A Second Scottish Independence Referendum in the UK Supreme Court

Sionaidh Douglas-Scott 2022-10-14T16:00:10

On October 11 and 12 an important case was argued in the UK Supreme Court over whether the Scottish Parliament has the competence to enact an independence referendum Bill. The Lord Advocate, Dorothy Bain KC, the principle Law Officer for the Scottish Government, brought a reference to the Supreme Court under the Scotland Act 1998 Schedule 6 paragraph 34 (which provides that the Lord Advocate 'may refer to the Supreme Court any devolution issue which is not the subject of proceedings'). Even though the prospects for the case are unencouraging, an independence referendum is only one limb of the Scottish Government's planned strategy for independence.

Although an Independence Referendum Bill had been published in June 2022, it was not introduced into the Scottish Parliament, and the Lord Advocate instead sought to make a reference under this procedure to determine the legality of the Bill prior to its passage through Parliament. The issue of whether the Scottish Parliament has the competence to legislate for a second referendum has been hotly contested, with many, including the UK Government, contending that it relates to a reserved matter that may only be legislated by Westminster – the UK Parliament.

The legal crux(es) of the matter

In order to succeed in this reference, the Lord Advocate needs to first convince the Supreme Court that the Court actually has the jurisdiction to hear the case, and that it is not 'premature' to bring an application regarding a draft Bill that has not yet been introduced into the Scottish Parliament, let alone passed. The procedure under Schedule 6 paragraph 34 has rarely been used, and never successfully. The Advocate-General for Scotland, Keith Stewart KC, (the UK Government's chief law officer on Scottish legal affairs) had earlier attempted to have the case dismissed on the basis that as there was no extant legislation, thus the case was premature, arguing that the Court did not hear hypothetical matters. However, the Supreme Court refused to dismiss the case then, instead preferring to hear this preliminary issue along with substantive argument, namely whether the Scottish Parliament has the competence to pass legislation regarding a second referendum. So both matters were aired in court over the past two days.

It is worthwhile setting out some of the legal provisions and resources that have formed the parameters of this case. s29(1) of the 1998 Scotland Act states that Acts of the Scottish Parliament that fall outside its legislative competence are 'not law,' and s29(2)b provides that an Act will be beyond competence in so far as it 'relates to reserved matters'. So, the key question is what is a reserved matter? Schedule 5 of the Scotland Act deals with these, and Sched 5, Part 1 reserves "aspects

of the constitution" to Westminster. These include 'the Union of the Kingdoms of Scotland and England' and 'the Parliament of the United Kingdom'. Further provisions in the 1998 Act elaborate on the issue of competence. s29(3) states that whether a provision 'relates to' a reserved matter to be determined 'by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances'. s101 provides that, in interpreting Acts of the Scottish Parliament, provisions are 'to be read as narrowly as is required for it to be within competence, if such a reading is possible'. Further relevant clarification has been provided in recent case law. In the 2010 case of *Martin v Her Majesty's Advocate*, Lord Walker held in the Supreme Court that a provision must possess 'more than a loose or consequential connection' to a reserved matter in order to 'relate to' it. And in 2012 *Imperial Tobacco Ltd v Lord Advocate* and subsequent case law (eg 2018 Scottish Continuity Bill case and two further references in 2021) the Supreme Court was clear that the Scotland Act 1998 should be interpreted on a 'plain reading' of its words.

The Lord Advocate argued that the draft referendum Bill is a 'consultative referendum' whose 'purpose' is, in the very words of the draft Bill itself, 'to make provision for ascertaining the views of the people of Scotland on whether Scotland should be an independent country'. As such, she argued that the Bill is deliberately designed as an advisory exercise that would not relate to Union or the UK Parliament because its effect, in legal terms, would be zero. As a purely consultative exercise, it could not end the Union. Further steps would have to be taken. In this way, the Lord Advocate argued that a consultative referendum would not 'relate to' the reserved matter of the Union, in more than the 'loose or consequential' sense required by caselaw.

In contrast, the Advocate-General (represented in Court by the UK Government Treasury Counsel, James Eadie KC) argued that the scope and purpose of the draft Bill lies outside the competence of the Scottish Parliament as it clearly related to the Union and UK Parliament. Although he acknowledged that a referendum would not be self-executing, he argued that a 'Yes' vote would have an effect on the UK constitutional settlement, and the possibility that it could lead to the UK Parliament losing its sovereignty over Scotland created more than a 'loose' connection.

Reflections on the hearing

Lord Reed, the President of the UK Supreme Court, made some introductory remarks before the hearing on Tuesday 11th, declaring it unlikely there would be a judgement in this case for some months – a longer delay, perhaps, than most had expected. Given that Scotland's First Minister, Nicola Sturgeon, had set a date of 23 October 2023 for an independence referendum in the event of it being found within the Scottish Parliament's competence, this would not leave much time for campaigning. The First Minister had also declared a Plan B, should the Court find an independence Bill outwith the Scottish Parliament's competence. In this case, Nicola Sturgeon declared that the next UK General Election would be treated by the Scottish Government as a 'de facto' referendum on independence. Again, however,

reserving the judgement for a longish period of time, creates uncertainty and little time to campaign for this issue.

The first notable aspect of the case is that only five Supreme Court judges – Lord Reed, Lady Rose, Lord Lloyd-Jones, Lord Sales and Lord Stephens – sat to hear the case – not the plenary of 11 who sat in the *Miller I* and *Miller/Cherry* Brexit cases. Although it was acknowledged that this was a case of constitutional importance, it was nonetheless not deemed sufficiently important to merit a hearing by the full Court – in itself perhaps a telling indication. Both *Miller* lawsuits resulted in holdings against the UK government, so they might have been thought encouraging for the Lord Advocate's reference. However, there are important distinctions. Lord Reed was not President of the UK Supreme Court at the time of the *Miller* cases (Lord Neuberger was President at the time of *Miller I*, and Baroness Hale at the time of *Miller/Cherry*). It has been convincingly argued that the Reed court differs in judicial approach from its predecessors. For example, Conor Gearty has argued that the Reed court is committed to legal formalism, and a narrow reading of the rule of law, preferring a close reading of the legal text, and eschewing broader (perhaps political) arguments (such as those relevant to Scottish independence which rest on the principle of democracy, or on unincorporated human rights such as self-determination).

Second, legal precedents indicate that the Supreme Court has taken a narrow approach to devolution, which does not favour the Scottish Government's arguments for independence. In the *Miller I* case, it found the Sewel Convention (that the UK Parliament 'will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament') to be a mere political convention and legally unenforceable, despite having been legislated in section 2 of the 2016 Scotland Act. On the other hand, in *Miller I,* the Supreme Court took a broad approach to the 'effect' of actions – finding the royal prerogative could not be used to trigger Article 50 TEU to start the process of leaving the EU, because its practical effect would lead to the repeal of the ECA 1972, and only Parliament could repeal legislation, not the Government. Following this approach, the Court might consider that even a consultative referendum had wide effects, even if not legal ones, because it might ultimately lead to the breakup of the UK. In the *Scottish Continuity Bill case* and 2021 *UNCRC case* (decided unanimously by the Supreme Court, and in which four out of the five judges in the present referendum case sat) the Supreme Court also interpreted the Scottish devolution settlement narrowly (not 'generously and purposively', as it had held in the much earlier *Robinson* case) – finding that the Scotland Act 'must be interpreted in the same way as any other statute'. They concluded that it could not be applied in a way that undermined the sovereignty of the Westminster Parliament. All of this tends to imply that the Supreme Court is unlikely to find a referendum Bill within the Scottish Parliament's powers.

Was the UK Government's conduct unconstitutional?

A recent argument has been made that, even if the Scottish Parliament is found to lack the competence to pass a referendum Bill, there is still a strong case that the Supreme Court could find the UK Government's conduct to be *unconstitutional* (if not illegal), in preventing the implementation of previous SNP manifesto commitments to instigate an independence referendum. This argument draws an analogy with judgements of the Canadian Supreme Court (SCC), in particular the 1981 *Resolution to Amend the Constitution*, in which the Canadian federal government attempted to patriate the Canadian Constitution without a majority of provinces' consent. The SCC ruled this lawful, but *unconstitutional* because it violated the constitutional convention that consent would be sought. The SCC's judgment encouraged further political negotiations which eventually secured the majority of provinces' consent. In this way, it has been argued that UKSC 'can play an important role in attempting to encourage civilised negotiations.'

That is – if the Supreme Court even makes a finding on the issue of substantive competence. Quite a few legal commentators had opined that the Court was unlikely to find the reference within its jurisdiction, on the grounds that the matter was premature, with no legislation actually adopted. A great deal of Court time was spent on this issue, with much questioning directed to the Advocate-General's counsel, Sir James Eadie KC, suggesting that the Court was taking the issue seriously and minded perhaps to dispose of the case on this preliminary issue.

And even if the matter were found to be within the Scottish Parliament's competence, the UK Government could still legislate to prevent the referendum going ahead, or to require turnout or threshold requirements. But this would require primary legislation, contradict the precedent of the EU Referendum, and likely be without the consent of the Scottish Parliament, in open defiance of Sewel Convention. The UK Government might also choose to ignore the outcome of a referendum. Yet this would be difficult politically if a referendum had the legal authority of a Supreme Court ruling. Overall, however, it seems likely that the Scottish Government will be prevented from implementing its legislation and holding its planned referendum next year.

What next? Framing the issue of independence more broadly

In all, these reflections may seem somewhat pessimistic. However, an independence referendum is only one limb of the Scottish Government's planned strategy for independence. If the Supreme Court decides that a draft Bill is not within Holyrood powers, the First Minister announced that the SNP would fight the next UK General Election as a 'de facto' referendum on the 'single question' of whether Scotland should be independent. Although it has been suggested that that there is no such thing as a 'de facto referendum,' in actuality, if pro-independence parties choose

to declare in their manifestos that they will interpret a vote for them as a direct vote for independence, then there is nothing to stop them doing that. Indeed, there are clear historical precedents for General Elections being fought on single issues, and, it was once argued that additional General Elections should be required to authorise constitutional change (such as Home Rule for Ireland) – a view widely promoted by the constitutional academic AV Dicey, and referred to by Lord Salisbury as the 'referendal theory'. The UK 1918 General Election was fought by Sinn Féin on a manifesto commitment to establish an Irish Republic and resulted in a landslide victory for Sinn Féin, which it regarded as giving it the mandate to establish a provisional Dáil Éireann and Declaration of Independence. Indeed, prior to the establishment of the Scottish Parliament by the Scotland Act 1998, the SNP's policy was to treat the election of a majority of SNP MPs in Scottish seats as a mandate to negotiate independence.

Framing the issue of independence more broadly also widens the debate beyond the narrow issue of legal competence to hold a referendum under the 1998 Scotland Act. Otherwise, debate on Scotland's right to self-determination is restricted to the context of a devolved settlement under 25 years old. This ignores the constitutional relations between Scotland and England that have existed since the UK was established by a Treaty of Union between two sovereign states, and ratified by two Acts of Union in the respective parliaments. There are also reasons to believe that the nature of this relationship, and the issue of consent of both parties to it, is an *ongoing* one, not something done and dusted by a past Act of Union over 300 years old. Since 1707, Scotland has maintained its own separate civic institutions, legal system and cultural heritage – all factors which point to the Union as a continuing agreement between two independent nations. This in turn, suggests that, should Scotland no longer wish to continue the Union, there is the right to terminate this agreement.

The Lord Advocate has been criticized for the narrow scope of her arguments which related to competence under the Scotland Act. Indeed, a separate intervenor brief was submitted by the SNP, which, as well as adopting and embracing the arguments made by the Lord Advocate, also made further submissions relating to the right of the Scottish people to self-determination, and to the right to democracy. These got little to no airing in the Court hearing, probably because of the constraints of the Scotland Act, but are extremely important and should be given the widest airspace more broadly so as to formulate an argument – perhaps even a legal one – that the UK Government is unreasonably refusing to negotiate over independence.

The principle of self-determination was stressed in this SNP brief. The right to self-determination is a fundamental and inalienable right, which is to be found in the UN Covenant (which, unlike the ECHR, has not been incorporated into UK law, and so might find little purchase as a knock-down legal argument with textualists such as Lord Reed). However, as the SNP brief argued, there is case law providing that, where two possible readings of a statutory provision are available, that compatible with the UK's international law commitments is to be to be preferred. Time and again, UK Prime Ministers and politicians, including Margaret Thatcher, have acknowledged that the Union is a voluntary one, and that Scotland has a right to

self-determination. Through its own conduct over many years, the UK Government generated an expectation allowing for independence in principle. Thus the UK constitutional situation is very different from, for example, Spain, Article 2 of whose Constitution declares 'the indissoluble unity of the Spanish nation', or the US, where in 1868 the US Supreme Court, in *Texas v White,* found there was no right to secession.

Democracy is also a key constitutional principle, and currently, the UK Government is undermining democracy by refusing to take seriously SNP's 2021 manifesto pledge and its endorsement by the Scottish people, as well as the January 2020 Scottish Parliament vote in favour of an independence referendum.

If the Scottish people have an entitlement to self-determination, and the only way to actualize that is through a referendum, or at least negotiations with the UK Government, then it follows that such negotiation may not be unreasonably withheld. As the SNP brief in this case argued, if there is no way to exercise a right, then it is no right at all: *ubi jus ibi remedium*. However, if the UK government continues to reject any negotiation with Scotland, or to countenance any further independence referendum, then, as Ciaran Martin has written, 'you have to give up the pretence that this is a voluntary union, that Scotland is allowed to leave'. This reduces Scotland to the status of a colony, or a region with no history of independent statehood, which flies in the face of history, and also undermines any claims for the exceptional, voluntary, 'family', nature of the UK Union.

So if the Supreme Court case is lost, the focus should be on arguments beyond the Scotland Act 1998, and on the principles of self-determination and democracy. Debate should also be focussed on the unreasonable – and perhaps unlawful – behaviour of the UK Government. I believe there are arguments (which there is no space to sketch out here) based on change of circumstance and good faith that can and should be made in this context. These arguments should be made again and again – to the Scottish people, to the UK Government, and to the international community.
