Chapter 9: Devolution and local government

Problem scenario 1: Devolution

Across the UK, and in the aftermath of Brexit, there is a (fictitious) employment crisis. Due to new, stricter immigration laws, the departure of a great many European citizens has left a huge number of vacancies across both the public and private sectors and an increase in university tuition fees in certain parts of the country (as a consequence of fewer students from the European Union) is discouraging students from attending university and getting degrees, thus meaning that the quality of applicants for many such jobs is declining. Devolved and centralised legislatures across the country introduce measures to combat this crisis. These include the following:

- In Scotland, a new law is passed that permits employers to require their employees to be at work six days a week; Saturday and Sunday are to be regarded as normal working days. A large majority of public and private sector employers enforce this.
- In Wales, to improve the quality of applicants to job vacancies, a law is passed that makes it compulsory for children to attend school until they are eighteen years old. It is hoped that this will motivate more students thereafter to attend university.
- Aware of its border with an EU Member (the Republic of Ireland), Northern Ireland decides to introduce its own immigration laws, different from and more lenient than those adopted by the UK Government in respect of the country as a whole. The aim is to permit EU nationals to enter Northern Ireland to work, without a visa, provided they already have a job lined up.
- Finally, the UK Parliament seeks to pass a law that requires all universities across the UK to condense all their degree programmes to two years in the hope that this will work out both cheaper and quicker for those thinking about going to university.

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Imagine that you have been presented with this problem scenario and asked to critically discuss the legality of the laws passed by the devolved legislatures and the UK Parliament.

With regard to the new law passed by the Scottish Parliament, the list of reserved matters given in Chapter 9 sets out some of the matters that are expressly labelled as reserved matters under the Scotland Act 1998, as amended by the 2012 and 2016 Acts. This list includes employment and industrial relations and, indeed, Schedule 5(H1) to the 1998 Act provides that '[e]mployment rights and duties and industrial relations' are reserved matters. This means, therefore, that the Scottish Parliament has no power to pass this law permitting employers to require employees to work six days a week, such power lying only with the Westminster legislature. On the basis, therefore, that this law has seemingly already been passed, under section 29(2)(b) of the Scotland Act 1998, which provides that an Act of the Scottish Parliament is not law if it is a reserved matter, the Act is invalid. Furthermore, as the Supreme Court judgment in AXA Insurance v Lord Advocate 1 exemplifies, it is possible for the courts to declare the Act as invalid under section 29.

The second issue presented by this Act of the Scottish Parliament in the problem scenario concerns the compatibility of the law permitting employers to require employees to work six days a week with the ECHR. Whilst the finding that this law relates to a reserved matter and is therefore invalid renders this point moot, it is worth considering nonetheless. Section 29(2)(d) of the Scotland Act 1998 provides that an Act of the Scottish Parliament is not law if it is outside the competence of the Scottish Parliament, an eventuality that can arise where the law is incompatible with the ECHR. Whilst we consider the ECHR and its application in the UK, in Chapters 15 and 16, it is worth identifying at this point the right set out in Article 8 of the ECHR. This provides that '[e]veryone has the right to respect for his private and family life, his home and his correspondence'. With this in mind, it could be argued that by requiring employees to treat Saturday and Sunday as normal working days, they are thereby deprived of valuable time with their families—and perhaps children—contrary to Article 8 of the ECHR. Even if the law were found to be within the realm of matters devolved to Scotland, therefore, incompatibility with the Convention rights could also potentially render it invalid.

In relation to the law passed in Wales, Education in Wales was listed, under the 2006 Act, as being an area in which the Assembly could make primary legislation. It is not listed as a reserved matter under the 2017 Act. Keeping in mind changes recently introduced, is the Welsh Assembly acting within its powers to pass a law increasing the age at which children leave school to eighteen

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years of age? On the basis that the reserved matters in the newly added Schedule 7A to the Government of Wales Act 2006 does not list education as a matter that is reserved for the exclusive competence of the Westminster Parliament, it can be concluded that it is a matter that falls within the competence of the Welsh Assembly. On this basis, this law can be regarded as valid.

Thirdly, with regard to the Act passed by the Northern Ireland Assembly, Schedule 2 to the Northern Ireland Act 1998 lists immigration as an excepted matter, meaning that it remains within the exclusive competence of the UK Parliament and government. Similar to section 29 of the Scotland Act 1998, section 6(2)(b) of the Northern Ireland Act makes clear that laws passed by the Northern Ireland Assembly dealing with an excepted matter are outside the legislative competence of the Assembly. This being the case, the law seeking to permit EU nationals entry to Northern Ireland, provided they have a job lined up, is outside the competence of the Belfast legislature and, therefore, invalid. Furthermore, and on the basis of the authority provided by the case of AXA Insurance v Lord Advocate, this law could be reviewed by the courts in line with the excepted powers set out in the 1998 Act and, on that basis, held to be beyond the legislative powers of the Assembly.

The final aspect of this scenario concerns the UK Parliament seeking to pass a law changing the length of degree programmes across the UK. The various legislative provisions, determining the powers of the devolved legislatures in Scotland, Wales, and Northern Ireland, make clear that education is a matter that is devolved, since it is not listed as an area reserved or excepted for the exclusive competence of Westminster. On this understanding, the law passed by the UK Parliament, changing the length of degree programmes across the whole of the UK, impacts upon a devolved matter.

Unlike devolved legislation that affects a reserved matter, Acts of the UK Parliament cannot be subjected to scrutiny by the courts since Parliament is sovereign and, as Dicey made clear, no court can question the validity of any parliamentary enactment.2 The actions of the UK Parliament, however, do engage the Sewel Convention. As Chapter 9 explains, this makes clear—as a matter of convention—that the UK Parliament will not normally legislate on devolved matters, without the consent of the relevant devolved institution(s). This makes sure that the authority of the legislatures in Edinburgh, Cardiff, and Belfast is protected, but as a merely political convention, it also determines that the sovereignty of Parliament is legally unaffected by the arrangements.

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The consequence of all this, however, is that there are no legal ramifications in the event of Parliament passing a law such as that described in the problem scenario, despite its focus on devolved matters. Any consequences would be purely political, for example, potentially adding momentum to calls for independence from the United Kingdom or reducing support for the government in power.

Problem scenario 2: Local government

Parliament enacts the Local Housing Act 2022. This gives effect to key parts of the government's plans for solving a housing shortage by requiring local councils to subsidize private tenancies, thereby making it more affordable for poorer families and individuals to rent somewhere to live. Central government awards grants to councils, as it sees fit, for the specific purpose of subsidizing the tenancies. In the (fictional) town of Strochester, however, the council has recently been newly elected and one of the main parts of the winning party's manifesto was a pledge to ensure the building of 500 new homes in the town. Strochester Borough Council, in view of its election promises, decides to use the money granted by central government to embark on a five-year programme of home-building. The Secretary of State, learning of Strochester's refusal to use the money for the specific purpose for which it was intended, decides to cancel their grant with immediate effect.

Imagine that you have been presented with this scenario and asked to discuss the local governmental issues arising. The first thing to consider is the actions of the council in using the money from central government to fund the building of new homes, rather than the subsidisation of private tenancies, as stipulated in the 2022 Act. This is *ultra vires*. This scenario is reminiscent of the case of *Attorney-General v Fulham Corporation*.[1] It is recalled that, here, the local council used a power intended for the establishment of wash-houses, to create a launderette wherein council employees would wash customers' clothes. The court found that this was *ultra vires* the statutory power. Similarly, therefore, since Strochester Council are seeking to use a grant of money, intended

[1] [1921] 1 Ch 440. Also see fuller discussion of this case in 11.2.

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for the subsidisation of private tenancies, to build new homes, they can similarly be deemed to be acting *ultra vires*.

The second aspect of the problem scenario for discussion is the fact that Strochester Council was elected on the basis of a promise to build 500 new homes. As the decision in *Bromley London Borough Council v Greater London Council*[2] makes clear, though, local councils are not legally bound by promises made in an election manifesto. Indeed, it would arguably be unreasonable to impose such expectations. What is more, 9.5.2 makes clear that councils can only do—and must only do—that which central government and Parliament instructs. Strochester Council, therefore, is not required to honour its election pledge to build 500 homes and, indeed, in light of the discussion already had about the actions of the council being potentially *ultra vires*, their legal responsibilities under the 2022 Act must take priority over their political promises. This might, of course, have political ramifications, such as a petition or a different result in a subsequent election, however, election promises do not affect the legal responsibilities of councils.

Finally, the Secretary of State is arguably justified in cancelling the grant. As the problem scenario makes clear, central government awards grants to councils 'as it sees fit'. It is, therefore, entirely within the discretion of the Secretary of State to decide whether or not to make such an award. In light of Strochester Council's misuse of the funds, it could be argued that the Secretary of State is more than justified in cancelling the money.

[2] [1983] 1 AC 768.

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