other statutes.” By contrast, the Lord Advocate and the LLywydd take a more pragmatic approach, arguing that in the context of the Brexit process, it is incorrect to characterise the Bills as anticipating an expansion in legislative competence; rather they are necessary measures to deal with the domestic consequences of leaving the EU.

Which of these approaches is likely to prevail? It is true that the Supreme Court has rejected the argument that, as constitutional statutes, the Scottish and Welsh legislation are to be interpreted differently to other legislation (see Lord Reed in the Inner House and Lord Hope in the Supreme Court in *Imperial Tobacco*). Whereas in relation to challenges based on encroachment upon reserved matters, the courts are instructed to have regard to the “purpose” and “effect” of impugned legislation, this does not apply to challenges based on breach of EU law. A literal reading the devolution statutes would therefore suggest that the delayed effect of the Continuity Bills is irrelevant to their legal validity.

However, it is incorrect to suggest that treating the devolution statutes as ordinary legislation means giving them a literal or narrow interpretation. On the contrary, as Lord Hope clearly recognised in *Imperial Tobacco*, as is the case in any process of statutory construction, both the purpose of the devolution statutes and their context are relevant to understanding the meaning of the words used (see paras 15 and 16). Clearly, the approach taken to the construction of devolved competence has varied in the context of different cases, as well as between different judges. In *Martin & Miller*, for example, the Supreme Court majority took a much more pragmatic approach to the extent of the Scottish Parliament's competences than the minority, so as to avoid the achievement of its policy objectives being hamstrung by technical restrictions. The minority, by contrast, was less perturbed by the prospect that cooperation between the UK and Scottish Parliaments might be required to work around the latter's competence constraints. Of course, the political and constitutional stakes are much higher in relation to the Continuity Bills than in relation to the road traffic sentencing powers that were at stake in *Martin & Miller*. Nevertheless, whether one sees the operation of the EU law constraint in the context of Continuity Bills as a mere technicality or alternatively as a necessary mechanism for achieving a consistent UK-wide approach to Brexit is equally a matter of perspective. That in turn might depend upon how much weight one is inclined to give to the autonomy of the devolved institutions as against the authority of the UK-level institutions in determining the domestic consequences of Brexit.

On this key question, then, of *the point at which* the competence of the Continuity Bills falls to be judged, much might depend on the particular judges hearing the case, and on how the background constitutional narrative is constructed. However, the second and third issues identified above might make the answer to this first issue less important than it initially appears. Responding to the Lord Advocate in the Scottish Parliament, Adam Tomkins MSP questioned the assumption (shared by both Presiding Officers) that the EU law constraint would cease to have any content once the UK leaves the EU. Rather, he suggested that the EU law constraint on devolved competence exists as a matter of the will of the UK Parliament when enacting the devolution statutes, independent of the UK's membership of the EU. If this is correct, legislation contemplating any departure from EU law in Scotland or Wales would continue to be invalid even after Brexit unless the EU law constraint is expressly lifted.

Again, however, this is not a persuasive argument. The Scotland Act (section 126(9)) and the Government of Wales Act (section 158(1)) define EU law as "all those rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the EU Treaties, and (b) all those remedies and procedures from time to time provided for by or under the EU Treaties." In other words, in the language used in the *Miller* case, the definition is ambulatory and, as the Supreme Court majority concluded in that case, if the UK ceases to be bound by the EU Treaties, it will be emptied of content. Again, this interpretation finds support in the Withdrawal Bill: if the EU law constraint in the devolution statutes were to continue in effect post-Brexit, it would not be necessary to replace it with a new restriction in relation to retained

EU law in order to ensure that all repatriated competences are allocated to the UK rather than the devolved level.

The final issue also potentially renders the temporal question redundant: if there is no breach of EU law at all, then the question of the point at which validity is to be judged simply does not arise. In his written answer, the Lord Advocate argued that it was not incompatible with EU to make provision for what is to happen when EU law no longer applies, given that the withdrawal process is provided for in EU law itself and that process has already been initiated. In response to a question from Ben Macpherson MSP following his oral statement, he confirmed that, in his view, if the Scottish Continuity Bill is incompatible with EU law because it contemplates post-Brexit departure from EU law, the same argument would necessarily apply to the Withdrawal Bill itself. Since the issue is one of compatibility with EU law, it is no answer to this point to argue that the UK Parliament is a sovereign parliament whereas the devolved legislatures are not. If the question came before the CJEU, the court would not concern itself with the domestic constitutional status of the legislature whose Bill was under challenge. And it is hard to imagine, in the context of a withdrawal procedure designed to secure a staged and orderly transition out of the EU, that the CJEU would conclude that preparatory domestic measures were incompatible with EU law. For this reason, although the answer to the temporal question remains uncertain, we consider that the Continuity Bills *are* within devolved competence.

An additional competence issue was raised in the Llywydd's statement regarding the validity of imposing an obligation on UK ministers to seek devolved consent before making regulations affecting retained (devolved) EU law. This is a provision which UK Ministers are likely to want to resist. Nevertheless, the Llywydd seems correct to conclude that the provision is within competence. As she argues, it is uncontroversial to say that the devolved legislatures could validly legislate to *remove* powers from UK ministers within devolved areas altogether. Accordingly, it seems logically to follow that they must be able to take the lesser step of regulating the use of such powers by making their exercise subject to the requirement of devolved ministerial consent.

A final point to note about the Presiding Officer's statement of competence relates not to its substance but to the way in which it has changed the dynamic of the legislative *process*. Whereas until now the practice has been for the Presiding Officer to provide only minimal reasons for any view that a Bill would be outwith legislative competence (highlighting the relevant boundary but without revealing in more detail the reasons *why* that view has been taken) the very detailed reasons set out by the Presiding Officer in relation to this legislation - reflecting, he said, the "constitutional significance of [the] Bill and the complex issues it presents" – is a welcome step in fulfilling the function of the Presiding Officer's statement: to "help inform Parliament and to assist Members in ensuring that laws passed are valid." Until now the Scottish Government's clean bill of health in achieving positive statements for its legislation has – on occasion – obscured from Parliament's view disagreement between the Presiding Officer and the Scottish Ministers as to the question of legislative competence – where the former grants to the Scottish Government the benefit of the

doubt in close call situations or where the latter makes concessions prior to introduction in order to secure a positive statement. In these situations Members have deferred to – and not looked behind – the view of the Presiding Officer that might nevertheless be underpinned by doubts as to the likelihood that legislation would survive any subsequent challenge in the Supreme Court. In relation to the Scottish Continuity Bill, however, the quality of legislative debate ought to be enhanced by Members being made aware of the basis for any reasonable disagreement between the Presiding Officer and the Lord Advocate, with an opportunity for them to contribute to that debate by calling on expert evidence during the Bill's committee stages and by participating themselves in plenary debates as the Bill passes through the Parliament. Rather than being seen as a challenge by the Presiding Officer to the authority of the Scottish Government, or – by proceeding regardless – a challenge by the Scottish Government to the authority of the Presiding Officer, the detailed and public reasons given should be seen as a welcome opportunity to improve the capacity of Parliament meaningfully to carry out its scrutiny function in relation to legislation that the Supreme Court might *or might not* hold to fall outwith legislative competence.

What Happens Next?

So, what next? There are at least four scenarios that are worth pausing to consider. First, the political pressure applied by the devolved governments might yet pay off in order that the Withdrawal Bill can be passed with the consent of the devolved legislatures. Negotiations about the Withdrawal Bill are continuing and – if agreement can be reached around clause 11 and over the need for, and creation of, common frameworks in specific areas – there is both a political will amongst all of the parties to pass a UK Bill and a legal mechanism by which the Continuity Bills can quickly be repealed. Section 37 of the Scottish Continuity Bill provides for repeal by regulations made by the Scottish Ministers, subject to the affirmative procedure. In this scenario it is likely that the achievement of consensus will be enough in itself to discourage further significant amendment during what remains of the legislative process.

Second, as noted above, the UK Government has indicated that it is inclined to exercise its discretion to refer the question of legislative competence to the Supreme Court during the statutory four week period that precedes the submission of devolved Bills for Royal Assent. Whilst this power has been exercised by both the Attorney General (unsuccessfully) challenging the competence of, and by the Counsel General for Wales (pre-emptively – but unsuccessfully) *defending* the validity of, Welsh legislation neither the UK nor the Scottish Law Officers have as yet used this "nuclear" option in relation to Bills in the Scottish Parliament. Thus far, the possibility that such a reference might be made has either led to the Scottish Government to make any necessary changes prior to a Bill's introduction in order to secure its safe passage to Royal Assent, or it has led to the UK Government giving to its devolution counterparts the benefit of the doubt, in the knowledge that contentious legislation (particularly where commercial interests are at stake) is likely to be subject to post-enactment judicial review raised by private parties. The risks on both sides here in part captures why both might seek to avoid making a reference

even where legislative competence is contested. On the one hand, if the Scottish and Welsh Law Officers refer the Continuity Bills in order to defend their validity and *lose* this will inevitably weaken their subsequent political and legal position in relation to the Withdrawal Bill. On the other hand, even if the UK Law Officers are *successful* in challenging the validity of the Scottish Bill this could have the unintended consequence of fanning nationalist flames at a time when the SNP is actively considering its position on the need for a second referendum on Scottish independence.

Third, if legislative consent cannot be given to the Withdrawal Bill and the Supreme Court *upholds* the validity of the Continuity Bills the UK Government will be forced to make one of three difficult choices: to maintain clause 11 in its current form and to legislate over the top of (and therefore to trump) the Continuity Bills - a move that would be certain to provoke a justifiable backlash from the devolved institutions; to amend clause 11 so as to remove the retained EU law boundary, and to allow for the devolved institutions to take the lead on the continuity and amendment of devolved retained EU law, subject to new cross-cutting constraints in the devolution statutes (e.g., the continued integrity and operation of the UK single market) – a move that would be likely to come at the expense of legal certainty (as to the interpretation and application of any new cross-cutting constraint by the Supreme Court) and political stability (as the desirability or need for common frameworks is deferred for determination on a subject by subject basis, with a resulting risk of irresolvable ping-pong between the UK and devolved governments as and when those debates arise); or, to accept parallel but varied continuity provisions relating to reserved and devolved matters after Brexit Day, with no re-reservation or new cross-cutting restraints, but again at the expense of legal certainty and political stability: not least of all as to where the reserved/devolved boundary is situated on any given matter and therefore where the divergent approaches to withdrawal, such as to the applicability of Charter rights, will bite.

Finally, if negotiations fail to produce an agreeable compromise and if the Supreme Court holds the Continuity Bills to be outwith devolved competence (a scenario which the Lord Advocate declined to address in the Scottish Parliament due to its hypothetical nature) it is likely that the *necessity* of providing legal certainty on Brexit Day would override the constitutional requirement that the UK Parliament will not *normally* legislate on devolved matters without the consent of the devolved legislatures. Whether such a scenario would be politically palatable in Scotland and in Wales remains to be seen. What does seem clear, however, is that the political and legal stakes on all sides favour consensus to be reached on the devolution aspects of the Withdrawal Bill. However, as the UK Government is finding out on a number of fronts, a clean withdrawal from the EU which leaves the UK's territorial constitution untouched is easier said than done.