Scotland and Wales wait for the Supreme Court referee on Brexit

As the UK government refers the Scottish and Welsh bills to alter inherited EU law to the Supreme Court, ***Richard Parry (University of Edinburgh)*** *discusses the interacting policies on devolution and Brexit.*

As part of their unfolding tactics on Brexit, the Scottish and Welsh governments have through their legislators taken powers to alter inherited EU-based law in devolved areas after Brexit date (the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill and Law Derived from the European Union (Wales) Bill). The UK government response on 17 April has been to refer the bills to the Supreme Court as outside the legislators' powers to pass. What should be a natural part of the system, when the levels disagree on their respective powers, is sufficiently unprecedented to be of striking political effect, especially now that Scotland and Wales with their different political makeup are united behind the same approach.

Wales v England under-19s in 2014. Photo: Rhys Park via a CC BY 2.0 licence

The passage of the Scottish bill was preceded by a dramatic moment, overshadowed by the extreme weather, when the Presiding Officer of the Scottish Parliament, Ken Macintosh, declared that in his opinion the new law was outwith the powers of the Parliament. He is required to address this issue in the case of every bill that it is introduced, but it is a curious power. It does not prevent the introduction or passage of the bill and is not legally binding. The competence of a bill can only be determined by the UK Supreme Court after referral by Scottish or British laws officers once it is passed. The Presiding Officer power seems designed to warn off obvious attempts, especially by individual members, to pursue legislation in clearly reserved areas.

Macintosh's decision reveals a line of legal advice that contrasts with the Lord Advocate's (as set out to the Parliament on 28 February). International affairs, including EU law and institutions, are clearly reserved, but the grounds of the Presiding Officer's objection are not that. Instead he suggests that the new law is invalid as it foresees a situation (Brexit) that has not yet happened. The Lord Advocate agrees that the use of the Act to amend laws would not be valid pre-Brexit, but points out that this objection would apply to the UK Government's withdrawal bill as well.

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At the same time the Welsh Presiding Officer issued her certification of the Welsh bill in the usual routine way, without explanation. She is Elin Jones, Rural Affairs Minister when Plaid Cymru were in coalition with Labour. Just as Macintosh has abandoned his party allegiance (Labour), so has she. But unlike him she has not attempted to deploy a base of legal advice to rival the government's. This may reflect the Welsh Assembly's genesis in 1999 as a single corporate body with subsequent separation into legislative and executive branches. The texts of the bills are different and reflect different legislative frameworks. It could be argued that this accounts for the discrepant opinions. But the heart of the matter – taking powers now in anticipation of UK withdrawal – is surely the same.

In both Scotland and Wales, the situation has arisen because the UK government wants to gain legislative consent for its withdrawal bill through a political deal with the devolved governments that demarcates any former EU-derived powers that might be retained by Westminster in the name of maintaining a common UK market. If this cannot be negotiated the UK can have its way by taking the powers it wants by primary legislation, which no-one doubts its legal ability to do. Its pursuit of a negotiated agreement reflects not just a desire for agreement but also political weakness and lack of secure parliamentary majority.

Meanwhile, the process continues of what might be seen the UK's expulsion from the EU – in the sense that the EU27 are thinking beyond withdrawal and seem intent on closing off any UK second thoughts. The draft Withdrawal Agreement of 19 March and EU negotiating guidelines of 23 March are quite brutal in taking control of the process. The UK's membership ends on 29 March 2019 but its financial and legal effect is perpetuated until 30 December 2020 with only the most minimal consultation. The UK's expressed red lines – whether or not fully meant – are construed to rule out anything beyond a free trade agreement with which EU members are comfortable. There is no mechanism for extending what is now billed, in a laughable 'concession' to the UK's preferred term, the 'transition or implementation period' (art 121). At the moment there is nothing to be implemented beyond March 2019. The 'Protocol on Ireland/Northern Ireland' gives legal form to the concept of 'the United Kingdom in respect of Northern Ireland' which 'shall be considered to be part of the customs territory of the Union' unless both EU (with an implicit Irish veto) and UK agree something else.

Remarkably, the UK government has managed to portray all this as a negotiating success. Their most concrete achievement is winning the right to sign as well as negotiate international agreements in areas of EU competence after March 2019 as long as they do not come into effect before 2021. Tough negotiating to get a good deal, the rejected political premise of Theresa May's 2017 election campaign, always implied refusal to leave the EU unless the terms were right. Now that leaving has become an end in itself, anything that might hold it up is liable to be jettisoned, including perhaps resistance to the united front of the Scottish and Welsh governments. The likelihood is that the UK law officers' action will simply be a ploy in negotiations. The Attorney-General's statement of 17 April suggests as much. After the Miller case of 2017, the UK level will surely be wary of assuming that the Supreme Court will share their perspective. The Welsh, but not the Scottish, referee waved play on but Ken Macintosh's 'on-field decision' was cited by the UK's Advocate-General for Scotland, Lord Keen, as a reason for the referral in order to remove legal uncertainty. It is a dangerous argument to make, for what would the UK position be if Macintosh, like Jones, had gone the other way?

This post represents the views of the author and not those of the Brexit blog, nor the LSE. It first appeared at the Centre on Constitutional Change blog.

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