



Ouroboric devolution: *In Re Scottish Ministers' Petition*

Anurag Deb*

Queen's University Belfast

Correspondence email: adebo1@qub.ac.uk.

INTRODUCTION

The boundaries between the powers of the United Kingdom (UK) Government and those of the devolved administrations are complex, imprecise and asymmetric. On one level, this should not be a surprise: the laws which apply in the UK have been enacted by multiple legislatures throughout history and were sometimes changed, repealed and superseded by different legislatures to those which enacted them. A recent example involved the ban on the use of any language other than English in legal proceedings in Northern Ireland – originally enacted by the Parliament of Ireland,¹ it was repealed by the UK Parliament.² Consequently, there is a considerable degree of overlap between the scope of the powers of the UK Government and those of its devolved counterparts. However, where the boundaries between them are demarcated (however imprecisely) in statute, the sometimes invidious task of policing such boundaries falls on the courts. In late 2023, the Outer House of the Court of Session found itself carrying out precisely this task. This is a critical analysis of the opinion of Lady Haldane in *Re Scottish Ministers' Petition*,³ concerning the unprecedented exercise by the UK Government of its power under the Scotland Act 1998 (as amended) (SA) to intervene in the Scottish Parliament's law-making. As the first such decision, it has the potential to colour the way such powers are framed, exercised and scrutinised. As will become clear in this comment, the Outer House's framing was at times problematic – with the SA appearing to devour itself in the process.

This comment is divided into four main sections. The first section explores the relevant factual and legal backdrop to the petition; the second section sets out the petitioners' and respondent's arguments; the third section explores some key elements in the court's decision and

* PhD Candidate, School of Law. I am grateful to Christopher McCorkindale for a much-needed lesson in forms of legal address in the Scottish courts. I am also grateful to Paolo Sandro and David Capper for feedback on an earlier draft.

1 Administration of Justice (Language) Act (Ireland) 1737, s 1.

2 Identity and Language (Northern Ireland) Act 2022, s 4. Note: s 4 is not in force at the time of writing.

3 *Re Scottish Ministers' Petition* [2023] CSOH 89.

the final section sets out what I argue ought to be the proper scrutiny of the power at issue. In sum, my argument explores what I set out (in greater detail below) to be a major shortcoming in Lady Haldane's opinion: the effective framing of the entire issue as one merely of the interpretation and enforcement of a statute, rather than the interpretation and enforcement of a statute embodying a *constitution*.

BACKGROUND

Introduction

I begin this section with an exploration of the relevant aspects of the legal framework governing devolution in Scotland before turning to the factual circumstances of the petition. This is because the legal framework allowed the factual controversy to occur, and, what's more, the framework allows this kind of petition to *recur*. Thus, the *Scottish Ministers* case was not by itself so unique as to be unlikely to appear again. On the contrary, depending on Whitehall's attitude to devolution, petitions such as this may even be more frequent.

The Scottish devolution settlement

The SA is a complex statute. This is unsurprising, given the complex nature of governance and the purpose of the SA to provide for effective government in Scotland. The institutions established by the SA mirror much of the institutions at Whitehall and Westminster: the Scottish Parliament makes laws for Scotland and holds the Scottish Government to account, with the Scottish Government holding office only with the confidence of the Scottish Parliament.⁴ Important differences between these two models (Holyrood on the one hand and Westminster on the other), such as the differences in methods of election,⁵ the unicameralism of Holyrood and the bicameralism of Westminster and the fundamental character of each legislature's law-making powers (Westminster remains sovereign while Holyrood is not) do not fundamentally alter the similarities in the relationship between each legislature–executive pair.

Nevertheless, there are important differences in the limits to what each government can do. For Whitehall, the supervision of the

4 SA, ss 45(2), 47(3)(c) and 49(4)(c).

5 The Scottish Parliament comprises two types of members: those elected as constituency members under first-past-the-post (see SA, s 1(2)) and those who are returned from regions under the additional member system of proportional representation (see SA, s 1(3)). The House of Commons of the UK Parliament, meanwhile, comprises only members who are elected under first-past-the-post (see the Representation of the People Act 1983, sch 1, para 18).

common law aside, any statutory fetters or conditions on its ability to govern can (at least in theory) be undone by moving a Bill through favourable parliamentary arithmetic. In Holyrood, however, there being limits to the Scottish Parliament's legislative competence, the Scottish Government has to work within certain legal strictures which cannot be undone (in Holyrood, at least).⁶

More importantly, Whitehall can intervene in the legislative business of Holyrood in a way which is not reciprocated in the SA. The Secretary of State for Scotland may in certain cases make an order preventing a Bill passed by the Scottish Parliament from being submitted for royal assent.⁷ *Scottish Ministers* concerned the first exercise of this power, preventing the Gender Recognition Reform (Scotland) Bill (GRR)⁸ from being submitted for royal assent. For the purposes of this comment, I categorise this power as pre-assent intervention (PAI). The reason for this categorisation is that, far from being unique, PAI has been a widespread and longstanding feature of constitutional settlements which Westminster has enacted in respect of virtually every territory, region or nation under its jurisdiction over time (except, of course, the UK as a whole). I return to this point further below in my analysis of how the Court of Session construed the power in question.

The GRR Bill

The GRR was moved to significantly alter the process of gender recognition. The present process under the Gender Recognition Act 2004 (GRA) is open to those over 18 years of age who satisfy a Gender Recognition Panel (comprised of legal and medical members)⁹ that they have or have had gender dysphoria, have lived in their acquired gender for a period of two years prior to making an application to the Panel, intend to live in their acquired gender until death and various evidential requirements (including relevant and prescribed medical evidence)¹⁰ for the application to be valid.¹¹

The GRR Bill would lower the eligibility age for applicants to 16 and replace the requirements for medical evidence and the satisfaction of a Panel with a statutory declaration to the Registrar General for Scotland that the applicant has lived in the acquired gender for three months

6 For example, by delisting international relations from the list of reserved matters, so that Scotland may be in complete control of its own foreign policy. See SA, sch 5, para 7.

7 SA, s 35.

8 SP Bill 13B, Gender Recognition Reform (Scotland) Bill [as passed] Session 6 (2022).

9 GRA, sch 1, para 1(2).

10 Ibid s 3(1)–(3).

11 Ibid ss 2 and 3. Note that there are alternative grounds for granting applications under the GRA, but these will not be explored in detail in this comment.

prior to making the application if aged at least 18 years, or has lived in the acquired gender for six months prior to making the application if aged 16 or 17 years.¹² Importantly, the GRR Bill contains a three-month reflection period which would begin once the Registrar General notifies the applicant that their application has been received.¹³ At the end of this period, the Registrar General would determine the application and grant either a full or interim gender recognition certificate (GRC).¹⁴

At this stage, I set out an important *caveat*. I do not explore the merits (or otherwise) of the GRR Bill or its underlying policy objectives beyond their relevance to the PAI which was the subject of the court's supervisory jurisdiction. My sole concern is to explore the merits of the court's reasoning in *Scottish Ministers*, the majority of which (as I set out below) explore the PAI and the proper scrutiny to which it should be subject.

The Scottish Secretary's intervention

The GRR embodied the Scottish Government's policy to reform the process of gender recognition in Scotland. In her opinion, Lady Haldane set out the history of the Bill, from its policy origins to the research and consultations carried out prior to its introduction as well as during its passage through the Scottish Parliament.¹⁵ In the weeks preceding its final vote in the Scottish Parliament, the UK Minister for Women and Equalities, Kemi Badenoch MP, wrote to the (then) Cabinet Secretary for Social Justice, Housing and Local Government (in the Scottish Government), Shona Robison MSP, outlining a number of concerns about the GRR – specifically around the potential for divergence in gender recognition regimes between Scotland (as a consequence, *inter alia*, of the GRR Bill removing the requirement for an applicant to have or have had gender dysphoria) and the rest of the UK, and the knock-on impact this divergence may have for laws around equal treatment which apply beyond Scotland.¹⁶ A meeting took place between Ms Badenoch and Ms Robison, even as the Bill progressed in the Scottish Parliament and was finally passed on 22 December 2022. The same day, the Scottish Secretary publicly stated that he was considering intervention

12 GRR (n 8 above), cl 2 and 4. Note that there are exceptions, eg see cl 6A.

13 Ibid cl 3.

14 Ibid cl 6.

15 *Scottish Ministers* (n 3 above) [3]–[4].

16 See Oliver Wright and Kieran Andrews, 'SNP's self-identity Bill could "harm women's rights in England"' *The Times* (London 9 December 2022)

in respect of the GRR,¹⁷ which he did by letter to the Presiding Officer of the Scottish Parliament on 16 January 2023.¹⁸

THE CHALLENGE AND RESPONSE

The challenge

The power in section 35 has two core aspects to it. First, the section outlines the applicable conditions for its exercise – when the Scottish Secretary believes that a Bill of the Scottish Parliament would either be incompatible with international obligations, defence or national security interests; or make modifications to the law as it applies to reserved matters which would adversely affect the operation of that law.¹⁹ Second, the section lists the procedural requirements for the validity of an order made pursuant to it, both in terms of the content of such an order²⁰ as well as the timeframe within which it should be made.²¹

In *Scottish Ministers*, the section 35 order was made under the second condition above. In other words, the Scottish Secretary claimed to have reasonable grounds to believe that the GRR would make modifications to the law as it applied to reserved matters which would adversely affect the operation of that law. The petitioners challenged the order's validity under both limbs of this condition – claiming that the GRR Bill did not make modifications of the law as it applied to reserved matters, far less that it adversely affected the operation of that law. The petitioners also claimed that the order did not identify the provisions of the GRR Bill in respect of which it had been made, and neither did it state proper reasons for having been made, in breach of the procedural requirements of section 35.²² On the first of these grounds, the Lord Advocate (for the petitioners) stated that the GRR Bill did nothing affecting a GRC – those individuals who would obtain such a certificate under the GRR would be in the same legal position as those who have obtained and continue to obtain them under the GRA.²³

17 Lewis McKenzie, 'Holyrood will "vigorously contest" Westminster gender reform block' (*STV News* 23 December 2022)

18 Scotland Office, 'Gender Recognition Reform (Scotland) Bill: statement from Alister Jack' (16 January 2023).

19 SA, s 35(1).

20 Ibid s 35(2).

21 Ibid s 35(3).

22 *Scottish Ministers* (n 3 above) [17].

23 Ibid [18].

The Lord Advocate then detailed the petitioner's challenge on the assumption that section 35 was engaged, under five distinct headings: error of law, irrationality, adverse effects, irrelevant considerations and the lack of proper reasons.²⁴ In reality, these headings largely overlapped with one another. The reasoning behind the order states that the GRR would modify the GRA (by de-medicalising gender recognition) and thus adversely impact the operation of the law as it applied to reserved matters *inter alia*, by necessitating the creation of a dual system for tax and social security systems, in order to account for the differences in eligibility under the GRR and the GRA (those who could obtain a GRC under the GRR may not be eligible under the GRA, resulting in a person with a different legal sex in different parts of the UK),²⁵ a higher risk of fraudulent applications²⁶ and adverse impact on the operation of the Equality Act 2010, including in areas such as single-sex associations,²⁷ the public sector equality duty²⁸ and equal pay.²⁹ The Lord Advocate criticised these reasons as disclosing an aversion to divergence under the GRR *per se*, rather than revealing adverse impact,³⁰ that such aversion was founded on speculation³¹ and irrelevant considerations,³² that the Scottish Secretary had essentially vetoed the democratic will of the Scottish Parliament because he had disagreed with the expression of that will (ie the GRR),³³ and that he had put forward insufficient or improper reasons for making the order.³⁴

It was a significant part of the petitioner's case that the power in section 35 was intended to be an exceptional power, the mere existence of which 'should be sufficient to ensure consultation between Whitehall and Edinburgh such that the power ought never in practice to be used'.³⁵ In this context, the petitioner's framing of the section 35 order as emanating essentially from political disagreement between the UK Government and the Scottish Parliament called the order's

24 Ibid [19].

25 See Scottish Secretary, *Policy statement of reasons on the decision to use section 35 powers with respect to the Gender Recognition Reform (Scotland) Bill* (Equality Hub and the Scotland Office) [20]. Also, see Scottish Ministers (n 3 above) [21].

26 Scottish Secretary (n 25 above) [22]–[28].

27 Ibid [31]–[36].

28 Ibid [37]–[40].

29 Ibid [41]–[47].

30 *Scottish Ministers* (n 3 above) [20]–[21].

31 Ibid [27].

32 Ibid [28]–[29].

33 Ibid [24].

34 Ibid [30].

35 Ibid [15].

validity into question while simultaneously arguing for the exercise of the section 35 power to be subject to exacting scrutiny.³⁶

The response

The Scottish Secretary opened by attempting to bring section 35 from the stratospheric heights of constitutional exceptionality and last-resort-ism down to the *terra firma* of constitutional ordinariness. In contrast to the petitioners, the Scottish Secretary's framing was that section 35 was 'part of the scheme' of the SA, that it was 'meant to work together' with the other parts of that Act and was far from being an unusual provision.³⁷ Indeed, the Scottish Secretary contended that 'section 35 was as much a part of the constitutional framework as any other provision in the [SA]'.³⁸

The Scottish Secretary then took up the issue of the proper intensity of review – contending that the appropriate standard was rationality, subject only to the duty to be properly informed and that the court should not stray into a merits review of the order so that the court should not step into the Scottish Secretary's shoes.³⁹

In addressing the criticism that the order had been made essentially due to policy disagreement rather than due to any adverse impact (as section 35 requires), the Scottish Secretary denied that this was the case. Instead, he contended that *inter alia* the designation of a person with a different legal sex in different parts of the UK had a materially adverse impact on the *operation* of the law as it applied to reserved matters – including information technology systems (which 'exist to serve the purpose of the [relevant] legislation') – which the petitioners had wrongly downplayed.⁴⁰

THE COURT'S ASSESSMENT

The court dismissed the petitioner's challenge in what was ultimately a relatively short section of its opinion. However, there are four important aspects of the court's reasoning which deserve further and detailed examination. My main argument, developed further below, is that the court paid insufficient attention to the nature of the power in section 35, when seen in its proper context – the entire landscape of devolution in Scotland. Consequently, I argue that the court's scrutiny of the section 35 order was insufficiently exacting.

36 Ibid [24].

37 Ibid [38](iii).

38 Ibid [42].

39 Ibid [49]–[50].

40 Ibid [56].

First, Lady Haldane begins by stating: 'The power contained in the section of the Scotland Act 1998 that lies at the heart of this case has never before been invoked.'⁴¹ This is true, but on a narrow framing of the power itself. As previously set out, the power under section 35 allows the Scottish Secretary to intervene by preventing a Bill validly passed by the Scottish Parliament from being granted royal assent and thus enacted. This sort of PAI is not unfamiliar to the UK Parliament, which it has frequently conferred on Crown officials over the centuries. Prominent examples include, chronologically, powers in respect of New Zealand,⁴² Canada,⁴³ Australia,⁴⁴ the Union of South Africa,⁴⁵ Northern Ireland,⁴⁶ the Irish Free State⁴⁷ and British India.⁴⁸ The failed Scottish devolution settlement in 1978 also included PAI which closely resembled the modern section 35 power.⁴⁹ Within the UK, PAI was controversially invoked against a Bill passed by the nascent Northern Ireland Parliament in 1922 to abolish the single transferable vote in local authority elections. Stormont strongly protested and the UK Government, fearing instability, relented, allowing the Bill to be enacted.⁵⁰ This potted history of PAI will become more relevant further below. However, it suffices to say at this point that the novelty

41 Ibid [63].

42 New Zealand Constitution Act 1852, s 56. Note: this power no longer applies, given the repeal of the statute.

43 British North America Act 1867, s 55.

44 Commonwealth of Australia Constitution Act 1900, s 58.

45 South Africa Act 1909, s 64. Note: this power no longer applies, given the repeal of the statute.

46 Government of Ireland Act 1920, s 12(2). Note: this power no longer applies, given the repeal of the statute.

47 Irish Free State Constitution Act 1922, sch 2, art 41. Note: this power no longer applies, given the repeal of the statute.

48 Government of India Act 1935, s 32(1). Note: this power no longer applies, given the repeal of the statute.

49 Scotland Act 1978, s 38.

50 The Northern Ireland Government at the time viewed this reservation as a 'very grave step' and resolved to tender its resignation if the then Northern Ireland Prime Minister Sir James Craig did not persuade then UK Colonial Secretary Winston Churchill to recommend that assent be granted: see Northern Ireland Cabinet Minutes 27 July 1922 (contained in CAB/4/50 in the Public Records Office Northern Ireland). Churchill on his part found the Bill 'unfortunate', in part due to a protest against the Bill lodged by then Irish President of the Executive Council (of the Irish Free State) W T Cosgrave (see note of a telephone message between Churchill and Craig, 31 August 1922, contained in CAB/4/50) but ultimately relented, recommending assent (see letter dated 9 September 1922 from Churchill to Craig, contained in CAB/4/50). See generally, David Torrance and Doug Pyper, 'The Secretary of State's veto and the Gender Recognition Reform (Scotland) Bill' (House of Commons Library CBP9705) 12–13.

of the *power* contained in section 35 is, broadly speaking, perhaps overstated.

Second, the court observes:

Perhaps self-evidently, if this power had been invoked purely in response to, or as a result of, a policy disagreement between the respective legislatures, then that would be an end of matters. The conditions for the making of an Order under section 35 would clearly not be met.⁵¹

This effectively adopts the framing of both the petitioners and the respondent, albeit in the respondent's favour (by implicitly accepting that there was adverse impact). This is, however, an important point to remember. The touchstone for the second condition in section 35 is adverse impact on the operation of the law as it applies to reserved matters. It is just as conceivable for policy divergence to have no such impact (or negligible impact) as it is for policy divergence to have adverse impact. The question is not whether there is disagreement between Whitehall and Edinburgh on the policies which govern a given matter in Scotland – the question is whether any such policy which the Scottish Parliament wishes to enact may have adverse impact. Thus, even though there plainly was disagreement in *Scottish Ministers*, the question for the court was whether the relevant order was made as a result of adverse impact.

Third, in determining whether the GRR made any modifications to the law as it applied to reserved matters, Lady Haldane focused on one of the Bill's explicit purposes – to modify the meaning of 'full gender recognition certificate' within Scotland to embody a de-medicalised and administratively simpler process. This, in Lady Haldane's opinion, constituted a modification within the meaning of section 35, thereby engaging the section.⁵² Modification, therefore, has a broader meaning than simply the explicit amendment of statutory text – section 35 can be engaged by modification of statutory meaning and effect as well as by modification of text. While this may seem concerningly broad, it is important to recall that section 35 does not allow for intervention in response to modification *per se* – only when that modification also has adverse effects.

Fourth, the court determined that the making of a section 35 order is subject to a largely traditional *Wednesbury* review, albeit subject to the restrictions or qualifications contained within section 35 itself.⁵³ This lies at the heart of *Scottish Ministers* and was the outcome of two related issues: the constitutionally 'intrinsic' nature of section 35⁵⁴

51 *Scottish Ministers* (n 3 above) [64].

52 *Ibid* [67].

53 *Ibid* [71].

54 *Ibid* [70].

and the inapplicability of the principle of legality to the order under scrutiny.⁵⁵ I deal with each issue in turn.

The power in section 35 is 'intrinsic' in the same way that every provision in the SA is intrinsic – they all form part of the statute as a whole. But, ultimately, 'intrinsic' does not unpack the nature of section 35. It is on any view a very particular statutory creature: a power allowing a government which is *not* responsible to the Scottish Parliament – an institution with a direct democratic mandate in Scotland – to intervene in its legislative business in areas over which it *undoubtedly* has the competence to legislate.⁵⁶ It is neither normal nor common for Whitehall to look over Holyrood's shoulders; to do so would render devolution itself superfluous.

Constitutional settlements in the Westminster tradition sometimes contain provisions which allow national governments to intervene (directly or indirectly) in regional law-making or administration. These provisions can fairly be described as intrinsic to these constitutional settlements but might also (equally fairly) be described as outrageous in the upset they cause to the normal functioning of the relevant constitution. They are tolerated (however much under protest) precisely because of their extraordinary nature.

The tension is illustrated starkly in the case of *The State of Punjab v Secretary to the Governor of Punjab (No 2)*⁵⁷ determined by the Indian Supreme Court. In that case, the Punjab Legislative Assembly had passed four Bills in a special session of the Assembly. The Bills were then submitted to the Governor with a recommendation from the Government that they be granted assent. The Governor of an Indian State is constitutionally permitted to assent, withhold assent or reserve a Bill for consideration by the President of India, and must reserve a Bill which would, if enacted, 'so derogate from the powers of the High Court as to endanger the position which that court is by this Constitution designed to fill'.⁵⁸ The Governor effectively sat on the Bills and later, in response to repeated queries by the Government, stated that he considered the special session of the Assembly to have been unlawfully summoned, with the result that he would not now assent to four invalid Bills. In the Supreme Court, the Chief Justice of India Dr DY Chandrachud strongly criticised the Governor's conduct, rejected his claim that the special session had been unlawful and ordered him

55 Ibid [71].

56 Lady Haldane notes, at various points throughout her opinion, that the parties were agreed that the GRR Bill was within the Scottish Parliament's competence, see *ibid* [11], [36], [38](ii) and [68].

57 *State of Punjab v Secretary to the Governor of Punjab (No 2)* 2023 INSC 1017, [2023] 15 SCR 777.

58 Constitution of India 1950, art 200.

to make a decision in accordance with the options constitutionally available to him.⁵⁹

While this case may appear factually and legally different to *Scottish Ministers* at first blush, there are important parallels between the two cases: both in terms of the relevant power (of the Governor) as well as the Supreme Court's view of federalism in India. First, Indian Governors are appointed by the Indian President, who is constitutionally bound to follow the advice of her ministers in *Raisina Hill*.⁶⁰ In other words, Indian Governors are effectively political appointees of the Federal Government. This at times causes intense political friction between Federal and State Governments of different political hues, with the Federal Government unable to shake the suspicion of constitutional chicanery through indirect control of state governance.⁶¹ Second, although the Indian Constitution appears to allow a governor to withhold assent without qualification,⁶² the Supreme Court in *Punjab* held that the only course of action open to the Governor should he wish to withhold assent is to return the relevant Bill to the Assembly with one or more recommended amendments for the Assembly's (unqualified) consideration.⁶³ In the Chief Justice's view, this was an essential reading of the Governor's powers, as the alternative would allow

the Governor as the *unelected* Head of State [to] be in a position to virtually veto the functioning of the legislative domain by a duly *elected* legislature by simply declaring that assent is withheld without any further recourse. Such a course of action would be contrary to fundamental principles of a constitutional democracy based on a Parliamentary pattern of governance. (emphasis supplied)⁶⁴

If the capitalisation of 'parliamentary' evokes connections with Westminster, that is precisely the Chief Justice's point. The repeated references to the unelected nature of the gubernatorial office in contrast with the direct democratic legitimacy of the Punjab Legislative Assembly is in part anchored to the thread of responsible government

59 Ibid [44].

60 Constitution of India 1950, art 155 (Appointment of Governor) and art 74(1) (Council of Ministers to aid and advise President). *Raisina Hill* is a metonym for the Federal Government, due to the presence of some of the most important federal institutions on or within a certain radius of Raisina Hill in the heart of New Delhi.

61 See eg Gautam Bhatia, 'Do we need the office of the Governor?' (*The Hindu* 24 May 2018).

62 Constitution of India 1950, art 200 (Assent to Bills).

63 *Punjab* (n 57 above) [24].

64 Ibid [25].

which runs through the Indian Constitution – a direct influence from Westminster.⁶⁵

Third, although the Indian Governor is a political appointment whereas the Scottish Secretary is an elected MP, the exertion of national control by each is far from a coincidence. Deeply resentful of British control over elected provincial government, retained through Crown-appointed governors,⁶⁶ when India's constitution framers inscribed its independent Constitution, their concern with the risk of nascent India's disintegration led them back to the very governors against whom they had bridled.⁶⁷ In the Scottish context, although the present Scottish Secretary is indeed directly elected from a Scottish constituency, he is, like Indian governors, not responsible to the legislature in respect of which he may intervene. It is against this backdrop that the Indian Supreme Court insisted on narrowly reading gubernatorial powers. The risk of the alternative scenario in *Punjab* was the stagnation of its democratically elected legislature through the actions of a non-responsible official. A similar risk arises if the court is called upon to interpret section 35 – or indeed the SA – as 'any other' statute.⁶⁸ It should be trite law for the SA to be considered for what it embodies – a constitutional settlement.

The above mini-excursion into comparative constitutional history and practice leads me to Lady Haldane's second point I highlighted above: that the principle of legality does not apply to the dispute in *Scottish Ministers*. In the Lord Ordinary's view, this inapplicability was because the question at the heart of the case was not 'whether the executive is using a statutory power to interfere with a fundamental or constitutional right'.⁶⁹ Indeed, the section 35 order did not interfere with a fundamental or constitutional right. But that is only part of the content of the principle of legality. The fuller version of the principle can be found in Lord Steyn's meticulous exploration of it in *R v Home Secretary ex parte Pierson*.⁷⁰ Lord Steyn located the principle firmly in the presumption that the UK Parliament does not legislate in a vacuum, but within pre-existing rules which undergird the general system of

65 Ibid [16].

66 *Constituent Assembly Debates (India)*, vol 8, 8.94.108 (30 May 1949). The relevant Westminster statute was the Government of India Act 1935, s 48(1).

67 *Constituent Assembly Debates* (n 66 above) vol 8, 8.94.176.

68 *Scottish Ministers* (n 3 above) [38](i).

69 Ibid [71],

70 *R v Home Secretary ex parte Pierson* [1998] AC 539 (HL). Of note, Lady Haldane referred to *Ex parte Pierson*, but only a few selected passages quoted in *R (Evans) v Attorney General* [2015] UKSC 21, [2015] 1 AC 1787: see *Scottish Ministers* (n 3 above) [71].

law, displacing such rules only with 'irresistible clearness'.⁷¹ Properly understood, therefore, the presumption against casual, cursory or unintended displacement of fundamental rights is a manifestation of this broader principle, without being the entirety of it.

In *Scottish Ministers*, the broader principle of legality would have necessitated an exploration of PAI as it once existed, and why and how the language of section 35 clearly displaces pre-existing rules around how PAI functioned. This clear displacement would raise yet further questions as to the proper scrutiny of the section 35 Order, when considered in light of the scrutiny afforded to the exercise of PAI in previous avatars. When PAI manifested as reservation powers throughout the British empire,⁷² their complete lack of substantive qualification meant that scrutiny was extremely light. The Canadian Supreme Court, for example, held that, procedural compliance aside, there were no limitations on the power of Canada's Lieutenant-Governors to reserve Provincial Bills for the Governor General.⁷³ The substantive qualifications in section 35 must therefore bear consequentially upon the question of scrutiny. Indeed, engaging the broader principle of legality would *ipso facto* demand a higher level of scrutiny than the Lord Ordinary had held in *Scottish Ministers*. But what might this scrutiny entail?

A BREAKDOWN OF SECTION 35

In two typically erudite posts on the UK Constitutional Law Association blog, Michael Foran⁷⁴ and Paolo Sandro⁷⁵ present opposite appraisals of *Scottish Ministers*. For Foran, arguments about the separation of powers are properly focused – not on the devolved plane – but at Westminster. In other words, *Scottish Ministers* was not a case about Whitehall's interference with Holyrood's domain, but about the boundaries of that domain as determined by Westminster.

71 *Pierson* (n 70 above), Lord Steyn quoting *Maxwell on Interpretation of Statutes* 12th edn (Sweet & Maxwell 1969) 116.

72 See Anurag Deb, 'Lessons from the age of empire: the UK Internal Market Act as a rupture in the understanding of competence' (2024) 75(1) *Northern Ireland Legal Quarterly* 106–139, 117–118.

73 *Reference re the Power of the Governor General in Council to Disallow Provincial Legislation and the Power of Reservation of a Lieutenant-Governor of a Province* [1938] SCR 71, 79, per Duff CJ.

74 Michael Foran, 'Section 35 and the separation of powers: on the role of unwritten constitutional principles in the interpretation of the Scotland Act' (*UK Constitutional Law Association* 13 December 2023).

75 Paolo Sandro, 'Devolution and the phantom menace: an alternative view on the appropriate intensity of judicial scrutiny of the s 35 Scotland Act 1998 order' (*UK Constitutional Law Association* 20 December 2023).

Seen in this light, the Scottish Secretary's power under section 35 is not some usurpation, but simply an 'instantiation' of the balance between Whitehall and Edinburgh which Westminster enacted in the SA. In response, Sandro cautions against a 'centralist vision of the constitutional division of labour between UK and devolved institutions' which he says informed the Lord Ordinary's scrutiny in *Scottish Ministers*. For Sandro, the stated intention of the UK Government at the time of enacting the SA – that section 35 is a power designed to be effective through existence rather than use – is highly relevant, both to the use of the power as well as the scrutiny with which the courts should examine its use.

In discussing my view on the proper scrutiny of the section 35 order, I set out what I hope is a path which can be navigated using both Foran's and Sandro's visions of the SA. Assuming the Scottish Parliament passes a Bill which makes modifications (of whatever character) of the law as it applies to reserved matters, the word on which both the petitioners and respondent focused in *Scottish Ministers* is 'adverse'. This is understandable, but it somewhat glosses over the word 'operation'. Of course, the court did not exhaustively define what either 'adverse' or 'operation' meant (and it would be myopic to embark on such a course). But the word 'operation' is interesting when considered against the reasons proffered by the Scottish Secretary. The reasons are grouped into three parts: adverse effects of different GRC regimes across the UK; adverse impacts resulting from increased risk of fraudulent applications; and adverse effects in relation to the operation of the Equality Act 2010. The first part is detailed mainly in terms of the effect of GRC divergence: on tax and social security administration (in terms of cost and capacity); the increased burden on employers, especially from the operation of the bar on disclosing protected information relating to a person's acquired gender in respect of a greater cohort of GRC holders; and divergence in the criteria for overseas applicants to obtain a GRC in the UK. The point here is not to ask whether these reasons are evidentially supported – but rather whether these reasons relate to the *operation* of the law as it applies to reserved matters. If an increase in the *costs* (time, resources, capacity, etc) associated with the operation of a law – whether on the public or private sector – is elided with the operation of a law *per se*, then section 35 effectively warns the Scottish Parliament not to increase the operational costs of the law as it applies to reserved matters. The second part of the Scottish Secretary's reasoning – the scale of fraudulent applications – is also ultimately a question of the costs associated with mitigating that risk, whether through the increase in penalties for such applications or the enforcement of such penalties across a larger scale (assuming that the risk of fraudulent applications is indeed increased). The final part of

the reasoning – the effects of the GRR on the operation of the Equality Act 2010 – is, by the framing of the reasoning itself, an ‘exacerbation of existing issues’; again, a question of scale and the costs associated with accommodating that scale. In *Scottish Ministers*, the elision between the operation of the law as it applies to reserved matters and the cost of that operation is perfectly captured by Lady Haldane when she says:

The law operates and is delivered in many different ways, one of which may be by the use of IT systems. Therefore a concern about an adverse effect of divergence is, on the face of it, a legitimate one.⁷⁶

Here, adverse effect pertains to the operational cost as the operation of the law. Critics may dismiss this as pedantry because an increase in the operational cost of a law can fairly be classified as an adverse impact on the operation of that law. But if this is the potential of section 35, then it extends across much if not most of the Scottish Parliament’s legislative competence, including areas in which divergence has a conceivably much greater numerical impact – such as divergence in income tax rates between Scotland and the rest of the UK.⁷⁷ Seen in this light, section 35, a power which was described as a ‘safeguard’,⁷⁸ has the ouroboric potential to devour much of ordinary law-making, transgressing the domain of the Scottish Parliament well beyond what the UK Parliament enacted. This potential is, ultimately, why a close reading of the language of section 35 is necessary and why the Lord Ordinary’s light-touch scrutiny of the provision was a missed opportunity. With respect to Foran’s analysis, heightened scrutiny does not (*pace* Foran) delegitimise section 35 as unconstitutional. Rather, it tries to precisely understand the relationship between Whitehall and the Scottish Parliament, which is – lest it should be forgotten – an institution entrusted by Westminster to make laws for Scotland. Applying Sandro’s analysis, heightened scrutiny accords the Scottish Parliament proper respect given its democratic legitimacy.

CONCLUSION

The temptation to cast the SA as an ordinary statute and section 35 as an ordinary part of an ordinary statute is understandable when one considers its sheer complexity, length, the number of times it has been amended – incrementally and on a case-by-case basis – and the many questions it leaves unanswered. But this is, in many ways, the nature of a constitution – prescriptiveness can often be an obstacle to effective government. A constitution, is, moreover, by nature an extraordinary

⁷⁶ *Scottish Ministers* (n 3 above) [77].

⁷⁷ SA, s 80C.

⁷⁸ HC Deb 12 May 1998, vol 312, col 267.

law. Leaving aside the socio-political and cultural importance of a constitution, a law which enables law-making and administration could not be ordinary.

The extraordinary nature of a constitution, however, requires careful handling and careful interpretation. Nuance, not simplicity, is the virtue here. The Scottish Parliament is not just a delegated lawmaker, the Scottish Secretary is not just a UK minister and the relationship between them is not just a technical artefact tucked away in the dry verbiage of a long statute. Instead, the SA enables not merely devolution, but the possibilities inherent within devolution. In this, it is no different to devolution in Wales and Northern Ireland, both of which have as yet uninvoked PAI powers.⁷⁹ Consequently, *Scottish Ministers* has relevance beyond Scotland and ultimately to the position and future of devolution within the UK.

No matter how one frames devolution – as a gift from Westminster or as a democratic right which Westminster only helped to realise – we owe it to ourselves to look deeper and understand better. Otherwise, we may one day helplessly watch safeguards become straitjackets as ‘ordinary’ provisions devour extraordinary constitutions.

⁷⁹ Government of Wales Act 2006, s 114. Note: for Northern Ireland, this refers to the Northern Ireland Act 1998 (s 14(5)) and not, as previously explored in this comment, the Government of Ireland Act 1920.