**Welsh Devolution and the Supreme Court**

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The National Assembly for Wales now able to make primary legislation in all of the areas where it has devolved competence, known as ‘Acts of the Assembly’

The Local Government (Wales) (Byelaws) Bill was the first Bill under these new powers to be passed by the Assembly. It was also the first piece of devolved legislation to be referred by the UK Government to the UK Supreme Court; not once has the UK Government referred a Bill of the Scottish Parliament to the Supreme Court.

On 13 August 2013 another Assembly Bill, the Agricultural Sector (Wales) Bill was referred by the UK Government to the Supreme Court.

Local Government (Wales) (Byelaws) Bill introduced an alternative procedure for local authorities to follow in making certain local government byelaws, by removing the requirement of confirmation by the Welsh Ministers. In doing so the UK Government argued that the Bill also removed functions of UK Ministers of the Crown (Secretary of State for Wales’ confirmatory powers). Assembly Acts cannot remove or modify such functions which existed before Part 4 of GOWA 2006 came into force unless the Secretary of State consents or if the provision is ‘incidental to or consequential on’ the main purpose of the Bill.

5 Supreme Court Justices unanimously rejected the challenge: removal of the Secretary of State’s power incidental to the primary purpose of the Bill to simplify the procedures for making byelaws by removing the need for Welsh Ministers’ consent — this could not be achieved without the removal of the Secretary of State’s too.

The Byelaws judgment clarifies the interpretation of ‘incidental or consequential’ but little else.

**S.112 of GOWA 2006:** the Counsel General or the Attorney General may refer the question whether a Bill…would be within the Assembly’s legislative competence to the Supreme Court for decision.

Scope of such review is much more limited than the traditional scope of judicial review; ‘a more liberal approach would lead the courts into unwarranted scrutiny of the democratic legislative process’ (T Mullen (2010) 8 SLT 40).

In *Axa Insurance and others v Lord Advocate* (2011) UKSC 46 the Court held that Acts of the Scottish Parliament are not subject to review on the grounds of irrationality, unreasonableness or arbitrariness, because ‘it would be wrong for the judges to substitute their views as to what is rational or reasonable for the considered judgment of the democratically elected legislature.

**Devolved legislation only subject to review on the grounds prescribed for in the devolution Acts.**

The Agricultural Sector (Wales) Bill allows the Welsh Ministers power to make Orders setting employment terms and conditions for agricultural workers in Wales, following the UK Government’s abolition of the Agricultural Wages Board which the Welsh Government opposed.

The Attorney General has referred the Bill to the Supreme Court on the basis that it is outside the Assembly’s legislative powers.

The Welsh Government believes it relates to the conferred devolved subject of Agriculture.

The UK Government believes it relates to the non-devolved area of employment law.

No exception relevant to agricultural wages, but neither is it a specifically devolved subject, so reserved by implication to the UK Parliament. However, it is included in the Scottish Parliament’s powers as an exception to the general reserved area of ‘employment’.

The Court will have to decide whether the purpose of the Bill relates to a devolved matter (*[2010] UKSC 10, [2012] UKSC 61*).

**Do these referrals indicate a need for further constitutional change in Wales?**

The present Welsh devolution system is exceptionally complicated.

It took five Supreme Court Justices...several of the UK’s leading constitutional lawyers and a great many officials across three Governments to decide it was lawful to make minor changes to the way Welsh local councils deal with things like dog-fouling and loitering in public lavatories (Theodore Huckle QC, 2013).

Scotland has a reserved powers model of devolution: everything is devolved unless it is expressly listed as being reserved to the UK Parliament at Westminster.

Wales has a conferred powers model of devolution: power to legislate only where there is express provision to do so.

In Wales there is a list of subject areas in which the Assembly can legislate, and a list of exceptions; but a number of subjects are not mentioned at all. There is no list composite list of reserved areas, resulting in great uncertainty whether something is devolved or not (as is precisely the case with the Agricultural Sector Bill). It would also be an impossible task to list all things which are probably devolved to the Assembly.

**Determining questions of legislative competence is much easier under a reserved powers model. No subjects ‘in limbo’: all subjects included unless expressly excluded.**

My research concludes that Wales should move to a reserved powers model of devolution.

While the scheme in the 1998 Act may not strike one as a model of clarity, it does appear so far to have achieved the aim of stability. Lord Hope (2010 UKSC 10 para 3)