



Cracking a nut with a sledgehammer: the *Lord Advocate's Reference* on a second Scottish independence referendum in constitutional context[†]

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ABSTRACT

The UK Supreme Court's judgment in the *Reference by the Lord Advocate of Devolution Issues under Paragraph 34 of Schedule 6 to the Scotland Act 1998* [2022] UKSC 31 not only confirms that holding a second referendum on Scottish independence is outside the Scottish Parliament's legislative competence but raises a series of important constitutional issues. These include the constitutional status of referendums, the importance of sub-state democracy and the sovereignty of the United Kingdom (UK) Parliament. Whilst the Court gives referendums more significance than they were previously thought to have, its reasoning invoking democracy and on parliamentary sovereignty suggests it has adopted a vision of the UK constitution in which UK-level authority is privileged over sub-state authority, to the detriment of subsidiarity and devolved autonomy.

Keywords: referendums; devolution; parliamentary sovereignty; democracy; Scottish independence; constituent power.

BACKGROUND

On 28 June 2022, the then First Minister of Scotland, Nicola Sturgeon, announced that a reference was to be made to the United Kingdom (UK) Supreme Court by the Lord Advocate under paragraph 34 of schedule 6 to the Scotland Act 1998.¹ Paragraph 34 allows the Lord Advocate to refer to the UK Supreme Court 'any devolution issue which is not the subject of proceedings'. Under paragraph 1(f) of schedule 6, a 'devolution issue' includes questions about whether a particular function is 'exercisable within devolved competence or in or as regards Scotland and any other question arising by virtue of this Act about reserved matters'.

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¹ *Reference by the Lord Advocate of Devolution Issues under Paragraph 34 of Schedule 6 to the Scotland Act 1998* [2022] UKSC 31, hereafter '*Scottish Independence Referendum Reference*'.

The reference concerned a provision of a draft Scottish Independence Referendum Bill that had not yet been introduced into the Scottish Parliament. The Bill would provide for a 'consultative' referendum on Scottish independence, with the question 'Should Scotland be an independent country?'. The reference arose because the Lord Advocate felt she (the Lord Advocate) did not have sufficient confidence that the Bill did not relate to reserved matters under the Scotland Act 1998 for the minister introducing the Bill to certify this.² The reference therefore aimed to establish whether a consultative referendum would be within the Scottish Parliament's legislative competence.

The prospective referendum in question amounted to Plan B in the Scottish Government's pathway to independence. Under Plan A, the Scottish Government asked the UK Government to request His Majesty the King to make an Order in Council under section 30 of the Scotland Act 1998 to temporarily grant the Scottish Parliament the legislative competence to hold an independence referendum, as had happened in the lead-up to the 2014 independence referendum. The former UK Prime Minister, Boris Johnson, had rejected the Scottish Government's request. Plan B was this prospective consultative referendum, whilst Plan C is to treat the next UK General Election as a *de facto* referendum on independence.³ The political context of the reference is the growing call for a second independence referendum in the wake of the UK's withdrawal from the European Union (EU) in early 2020. In particular, the Scottish National Party, which now forms the Scottish Government in a confidence-and-supply arrangement with the Green Party, stood for the Scottish Parliament elections in May 2021 on a manifesto that committed to holding a second independence referendum.⁴

Three principal questions were put before the UK Supreme Court in argument:

- 1 Is the Lord Advocate's question a 'devolution issue' under paragraph 1(f) of schedule 6 to the Scotland Act 1998?
- 2 Should the Court decline to exercise its discretion to decide the question referred?
- 3 Does the provision of the Bill providing that the question to be asked in a referendum is 'Should Scotland be an independent country?' relate to the reserved matters⁵ of the Union of

2 Ibid [10]. See Scotland Act 1998, s 31(1).

3 Andrew Learmonth, 'Nicola Sturgeon to push ahead with plans for "de facto" referendum' *The Herald* (Glasgow 23 November 2022).

4 Scottish National Party, 'SNP 2021 manifesto: Scotland's Future, Scotland's Choice'.

5 See Scotland Act 1998, ss 29(2)(c) and 29(3).

the Kingdoms of Scotland and England (the Union) and the Parliament of the UK (the UK Parliament)?⁶

The Scottish National Party also intervened in the reference in support of an argument in favour of the Scottish Parliament's competence to enact the provisions in the draft Bill.

THE UK SUPREME COURT'S DECISION

Question 1: is the question referred a 'devolution issue'?

The Court determined that it was. It gave four reasons, each of which responds to one of the Advocate General for Scotland's arguments. First, the Advocate General had argued the question did not arise 'by virtue of this Act' because the need for the Lord Advocate to certify the competence of the Bill before its introduction was contained within the Scottish Ministerial Code and not the Scotland Act 1998. The Court held that whether a question so arises 'does not depend on whether the Lord Advocate is required *by the Scotland Act* to answer it'.⁷ The question was found to arise under section 31(1) of the Act, which requires a minister to certify competence.⁸ Second, allowing the reference to proceed under paragraphs 1(f) and 34 of schedule 6 did not undermine the system of legislative scrutiny involving ministerial statements, the Presiding Officer and the procedure for references on Bills passed by the Scottish Parliament in sections 31 and 33 of the 1998 Act. The Law Officers' section 33 power to refer questions on legislative competence to the Court did not prevent a reference from being made under paragraph 34 before the introduction of a Bill.⁹ Although this would result in references on legislative competence and reserved matters being handled under paragraphs 1(f) and 34 of schedule 6 and those on other issues relating to legislative competence¹⁰ being made under section 33 (the 'bifurcation' point), as well as consecutive references raising different issues about the same Bill, this was not a reason to narrowly construe paragraph 1(f).¹¹ The Law Officers having a 'parallel power' to choose whether to bring a devolution issue before the UK Supreme Court or the Scottish courts¹² would not be an issue

6 Scotland Act 1998, sch 5, para 1(b) and (c).

7 *Scottish Independence Referendum Reference* (n 1 above) [16], emphasis added.

8 Ibid [16]–[17].

9 Ibid [23].

10 These include the other grounds on which a provision might be outside competence under s 29 of the 1998 Act.

11 *Scottish Independence Referendum Reference* (n 1 above) [24].

12 Scotland Act 1998, sch 6, para 4.

in practice as the Law Officers could be expected to exercise that power appropriately.¹³ Third, the Court treated paragraph 1(f) as a 'sweeping-up provision' ensuring that every possible question about whether a function can be exercised within devolved competence is justiciable.¹⁴ Fourth, the possibility of the Lord Advocate answering the question referred did not exclude the reference, as the Law Officers could be mistaken on issues of competence, and it would be 'more consistent with the rule of law' and the Scotland Act 1998 for the Scottish Parliament to exercise its competence on the basis of an authoritative judicial decision.¹⁵ The Court added that there was little possibility of abuse of this power, as the UK Parliament could be confident that references 'would be made responsibly in the public interest'.¹⁶

Question 2: should the Court decline to exercise its discretion to determine the question asked?

The Court advanced six reasons why previous authorities suggesting that it should decline to exercise its discretion ought not to be followed. First, previous authorities were concerned with ordinary litigation, whereas the present case fell under the Court's 'devolution jurisdiction'.¹⁷ Second, the reference was not hypothetical but related to a legal question that had already arisen with practical importance and consequences. Third, the relevant provisions of the Bill would be introduced into the Scottish Parliament in the same form as they were in before the Court and there was little likelihood of amendment. Fourth, the purpose and effect of the Bill was apparent without recourse to other documentation. Fifth, it was unlikely that a further reference on the Bill would be necessary under section 33 of the Scotland Act 1998. Sixth, the Lord Advocate did not appear to be acting 'other than with a proper sense of her responsibilities'.¹⁸ The Court thus regarded itself as capable of determining the question referred.

Question 3: does the Bill 'relate' to reserved matters?

The Court had to determine whether the Bill would be outside the Scottish Parliament's legislative competence by virtue of 'relating' to the reserved matters of the Union and the UK Parliament.¹⁹ Section 29(3) of the Scotland Act 1998 states that whether an Act of the Scottish Parliament 'relates' to reserved matters must be determined

13 *Scottish Independence Referendum Reference* (n 1 above) [27].

14 *Ibid* [37].

15 *Ibid* [44]–[45].

16 *Ibid* [46].

17 *Ibid* [53].

18 *Ibid*.

19 Scotland Act 1998, sch 5, para 1(b) and (c).

'by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances'. The term 'relates to' means the provision must have 'more than a loose or consequential connection' with the reserved matter.²⁰ The Court stated that 'effect in all the circumstances' extends to non-legal effects.²¹ The scope of the relevant subject-matter encompassed, in the Court's view, whether the Union should end and whether 'Scotland should cease to be subject to the sovereignty of the [UK Parliament]'.²² In a crucial paragraph, it added that a lawful referendum was 'not merely an exercise in public consultation' but a formal democratic process governed by the referendum's enabling statute.²³ If the conditions in the enabling statute are followed, the authority of this statute 'confer[s] legitimacy upon the result'.²⁴ Given the public and political importance of referendums,²⁵ their effects would have the political consequences of shaping the democratic legitimacy of the Union and the independence movement,²⁶ since referendums are an expression of the view of the Scottish electorate in a constitution committed to democracy. The proposed referendum would therefore have 'more than a loose or consequential connection' with the Union, and with the sovereignty of the UK Parliament and therefore the UK Parliament itself.²⁷

The self-determination issue

The Scottish National Party argued that section 29(2)(b) of the Scotland Act 1998 should be interpreted according to the right of self-determination of the Scottish people. The Court dismissed this. The principle of self-determination was not in play here. The usual context for the right to external self-determination in international law, said the Court, was former colonies, people oppressed by foreign military occupation or a denial of meaningful access to government,²⁸ none of which applied to Scotland. The limitation of the right to secede was, for the Court, consistent with the UK's submissions to the International Court of Justice in its Advisory Opinion on Kosovo's Unilateral

20 *Scottish Independence Referendum Reference* (n 1 above) [17], citing *Martin v Most* [2010] UKSC 10 [49] and *Imperial Tobacco v Lord Advocate* [2012] UKSC 61 [16].

21 *Scottish Independence Referendum Reference* (n 1 above) [74], citing *Imperial Tobacco* (n 20 above) [39].

22 *Scottish Independence Referendum Reference* (n 1 above) [77].

23 *Ibid* [78].

24 *Ibid*.

25 *Ibid* [79]–[80].

26 *Ibid* [81].

27 *Ibid* [82].

28 *Ibid* [88]–[89].

Declaration of Independence.²⁹ Finally, neither a narrow nor a wide reading of section 29(2)(b) of the Scotland Act 1998 could result in a breach of the international law principle of self-determination as the 1998 Act creates a devolution settlement founded on subsidiarity. The Act is to be interpreted just as any other statute.³⁰

COMMENT

The procedural issues

Although there has been much focus on the Court's determination on the question referred, given its political importance, there are several points of note in its approach to whether the reference could be brought.

First, the Court adopted a wide reading of 'by virtue of this Act' in paragraph 1(f) of schedule 6. Armstrong argued prior to the handing-down of the judgment that the question before the Court did not truly arise under the Act, but by virtue of the Scottish Ministerial Code.³¹ This invokes the Lord Advocate's responsibility to ensure that the Scottish ministers act within the bounds of the law and suggests ministers must seek the Law Officers' advice where the constitutional propriety of a proposed Bill is in doubt. The Scottish Ministerial Code here seems to create an additional threshold relating to competence beyond the minister's certification under section 31(1) of the Scotland Act 1998. The Lord Advocate's lack of confidence in certifying the Bill as competent thus appears to strike at the relevant provisions of the Ministerial Code rather than the section 31(1) requirement. The Court, in holding that the paragraph 1(f) condition does not depend on whether the 1998 Act requires the Lord Advocate to address this issue, treats 'by virtue of the Act' as encompassing the broader constitutional scheme of government for Scotland of which the 1998 Act is the centrepiece. Its interpretation suggests that the legal and non-legal aspects of Scotland's constitution work in tandem and that this ought to be recognised by the courts.

Second, the Court's reasoning on its discretion to determine the question demonstrates that it views itself not simply as the apex court in a common law system but, increasingly, as a constitutional court. Its reference to the 'devolution jurisdiction'³² under which this case fell distinguishes the present reference from ordinary common

29 Ibid [90].

30 Ibid [91].

31 Kenneth A Armstrong, 'Will the Supreme Court clear the way to a Scottish independence referendum?' (UK Constitutional Law Association 21 November 2022); Scottish Ministerial Code, paras 2.30 and 2.33.

32 *Scottish Independence Referendum Reference* (n 1 above) [53].

law cases that might come before it. That the Court permitted the reference to be brought under paragraph 34 of schedule 6 *prior to the Bill's introduction* reinforces this distinction. In doing so, the Court has identified that it has a limited 'advisory' jurisdiction in respect of matters reserved under the Scotland Act 1998.³³ This sharply contrasts with the common law position, in which a matter must be 'live' before the courts will consider it, as represented by the *Keatings* case.³⁴ In *Keatings*, a petition for a declarator that the Scottish Parliament had the competence to legislate for a referendum on Scottish independence without the UK Government's consent was rejected by the Lord Ordinary as premature, academic and hypothetical. This was upheld by the Inner House of the Court of Session on the basis that the pursuer would not need the declarator to exercise his right to vote in the 2021 Scottish Parliament elections.³⁵ On an analogous situation of a draft Bill not introduced into the Scottish Parliament, the Scottish courts focused on the lack of a practical connection between the competence issue and the petitioner's voting rights. By contrast, the UK Supreme Court here regarded the introduction of the Bill as enough of a practical consequence to determine the question referred. The UK Supreme Court therefore appears willing to take a wider view than the lower courts on the necessary practical implications for making a determination and, accordingly, the extent to which it can act in a more 'advisory' capacity.

Third, the Court's finding that the Law Officers have a parallel power 'to choose the appropriate forum' to determine devolution issues exposes a distinction between the reference procedures under paragraph 1(f) and 34 of schedule 6 and under paragraph 4 of schedule 6 to bring proceedings in relation to devolution issues in the Scottish courts. Under the former procedure, the UK Supreme Court in effect sits as a first instance court, whereas under the latter, the question would be considered by both the Outer and Inner House of the Court of Session before reaching the UK Supreme Court. Although the Court in this reference acknowledges the importance of the question before it, the nature of the procedure necessarily limits the extent of judicial consideration the question referred might receive. Furthermore, the distinction between these two procedures has the potential to entrench the distinction between the UK Supreme Court as a constitutional court under paragraphs 1(f) and 34, and as an apex common law court under paragraph 4.

33 I am grateful to the anonymous reviewer for their comments on this point.

34 *Keatings v Advocate General* [2021] CSIH 25.

35 *Ibid* [54].

The constitutional status of referendums

Central to the Court's conclusion in this reference is that a second independence referendum would have political effects that must be taken into account in establishing whether the draft Bill 'relates to' reserved matters. The Court's brief discussion about referendums is striking for four reasons.

First, it appears to diverge from Lord Neuberger's orthodox position in *Moohan v Lord Advocate*.³⁶ Lord Neuberger took the view that the 2014 referendum on Scottish independence was not self-executing, in the sense that the result would have effect without further action by any institution. A 'Yes' vote in favour of independence would have required the UK Parliament to pass legislation to implement the result. In the course of doing so, Members of the UK Parliament would be 'constitutionally bound' to vote in any way they liked.³⁷ This view casts referendums as purely advisory, with no impact, or normative case for their impact, on democratic decision-making in the UK Parliament. Whilst the Court in the *Scottish Independence Referendum Reference* does not treat a second referendum as self-executing, it does accord it effects beyond those acknowledged by Lord Neuberger. In particular, by holding that the effects of a referendum result impact the democratic legitimacy of the Union,³⁸ the Court recognises that direct democratic exercises can have some weight within the UK's constitutional order, although it does not go further to specify exactly how they might do so.

Second, however, the Court does not explicitly state that all referendums have constitutional significance. Despite noting the practical consequences of a second independence referendum, it does not recognise a constitutional convention on following referendum results, which Tierney³⁹ has suggested now exists, nor does it explicitly invoke the language of constituent power.⁴⁰ The scope of the Court's reasoning is also unclear. It leaves us with uncertainty as to whether it is only *independence* referendums that produce these practical consequences (as opposed to a referendum on, for example, the time zone for Scotland),⁴¹ or whether it is only referendums in the devolved territories *held under devolved powers* that do so.⁴² This, presumably,

36 *Moohan v HM Lord Advocate* [2014] UKSC 67.

37 *Ibid* [47].

38 *Scottish Independence Referendum Reference* (n 1 above) [81].

39 Stephen Tierney, 'The Lord Advocate's Reference: referendums and constitutional convention' (UK Constitutional Law Association 4 October 2022).

40 Pravara Petkar, 'Consultative referendums and constituent power in the UK' (UK Constitutional Law Association 5 July 2022).

41 Head L5, sch 5, pt II, Scotland Act 1998.

42 The practical effects of a UK-wide referendum given effect by an Act of the UK Parliament would not present the same issue owing to parliamentary sovereignty.

would only pose an issue for Scotland and Wales, since the UK Parliament has already committed itself to a process for a referendum on Irish unification in section 1 of the Northern Ireland Act 1998. It is therefore difficult to draw general conclusions about the constitutional status of referendums from the Court's reasoning here.

Third, the Court does not specify the *source* of the democratic consequences of a second independence referendum. On one hand, it states that referendums are formal electoral processes with an enabling statute that 'confer[s] legitimacy upon the result'.⁴³ The focus on the enabling statute here as opposed to the referendum as a direct democratic exercise suggests that, in some way, the referendum derives democratic force *from the statute* and not from the views of the people expressed. This position would be more consistent with *Moohan* but also with the principle of parliamentary sovereignty, which places representative democracy at the heart of the UK's constitution⁴⁴ and, on the 'manner and form' account, tends to view constitutional change in terms of restrictions on the UK Parliament's legislative powers.⁴⁵ On the other hand, the Court also states that the referendum affects the democratic legitimacy of the Union by virtue of its status as an expression of the democratic will of the Scottish electorate in a constitution committed to democracy. This suggests it is the referendum *itself* as a direct democratic exercise that carries weight rather than its enabling statute. As a result, in the first case, a direct democratic exercise has significance only through the legislation of a representative institution, whilst in the second case, it does so on its own terms. This is an important distinction because it goes to the question of the place of direct democracy within the UK's constitutional order.

Fourth, by finding that a second referendum on Scottish independence would be outside the Scottish Parliament's legislative competence, the Court confirms that it is for the UK Government to determine, by means of a section 30 Order under the Scotland Act 1998 or otherwise, when a referendum should take place. The default position in the UK therefore remains that referendums occur at the executive's behest and not otherwise. As Qvortrup has suggested, this is not without its dangers. He notes that a referendum initiated by opposition groups or by the people can be a check on power, whereas a referendum initiated by the executive can become a 'plebiscitary instrument' to give the government a 'blank cheque' to do what it

43 *Scottish Independence Referendum Reference* (n 1 above) [78].

44 *R (Miller/Cherry) v Prime Minister* [2019] UKSC 41 [55].

45 Michael Gordon, *Parliamentary Sovereignty in the UK Constitution* (Hart 2015) ch 6.

likes.⁴⁶ In the present case, the Court's decision preserves the reality that a UK Government may only allow another referendum on Scottish independence when it is politically expedient for it to do so, rather than when a sub-state unit of the UK makes a principled case for such a referendum.

The paradox of sub-state democracy

In determining the question referred, the Court relies on the democratic authority associated with a second independence referendum. It states that the referendum, 'whichever way the question was answered, would possess the authority, in a constitution and political culture founded upon democracy, of a democratic expression of the view of the Scottish electorate'.⁴⁷ This extract makes clear that the referendum result would bear democratic authority at the sub-state level. The invocation of the UK's democratic culture, however, cuts two ways. It is simultaneously the reason why a sub-state referendum has authority and practical effects, but because of these practical effects, it is also the reason why the referendum should be deemed outside competence. Democracy is here mobilised by the Court to restrict a potentially alternative form or site of democratic authority, suggesting that the Court has a particular vision of democratic authority in mind when invoking this term. The Court's reasoning here creates a paradox regarding sub-state democratic authority: it is capable of existing, yet at the same time cannot exist, at least through any legal form.⁴⁸

This, it is submitted, creates a broader problem for the relationship between sub-state and UK-level institutions within the UK's constitutional framework. By invoking democracy as a fundamental principle in the manner it does, the Court makes democratic authority exercised at the UK level superior to that at the sub-state level. The latter, however, can only be exercised with the permission of the institutions wielding the former. On the surface, this is perfectly consistent with the devolution framework for Scotland. In *AXA*, Lord Hope pointed out that the Scottish Parliament does not enjoy the 'sovereignty' of the UK Parliament;⁴⁹ it is a subordinate legislature in the UK constitution that may only act under the powers conferred upon it. The hierarchical superiority of the UK Parliament is, on this view, a mere statement of legal reality.

46 Matt Qvortrup, 'The Referendum: *non basta più*', *The Referendum and Other Essays on Constitutional Politics* (Hart 2018) 6–7.

47 *Scottish Independence Referendum Reference* (n 1 above) [81].

48 Pravara Petkar, 'A second Scottish independence referendum and Schrodinger's sub-state constituent power' (*IACL-AIDC Blog* 29 November 2022).

49 *AXA General Insurance Ltd v Lord Advocate* [2011] UKSC 46 [47] (Lord Hope).

The Court's reasoning nevertheless, in my view, exposes deeper constitutional issues. The hierarchy of democratic authority that it sets up presents a vision of the UK constitution in which it is preferable to exercise democratic authority at the UK level instead of the sub-state level. The Court's invocation of democracy at [81] of its judgment conflicts with Lord Hope's defence of the democratic credentials of the Scottish Parliament in *AXA*, in which the Scottish Parliament's democratic mandate was a reason in favour of finding that its legislation was not subject to review on the ground of irrationality.⁵⁰ It also somewhat sits in tension with the Court's own reasoning at [90] in this reference, in which it states that the devolution settlement for Scotland is founded on 'principles of subsidiarity'.⁵¹ The principle of subsidiarity entails that power ought to be exercised at the most local level possible. It creates a trend in favour of devolution and therefore the exercise of sub-state democratic authority, whereas the Court's use of 'democracy' in this reference seems to take us in the other direction, towards a preference for the exercise of democracy at the UK level. This naturally raises questions about the importance given to sub-state democracy within the UK constitution on the view presented here by the Court.

The developing 'practical effects' doctrine

This reference marks the second time in two years that the UK Supreme Court has considered the 'practical' effects of a legislative provision in a Bill or draft Bill in determining whether that provision is within the Scottish Parliament's legislative competence. The first of these two instances was the *UNCRC Incorporation Reference*.⁵² The Court had to determine the legislative competence of several provisions of a Bill attempting to incorporate the UN Convention on the Rights of the Child into Scottish law as regards devolved matters. For present purposes, the key provision is section 21, which authorised courts to make 'incompatibility declarators' in respect of legislation infringing the UNCRC's requirements. This provision, materially equivalent to section 4 of the Human Rights Act 1998, was found by the Court to be outside competence as it modified section 28(7) of the Scotland Act 1998. In particular, the Court cast the section 21 power as a form of 'judicial condemnation' that would put pressure on the UK Parliament to avoid the criticism that would come from infringing an international

50 Ibid [45]–[46] and [49] (Lord Hope).

51 *Scottish Independence Referendum Reference* (n 1 above) [90].

52 *Reference by the Attorney General and the Advocate General for Scotland – United Nations Convention on the Rights of the Child (Incorporation) Scotland Bill* [2021] UKSC 42, hereafter '*UNCRC Incorporation Reference*'.

human rights instrument.⁵³ This would qualify the UK Parliament's sovereignty, protected by section 28(7), though the equivalent qualification in the Human Rights Act 1998 was permissible as it was imposed by *the UK Parliament itself*.⁵⁴ As Elliott and Kilford have noted, the Court here fails to distinguish legal and political constraints on the UK Parliament.⁵⁵ The Court's reasoning appears to replicate aspects of the 'manner and form' theory of parliamentary sovereignty,⁵⁶ making non-legal limitations on the UK Parliament impermissible unless self-imposed. This widens the scope of the UK Parliament's proper sphere of legislative action to include devolved matters that might affect its sovereignty.

The Court seems to take the 'practical effects' doctrine in a different direction in this reference, though in a manner that mirrors the substance of its earlier decision. Here, the potential practical effects of the referendum are relevant effects under section 29(3) of the Scotland Act 1998 and so 'relate to' reserved matters. The Court must necessarily develop a different shape for this doctrine because neither the Lord Advocate nor the Advocate General for Scotland argued before it that the provision for a referendum would modify section 28(7). Although the Court as a result does not quote its reasoning in *UNCRC Incorporation Reference*, it still takes the view that practical effects qualifying parliamentary sovereignty can only be imposed at the UK-level; here, the practical effects of a second independence referendum could end the sovereignty of Parliament over Scotland.⁵⁷ Both cases therefore discuss the impact of practical effects on parliamentary sovereignty. Nevertheless, the analogy with the 'manner and form' theory is somewhat weaker in this reference. Whilst UK-level action in the form of a section 30 order would be needed to grant the Scottish Parliament competence to hold a referendum, a section 30 order is made by the Crown on the advice of the executive rather than through the UK Parliament.

This discussion is significant because it suggests that the Court could have come to the same conclusion on the competence of the referendum provision without invoking the UK's democratic constitutional culture. Instead, taking the position it had developed in *Imperial Tobacco* about non-legal effects, it could have drawn an analogy between the effects of a referendum and the effects of the 'incompatibility declarators' at

53 Ibid [52].

54 Ibid [50].

55 Mark Elliott and Nicholas Kilford, 'The Supreme Court's defence of unqualified lawmaking power: parliamentary sovereignty, devolution and the Scotland Act 1998' (2022) 81 Cambridge Law Journal 4.

56 See generally Gordon (n 45).

57 *Scottish Independence Referendum Reference* (n 1 above) [82].

issue in *UNCRC Incorporation Reference*. Since both section 28(7) and the reservation of the UK Parliament concern parliamentary sovereignty,⁵⁸ it could be argued that the 'practical effects' doctrine developed in *UNCRC Incorporation Reference* should be transposed into the present case. This, it is submitted, would avoid the paradoxical and difficult discussion about democracy that is prompted by the way in which the Court actually reached its conclusion here.

The territorial scope of parliamentary sovereignty

Some attention should also be given to the way the Court construes the concept of 'sovereignty' in this case. In the context of the 2016 EU referendum, Douglas-Scott noted that sovereignty has parliamentary, popular and 'external' aspects. Parliamentary sovereignty applies to representative democracy, popular sovereignty to the direct democracy of a referendum and external sovereignty to state sovereignty on the international plane.⁵⁹ The Court here stated that a Bill providing for 'ending the sovereignty' of the UK Parliament over Scotland would have 'more than a loose or consequential connection' with that Parliament's sovereignty.⁶⁰ This conflates different senses of the term 'sovereignty' without highlighting those differences or detailing the distinctions between them. It is correct that an independent Scotland would not be subject to the UK Parliament's sovereignty, but this is because it would have ceased to be part of the externally sovereign state of the UK. This blends parliamentary sovereignty, which Douglas-Scott describes as 'unlimited legislative power',⁶¹ into external sovereignty. A potential change in the territorial scope over which the UK Parliament's supreme and unlimited legislative powers are to be exercised is thus treated as a challenge to those very legislative powers. Framing the issue of sovereignty in this loose manner paints the question of Scotland's secession as a challenge to the legislative supremacy of a representative democratic institution. In the UK context, this might be regarded as a limit on parliamentary sovereignty of the kind represented by the Parliament Acts 1911–1949, or even the courts' powers to issue declarations of incompatibility under the Human Rights Act 1998.⁶²

This line of reasoning creates a further conceptual challenge because of the apparent similarities with the 'manner and form' theory of parliamentary sovereignty. Since the UK Government would have

58 See *ibid* [76] on the latter point.

59 Sionaidh Douglas-Scott, 'Brexit, article 50 and the contested British constitution' (2016) 79 *Modern Law Review* 1019, 1020.

60 *Scottish Independence Referendum Reference* (n 1 above) [82].

61 Sionaidh Douglas-Scott, 'Brexit, the referendum and the UK Parliament: some questions about sovereignty' (UK Constitutional Law Association 28 June 2016).

62 *UNCRC Incorporation Reference* (n 52 above) [52].

to advise the King to make a section 30 order allowing a referendum, and the UK Parliament would have to enact legislation to facilitate secession in the event of a result favouring independence, it seems that the territorial scope over which the UK Parliament's powers are to be exercised can ultimately only be altered by the UK Parliament itself. However, if Scottish secession is treated as a 'manner and form' limit on parliamentary sovereignty, it follows from the UK Parliament's unlimited legislative competence that it can unmake any self-imposed restrictions, including the restriction it would impose upon itself by permitting Scottish secession. The Court's reasoning, thus extrapolated, leads us to the uncomfortable conclusion that the UK Parliament could somehow bring Scotland back into the Union at any time of its choosing as a matter of domestic law. This would render the idea of a voluntary union between England and Scotland meaningless whilst flying in the face of the doctrine of state sovereignty in international law. As the Court's reasoning on the UK constitution's democratic culture does, its construction of sovereignty tilts the balance of the constitution firmly in favour of the UK-level institutions and away from current sub-state institutions. The availability to the Court of alternative lines of reasoning to reach the same conclusion, as suggested above, puts its actual reasoning into sharp relief. It raises the concern that, if extended, it could do more harm than good in the future for the relationships between different territorial elements of the UK's constitution.

CONCLUSION

From a political perspective, the Court's judgment is undoubtedly a significant roadblock in the pathway to independence outlined by the Scottish Government in June 2022. In strict legal terms, it confirms that there is no free-standing constitutional pathway to secession for Scotland that does not involve the consent of the UK Government of the day, distinguishing Scotland from the position of Northern Ireland and reinforcing the complex and tailored nature of the UK's devolution settlement. The Court's reasoning, however, threatens to open a series of constitutional Pandora's boxes, with implications that stretch beyond the question of competence. It brings into focus the relationship between sub-state and UK-level institutions within the UK constitution, the voluntary nature of the union and the way in which power is actually distributed under Scotland's contemporary devolution settlement. It remains to be seen whether, in future cases on the Scottish Parliament's legislative competence, the Court will further develop this line of reasoning or indeed step back from it to reorient Scotland's devolution settlement towards the principle of subsidiarity on which it claims that devolution settlement is based.