Case No. UKSC 2018/0080

IN THE SUPREME COURT OF THE UNITED KINGDOM

BETWEEN

HER MAJESTY'S ATTORNEY GENERAL

-and-

HER MAJESTY'S ADVOCATE GENERAL FOR SCOTLAND

Applicants

-and-

THE LORD ADVOCATE

Respondent

-and-

(1) THE COUNSEL GENERAL TO THE WELSH GOVERNMENT

(2) THE ATTORNEY GENERAL FOR NORTHERN IRELAND

Interested Parties

Case for the Attorney General for Northern Ireland

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1. This case is filed in order to assist the Court in determining the reference made[1] by HM Attorney General and HM Advocate General for Scotland of the (entire) UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill which was passed by the Scottish Parliament on March 21 2018, 'the 2018 Bill'.

2. The Attorney General for Northern Ireland recognises the strength of the policy argument in favour of making comprehensive provision in an Act of Parliament for the future of EU law throughout the United Kingdom but submits that the 2018 Bill is within the legislative competence of the Scottish Parliament.

3. In this case, before addressing the four broad grounds on which the 2018 Bill is challenged, some general observations are offered about three basic principles that should inform the approach of the Court to this reference.

Three basic principles:

1. Parliament can enact what it pleases

4. Parliament can make any laws it wishes to make in order to give it (greater, even irresistible) advantage in any contention with the Scottish Parliament, the National Assembly for Wales and the Northern Ireland Assembly. Parliament holds all the cards but it may not wish or choose to play them. It would be open to Parliament to enact, and give retrospective effect to, an amendment to the Scotland Act 1998 inserting a new head into Part II of Schedule 5 to the Scotland Act, "the subject matter of the European Union (Withdrawal) Act 2018", but Parliament has not done so, and both the 2018 Bill and the Scotland Act 1998 must be interpreted in this reference as each

[1] The case of June 8 filed in support of the reference will be referred to in this case as the Advocate General's case.

of them stood when the 2018 Bill passed[2], and not with the content that the Government might have wished each of them then had.

5. The insertion by paragraph 21 of Part 3 of Schedule 3 to the European Union (Withdrawal) Bill of 'The European Union (Withdrawal) Act 2018' into Schedule 4 to the Scotland Act 1998 would not operate to retrospectively place the 2018 Bill beyond the competence of the Scottish Parliament. It would do no more than prevent that Parliament from modifying that Act in the future. The Scottish Parliament is *functus officio* as respects the 2018 Bill[3].

2. The Scotland Act should be interpreted purposively – but not 'generously'.

6. The Scotland Act 1998 is a constitution for Scotland; it forms a permanent part of the constitutional arrangements of the United Kingdom: see section 63A(1) of the Scotland Act 1998. While "the description of the Act as a constitutional statute cannot be taken, in itself, to be a guide to its interpretation" (Lord Hope in *Imperial Tobacco Ltd v Lord Advocate* [2012] UKSC 61 at [15]), the constitutional purpose of the Act "provides the context for any discussion about legislative competence." (ibid.) If the description of the Act as constitutional matters little for interpretation, its constitutional purpose matters a great deal. "We must never forget that it is a constitution we are expounding." (Marshall CJ in *McCulloch v Maryland* 17 US 316 at 407 (1819)).

7. In interpreting the Scotland Act 1998 the task is one of exegesis; the Act is a guide to its own purpose, and meaning is to be extracted from the text. Political views will, doubtless, differ about the relative merits of the 2018 Bill and the European Union (Withdrawal) Act 2018. An eisegesis of the Scotland

[2] It is accepted that a provision in the European Union (Withdrawal) Act 2018 might well have contained or been accompanied by a deeming provision which had the effect that any relevant change to the Scotland Act 1998 is to be regarded as always having formed part of that Act or, at least, having formed part of that Act at a time prior to the passing of the 2018 Bill. The Act does not contain such a provision.

[3] Save in the circumstances provided for in section 36(4) of the Scotland Act 1998.

Act 1998 that would read it (and the 2018 Bill) through the current estimations of the United Kingdom Government about convenience and workability should be resisted.

8. Although in *Robinson v Secretary of State* [2002] NI 390 at [11] Lord Bingham suggested that the Northern Ireland Act 1998 should "be interpreted generously and purposively", in the devolution litigation that has since been determined, 'generosity' has not been widely invoked as a canon of interpretation[4] but purpose has. This is unsurprising. Purpose can be discerned exegetically from the text but 'generosity' (and to whom?) is inserted from without and, inevitably, reflects an external judgement about result.

3. The 2018 Bill is entitled to the presumption of validity

9. Acts of the Scottish Parliament, it is argued[5], do not enjoy a formal presumption of validity. Such a presumption would be equivalent to the presumption of constitutionality enjoyed by post-1937 Acts of the Oireachtas under Irish constitutional law. Yet it is difficult to see how the rationale for that presumption ("that respect which one great organ of State owes to another": Byrne J in *Buckley and others v Attorney General* [1950] IR 67 at 80; see also *ZS v DPP* [2011] IESC 49 at paragraphs [20]-[21]) does not apply to the Scottish Parliament which is, by section 63A(1) of the Scotland Act 1998, "a permanent part of the United Kingdom's constitutional arrangements" and a Parliament to which Parliament (and the United Kingdom Government) have, by section 63A(2) of the Scotland Act 1998, signified their commitment.

10. Paragraph 15 of Lord Hope's judgment in *Imperial Tobacco Ltd v Lord Advocate* [2012] UKSC 61 is to be read as rejecting any suggestion that section 29 of

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[4] Lord Kerr (dissenting) in *In the matter of an application by the Northern Ireland Human Rights Commission for judicial review* [2018] UKSC 27 at [211] invokes Lord Bingham's dictum but Lord Reid omits 'generously and purposively' when citing, with approval, a passage from paragraph [11] of *Robinson* in *Axa General Insurance Ltd v HM Advocate* [2012] 1 AC 868 at [153].

[5] Paragraph [23] of the Advocate General's case.

the Scotland Act 1998 itself creates a presumption of validity for Acts of the Scottish Parliament. Similarly, paragraph 7 of that judgment is to be read as rejecting a presumption of validity arising from no objection to competence being made. That judgment is not to be read as rejecting any broader analogy to the settled rationale of Irish constitutional law for the presumption of constitutionality. Importantly, *Imperial Tobacco Ltd* antedated the changes introduced to the Scotland Act 1998 (including section 63A) by the Scotland Act 2016. The effect of those changes is, plainly, to enhance the respect owed to the Parliament of Scotland by the other great organs of state in the United Kingdom and strengthen a rationale for the presumption of validity.

11. In what has been described as "an important corollary" of the presumption of constitutionality in Irish constitutional law, "where the legislative provision under examination is reasonably open to two or more interpretations, one of which is constitutional and the other or others of which are not, the court must adopt the former interpretation." (*ZS v DPP* [2011] IESC 49 at [22]). Section 101 of the Scotland Act 1998, serving a similar function to this 'important corollary', tends itself to demonstrate or support the existence of a presumption of validity for Acts of the Scottish Parliament.

Is the 2018 Bill as a whole beyond the legislative competence of the Scottish Parliament because it falls outside paragraph 7(2) of Part I of Schedule 5 to the Scotland Act 1998?

12. A candid reading of the 2018 Bill does not permit the conclusion that the Bill as a whole relates to international relations other than as respects the implementation of EU law. When the 2018 Bill passed there were (and still are) "obligations under EU law" (paragraph 7(2) of Part 1 of Schedule 5 to the Scotland Act 1998) which the devolved authorities in Scotland are bound to observe and implement. That the 2018 Bill may be said by the United Kingdom to make its negotiations with the EU more difficult does not cause the subject matter of the Bill to relate to international relations any more than does an aspect of Scottish planning policy displeasing to a foreign potentate

with whom the United Kingdom government wishes to have more cordial relations.

13. As a political judgement, it may well be true to say, as the Advocate General's case does, "Legislating for the effects of withdrawal from the EU is clearly a matter in which the UK, as a whole, has an interest *par excellence*."[6] What matters for this reference, however, is not whether the Scottish Government or the United Kingdom Government has made the wiser policy judgment, or prepared the better legislative text, what matters is whether the Scottish Parliament *could* lawfully pass the 2018 Bill, be it wise or unwise to have done so.

14. Similarly, it may well be a valid political criticism to say, as the Advocate General does, "In the Scottish Bill the Scottish Parliament makes extensive provision for the place of what is currently EU law in Scots law, but without knowing what obligations the negotiations may give rise to."[7] But it does not matter if, on this subject, the Scottish Parliament is not blessed with the gift of prophecy; what matters is whether the Bill is, when it is passed, within the competence of the Scottish Parliament[8]. The sentence quoted above is followed immediately by a *non sequitur*: "The Scottish Bill therefore departs from implementing and observing international obligations."[9] On this three brief observations may be made. Firstly, it is acknowledged in the immediately preceding sentence that the 2018 Bill makes 'extensive provision' for existing EU law. That cannot be a departure from implementing and observing obligations arising under EU law. Secondly, power is conferred on Scottish Ministers by section 12 of the Bill, constrained by, and coterminous with, the limits on the competence of the Scottish Parliament (section 12(2)) to *permit* compliance with certain international obligations. Thirdly, the competence of the Bill is to be assessed when it was passed. Current competence to pass the

[6] At paragraph [37]
[7] At paragraph [41]
[8] As the Advocate General acknowledges at paragraph [7] of his case.
[9] Paragraph [41]

Bill is not prospectively lost at the prospect or chance that the 2018 Bill will not adequately embrace some future and unspecified obligation.

15. Complaint is made that "if the UK Bill does not react specifically to deal with the now competing legislation from the Scottish Parliament, the result will be two legislative regimes, to different effects, creating confusion and ambiguity; and the potential for long and complex dispute as to the interface between them. That can only impair and not improve the government of the UK as a whole."[10] The Court is invited to note, firstly, the conditional nature of the concerns expressed; Parliament is, of course, free to deal with this subject matter, and the 2018 Bill, in any way that it pleases. Secondly, however much the Government of the United Kingdom may deplore it, the 2018 Bill has been passed, and passed in advance of the United Kingdom Act (The European Union (Withdrawal) Act 2018). While the competence of the 2018 Bill is to be assessed when passed[11] it will be for Parliament to decide how to respond to it. Strikingly, Parliament has not engaged 'head on' with the 2018 Bill.

16. A contrast with devolution under the Government of Ireland Act 1920 may be instructive. Section 6(2) of the Government of Ireland Act 1920 with the marginal heading 'Conflict of laws' provided that where an Act of the Parliament of Northern Ireland dealt with a matter within the competence of that Parliament, and that matter was also dealt with by an Act of the Parliament of the United Kingdom passed after the appointed day (May 3 1921) extending to Northern Ireland, then the Act of the Northern Ireland Parliament should be read subject to the Act of the United Kingdom Parliament, and the former void so far as repugnant to the latter.

17. Quekett notes (*The Constitution of Northern Ireland* Volume II (1933) pp. 14-5) that "Various Acts passed by the Parliament of the United Kingdom since the appointed day, and applicable wholly or partly to Northern Ireland, contain a

[10] Paragraph 46 (3)
[11] Although, as noted above, an Act of Parliament can retrospectively create conditions to deprive a devolved legislature of the competence to enact a measure.

provision to the effect that such Act, or some enactment thereof, shall for the purposes of s. 6 of the Government of Ireland Act 1920, be deemed to have been passed before the appointed day" and gives examples of such Acts.

18. Neither the Scotland Act 1998 nor the Northern Ireland Act 1998 contains an equivalent to section 6(2) of the Government of Ireland Act 1920. It might be thought that such a provision could be constitutionally desirable but such a provision has not been included in the Scotland Act 1998 and that Act should be interpreted as it stands and not as it might, by some at least, be wished to be. Conflicting or diverging legislative approaches between the devolved legislatures and Parliament, however undesirable these may be thought to be, are legal possibilities under the current models of devolution to an extent once inconceivable under the model of devolution created by the Government of Ireland Act 1920.

Is section 17 of the 2018 Bill beyond the legislative competence of the Scottish Parliament?

19. In the Advocate General's case it is suggested that section 17 of the 2018 Bill ('requirement for Scottish Ministers' consent to certain subordinate legislation') is beyond the competence of the Scottish Parliament on two grounds. Firstly, it is said that section 17 modifies section 28(7) and section 63(1) of the Scotland Act contrary to section 29(2)(c) of, and paragraph 4(1) of Schedule 4 to, the Scotland Act 1998[12]. Secondly, it is suggested that section 17 of the 2018 Bill relates to the reserved matter of the Parliament of the United Kingdom contrary to section 29(2)(b) of, and paragraph 1(c) of Part I of Schedule 5 to, the Scotland Act 1998 Act[13]. These arguments are considered in turn below, prefaced by observations about what is embraced by the prohibition on 'modification'.

[12] See paragraphs [50] to [56]
[13] See paragraphs [57] to [60]

What does 'modify' in paragraph 1(1) of Schedule 4 to the Scotland Act 1998 mean?

20. In determining the meaning of 'modify' in paragraph 1(1) of Schedule 4 to the Scotland Act 1998, the natural starting point is section 126(1) of that Act which says simply, "'modify' includes amend or repeal." It is suggested that the use of the drafter's classic verb of extension 'includes' is necessary only for 'repeal'[14] and that 'amend' is synonymous with 'modify'.

21. Importantly, there is nothing in section 126(1) to suggest that the idea of change/amendment/modification extends any further than the idea of repeal/removal/extinguishment. Importantly too, Lord Hope in *Imperial Tobacco Ltd v Lord Advocate* [2013] UKSC 61 at [44] and [45] rejected an argument that the creation of new criminal offences, in addition to those already in existence, amounted to modification. Lord Hope did not *define* 'modify' in paragraph [44] as including 'otherwise affect'; Lord Hope was simply pointing out that the impugned provisions did not amend or otherwise affect the 1992 and 2002 Regulations.

22. The separate existence of Schedules 4 and 5 to the Scotland Act 1998 means that "relates to" is not synonymous with "modify".

23. There ought to be no obscurity about the meaning of 'modify': if Statute A, notwithstanding the coming into existence of Statute B, continues "in force as before" (to apply the language used by Lord Reed in the Inner House) (*Imperial Tobacco Ltd v Lord Advocate* [2012] CSIH 9 at [152]) then Statute B cannot be said to modify Statute A, even if, depending on specific content, it may be said to relate to it.

[14] If only to prevent an argument that to repeal or remove a provision is not to change/modify it.

I. Does section 17 of the 2018 Bill modify section 28(7) of the Scotland Act?

24. Section 17 of the 2018 Bill deals with subordinate legislation. As respects section 28(7) of the Scotland Act 1998, the Advocate General's case ignores the distinction between an Act of Parliament and subordinate legislation made under a power given by an Act of Parliament. Section 17 of the 2018 Bill, even on the reading most extravagantly indulgent to the United Kingdom Government, simply does nothing about or to, far less modify, any Act of Parliament. The heading of the section is a faithful indication of the section's content.

25. Not only does the Advocate General's case ignore the distinction between an Act of Parliament and subordinate legislation, it also ignores the distinction between Parliament's power to enact (recognised by section 28(7) of the Scotland Act), and the exercise of that power. Section 17 of the 2018 Bill does not touch, far less modify, Parliament's power to enact; it does cut across what Ministers of the Crown or other persons (other than Scottish Ministers) may do pursuant to a power that Parliament may give them. If Parliament confers a power to make subordinate legislation without more, then, provided it otherwise acts within competence, there is nothing in section 28(7) that prevents the Scottish Parliament from depriving that subordinate legislation of effect within Scotland. The position would be different if Parliament specifically protected the power to make subordinate legislation against such legislation by the Scottish Parliament. If Parliament were to have enacted a power to make subordinate legislation, and to have protected that power against any Act of the Scottish Parliament, then an Act of the Scottish Parliament that subsequently defied that protection might be regarded as an attempt to modify section 28(7).

26. Contrary to what is suggested in paragraph [52] of the Advocate General's case, the rule of law set out in section 28(7) of the Scotland Act 1998, precisely because it is so set out or 'comprised in' that provision, cannot (also) fall

within paragraph 2(2)(a) of Schedule 4 to the Scotland Act 1998 as the terms of paragraph 2(2)(a) preclude a rule of law comprised in the Scotland Act 1998.

II. Does section 17 of the 2018 Bill modify section 63(1) of the Scotland Act?

27. Section 63(1) confers a power on Her Majesty in Council. That power, to transfer functions from a Minister of the Crown to Scottish Ministers[15], is unaffected by section 17 of the 2018 Bill. An exercise of that power can occur whether or not section 17 of the 2018 Bill is in place. The existence of section 17 of the 2018 Bill does not prevent, or hamper in any way, the exercise of the power under section 63(1) of the Scotland Act 1998.

28. An apparent premise of the Advocate General's case is that section 63 is a limitation on the transfer of functions from A to B. It is not. Rather, section 63 creates a power which would not otherwise exist. Two further points are made below about section 17 of the 2018 Bill.

29. Firstly, insofar as section 17 of the 2018 Bill deals with subordinate legislation made by persons other than Ministers of the Crown, it relates to a different subject matter than section 63 which is confined to the potential movement of a function only from a Minister of the Crown.

30. Secondly, section 17 of the 2018 Bill is not about the transfer of functions from Ministers of the Crown to Scottish Ministers by way of Order in Council; it is, instead, about the quite different activity of imposing a limitation (the requirement of prior Scottish Ministerial consent) on the making of subordinate legislation.

[15] This is a shortened description for the three modes of transfer in section 63(1)(a) to (c) of the Scotland Act 1998.

III. Does section 17 of the 2018 Bill relate to the Parliament of the United Kingdom?

31. It is easier to interpret the reservation in paragraph 1(c) of Schedule 5 to the Scotland Act 1998 by recalling that it is reserved as one of five aspects of the Constitution. The existence and powers of Parliament are, unsurprisingly, entirely unaffected by section 17 of the 2018 Bill. The reservation in paragraph 1(c) does not protect the policy supported from time to time by a majority in either House of Parliament from active opposition by a majority from time to time of Members of the Scottish Parliament. When the Scottish Parliament expresses opposition, in the form of an Act of the Scottish Parliament otherwise within competence, to the political stance taken by the Government of the United Kingdom, that Act cannot be assailed as relating to Parliament.

32. So, even if it is correct, as a matter of political observation, to say, as the Advocate General does in his case, "that the Scottish Government's policy objective behind s.17 is to achieve what it has thus far failed to achieve in the UK parliamentary process"[16], the forensic deployment of 'parliamentary process' does not bring a legitimate political divergence between Westminster and Edinburgh into the forbidden subject matter of paragraph 1(c) of Schedule 5 to the Scotland Act 1998.

33. It is also said that the purpose of section 17 of the 2018 Bill is to "make the exercise by a Minister of the Crown of a power conferred by Parliament, in legislation enacted after the Scottish Bill, subject to a veto by the Scottish Ministers, which Parliament itself has omitted or refused to grant".[17] There are two reasons why this, even if accurate, cannot support an argument for the invalidity of the 2018 Bill on the ground that it relates to Parliament.

[16] Paragraph [59]
[17] Paragraph [60]

34. Firstly, as the Advocate General elsewhere acknowledges[18], the competence of a Bill is to be assessed when that Bill passes. When the 2018 Bill passed, the Act of Parliament referred to had not been enacted, and, at best, its content may be predicted but not known. Secondly, the distinction between Parliament and an Act of Parliament has been ignored. The reservation in paragraph 1(c) of Schedule 5 to the Scotland Act 1998 does not embrace Acts of Parliament. Were it otherwise, the Scottish Parliament would enjoy no fixed legislative competence. Consider an Act of Parliament which creates a tribunal to which an appeal lies from decisions of Scottish Ministers. Provided it is otherwise competent to do so, the Scottish Parliament does not pass an enactment relating to Parliament if it removes this right of appeal against the decisions of Scottish Ministers, notwithstanding that the Scottish Act goes against the previously expressed will of Parliament.

Are section 33 of, and Schedule 1 to, the 2018 Bill beyond the legislative competence of the Scottish Parliament because they modify provisions of the Scotland Act 1998 contrary to section 29(2)(c) of, and paragraph 4(1) of Schedule 4 to, the Scotland Act 1998?

35. Plainly, section 33 of, and Schedule 1 to, the 2018 Bill modify (by repealing) the provisions of the Scotland Act 1998 that they refer to. Section 33 of and Schedule 1 to the 2018 Bill would, therefore, offend against the prohibition in section 29(2)(c) of the Scotland Act 1998 unless they can benefit from some other permission in that Act.

36. Paragraph 7(1)(b) of Schedule 4 to the Scotland Act 1998 provides that Part I of that Schedule (thus, including paragraph 4) does not prevent an Act of the Scottish Parliament repealing any spent enactment.

37. While the references to EU law and the European Communities Act 1972 in the Scotland Act 1998 and addressed by section 33 of and Schedule 1 to the

[18] Paragraph [7] and see also paragraph [78] "competence is not to be assessed by reference to hypotheses..."

2018 Bill are not currently spent, section 33 and Schedule 1 do not come into force (unlike the provisions set out in section 36(1) of the 2018 Bill) on the day after Royal Assent; rather, and in common with the provisions of the 2018 Bill, other than those set out in section 36(1), these provisions will only come into force (cf. section 36(2) of the 2018 Bill) on such day as the Scottish Ministers may by regulations direct. Section 33 of and Schedule 1 to the 2018 Bill could not be validly brought into force before the repeal of the European Communities Act 1972, but they could be brought into force after the repeal of that Act.

38. Here section 101 of the Scotland Act is relevant. Section 33 (and Schedule 1) taken together with section 33 of the 2018 Bill can (and should by section 101(2) of the Scotland Act 1998) be read as not permitting section 33 and Schedule 1 to come into force until the enactments to which these provisions relate are spent.

39. In *Christian Institute v Lord Advocate* [2016] UKSC 51 the lack of competence found by this Court was caused by "the information sharing provisions of Pt 4 of the 2014 Act and the RDSG as currently drafted [not meeting] the Art. 8 criterion of being 'in accordance with law'" (paragraph [85]). This lack of competence, on an ECHR ground, did not depend on any specific timing. Part 4 of the 2014 Act at issue in those proceedings would never be in accordance with law, and victim status would exist in respect of an anticipated breach of Article 8 ECHR accordingly. Here, the purely domestic question of competence, as respects section 33 of and Schedule 1 to the 2018 Bill, does turn on effect. A provision which is not in force cannot modify anything. A provision which will be within competence if brought into force after a future date, is not to be regarded as incompetently made unless it will be brought into force before that date.

If provisions of the 2018 Bill are contrary to EU law, are those provisions of the Bill beyond the legislative competence of the Scottish Parliament by reason of section 29(2)(c) and section 29 (2)(d) of the Scotland Act 1998?

I. Do the provisions of the 2018 Bill referred to in paragraph [84] of the Advocate General's case modify section 2(1) of the European Communities Act 1972?

40. Section 29(2)(c) of the Scotland Act 1998 and paragraph 1(2)(c) of Schedule 4 to that Act prevent modifications, whether by Act of the Scottish Parliament or subordinate legislation made under such an Act, to named provisions of the European Communities Act 1972.

41. It will be noted (cf. paragraph 84(1) of the Advocate General's case) that sections 3 to 5 and 13 of the 2018 Bill are not in force until regulations are made by Scottish Ministers for that purpose (section 36(2) of the 2018 Bill). For the reasons set out at paragraphs [37]-[38] above, these provisions are to be interpreted, pursuant to section 101(2) of the Scotland Act 1998, as not to be brought into force until this can be done competently. Further, section 3, section 4, section 5 and section 13 of the 2018 Bill depend for their operation on the arrival of 'exit day', as defined by section 28 of the 2018 Bill.

42. Section 6, section 7, section 8, and section 10 of the 2018 Bill (cf. paragraph 84(2) of the Advocate General's case) similarly depend for their operation on the arrival of exit day. These provisions also only come into force by regulations made under section 36(2) of the 2018 Bill. This is true also of sections 9, 9A and 9B of the 2018 Bill.

43. Section 11 of the 2018 Bill (cf. paragraph 84(3) of the Advocate General's case), while it comes into force on the day after Royal Assent (cf. section 36(1) of the 2018 Bill) does not become operational, that is, no regulations may be made under section 11, until "after the end of the period of 2 years beginning with exit day" (section 11(10) of the 2018 Bill).

44. Section 13A, section 13B, section 14, section 14A, section 15, section 16, section 18, section 19, section 21, section 22, and section 36A are all (cf. paragraph 84(4) of the Advocate General's case) castigated as "at least in part, parasitic on ss. 11 and 13". Of these provisions sections 14 to 22 come into force on the day after Royal Assent (section 36(1) of the 2018 Bill), section 13A, section 13B and section 36A come into force only when regulations are made to that effect under section 36(2) of the 2018 Bill. Even if it were to be assumed that sections 11 and 13 were beyond the competence of the Scottish Parliament, that lack of competence might render the provisions referred to in paragraph 84(4) of the Advocate General's case rather devoid of purpose but not, for that or any other reason, themselves beyond competence.

45. Similarly, section 23, section 24, section 25, section 26, section 34 of, and Schedule 2 to, the 2018 Bill (cf. paragraph 84(5) of the Advocate General's case) are castigated as being "at least in part, parasitic on ss. 3 to 5."

46. None of the provisions set out in paragraph 84 of the Advocate General's case modify section 2(1) of the European Communities Act 1972. They do not do so now, and they did not do so when the 2018 Bill was passed. The purpose of section 2(1) of the European Communities Act is to incorporate EU law into the domestic legal order of the United Kingdom. The treaties which give life to the EU law that is thus incorporated, will, by operation of Article 50 TEU, cease to have effect in the United Kingdom. The provisions set out in paragraph 84 of the Advocate General's case will either not deal with what section 2(1) of the 1972 Act deals with at all, or they should be interpreted (cf. section 101(2) of the Scotland Act 1998) as only being able to deal with it whenever, and to the extent that, they can, for example, when section 2(1) of the European Communities Act 1972 can be regarded as spent for the purposes of paragraph 7(1)(b) of Schedule 4 to the Scotland Act 1998.

II. Are the provisions of the 2018 Bill referred to in paragraph [84] of the Advocate General's case incompatible with EU law?

47. Structurally, the 2018 Bill is designed, and effectively designed, to avoid incompatibility with EU law. This is so for two reasons. Firstly, the provisions of the 2018 Bill castigated in paragraph 84 of the Advocate General's case will never relate to EU law as this is defined in section 126(9) of the Scotland Act 1998[19]. At a future date these provisions will deal with what was, but will then not be, EU law as defined in the 1998 Act.

48. Thus, section 11 of the Bill (about which complaint is made in paragraph 84(3) of the Advocate General's case) only deals with "retained (devolved) EU law" which is a quite different *corpus juris* from the EU law referred to in section 126(9) of the Scotland Act 1998, and regulations under section 11 may be made only after the end of a period of two days beginning with exit day (section 11(10)).

49. Secondly, even if it were to be supposed that, in some way, the provisions of the 2018 Bill referred to in paragraph 84 of the Advocate General's case would be incompatible with EU law, then the combination of section 1(2) and (3) of the 2018 Bill would operate to keep those provisions from becoming effective and to keep them within the legislative competence of the Scottish Parliament accordingly.

III. Are the provisions of the 2018 Bill referred to in paragraph [84] of the Advocate General's case contrary to the rule of law?

A. These provisions are not contrary to the rule of law

50. Three main submissions are set out here in response to the argument contained in paragraphs 97 to 111 of the Advocate General's case. Firstly, the

[19] "(a) all those rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the EU Treaties and (b) all those remedies and procedures from time to time provided for by or under the EU Treaties,"

provisions set out in paragraph [84] of the Advocate General's case are not contrary to the rule of law. Secondly, even if these provisions were to be regarded as flawed as giving rise to uncertainty, such uncertainty does not fall into the residual category for review identified in *Axa General Insurance Ltd v HM Advocate* [2011] UKSC 46 at [51] and [153]. Thirdly, the grounds on which competence may be challenged on a reference under section 33(1) of the Scotland Act 1998 are confined to the limits on competence set out in section 29(2) of that Act.

51. A claim that this or that provision of a Bill offends the rule of law may be, without particularisation, itself offensive of that clarity and foreseeability at which the law aims. A bare claim that x offends the rule of law (and the implication that the person making the claim upholds it) may be, despite its obvious rhetorical force, of no more analytical value than one theologian's denunciation of another's heterodoxy.[20]

52. The rule of law does not protect policy preferences. It may be regarded by some as undesirable to legislate now (within competence) with provisions to take effect (only) when competence will be different (cf. the complaint in paragraph [98] of the Advocate General's case) but it is not contrary to the principle of legality to do so. What matters *now*, for the principle of legality, is whether the provision that is made was within competence when it was made. When such provisions, or powers, are brought into effect, or exercised, at a future date the legality of those separate steps can be assessed *then*. The competence assessment provisions in the Scotland Act 1998 are not (cf. paragraph 107 of the Advocate General's case) 'frustrated' by any provisions of the 2018 Bill: competence can be assessed now, and when powers are exercised in the future, the legality of their exercise can be assessed in the light of the legal conditions that then exist.

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[20] What a 19th century Ulster Presbyterian described as "the Bishop's witticism ... – 'Orthodoxy is *my* doxy, and Heterodoxy is your doxy'." Henry Montgomery *Outlines of the History of Presbyterianism in Ireland* in *The Irish Unitarian Magazine and Bible Christian for the year 1847* (Volume 2) (Belfast, nd (1847)) pp. 358-9

53. If the definition of "exit day" in section 28 of the 2018 Bill were textually exceptionally vague, that would be regarded as unsatisfactory, but the criticism in paragraph [99] of the Advocate General's case is not directed at the definition of "exit day" but on its "uncertain application". In section 28 of the 2018 Bill, provision is made for what is to happen when or if a future event occurs, by identifying clearly the nature of the future event. Powers that can only be validly exercised after exit day will not be validly exercised before that date. The clear definition of exit day contained in section 28 of the 2018 Bill will permit a straightforward analysis of whether a power conferred by that Bill, exercisable only after exit day, can be lawfully exercised by reference back to that clear definition.

B. These provisions do not fall within the residual category for review of Acts of the Scottish Parliament identified in Axa General Insurance Ltd v HM Advocate

54. In rejecting "irrationality, unreasonableness or arbitrariness" as grounds for review of Acts of the Scottish Parliament in *Axa General Insurance Ltd v HM Advocate* [2011] UKSC 46 at [52], Lord Hope insisted (at [51]) that the "rule of law requires that the judges must retain the power to insist that legislation of that extreme kind is not law which the courts will recognise." Two examples were given by Lord Hope of 'legislation of that extreme kind': the abolition of judicial review, and the diminution of the role of the courts in protecting the interests of the individual.

55. Lord Reed explicitly rejected the contention (at [147]) that grounds of review developed with respect to administrative bodies were applicable to a devolved legislature with plenary powers exercisable within prescribed limits on legislative competence. Lord Reed also considered (at [153]) that "Parliament cannot be taken to have intended to establish a body which was free to abrogate fundamental rights or to violate the rule of law."

56. Taken at their height, the complaints in the Advocate General's case amount to no more than criticism of the (in)accessibility or (un)clearness of provisions

in the 2018 Bill. In essence, these are a critique of the quality of those provisions. Even if there were acknowledged to be force in that critique, that would not come close to the kind of violation of the rule of law contemplated by Lord Hope and Lord Reed in *Axa*. But against even that critique would come the riposte that the asserted unclearness was textually necessary to achieve the scrupulous respect for legislative competence (particularly as respects EU law) that characterises the 2018 Bill.

C. A reference under section 33(1) of the Scotland Act 1998 is confined to the limitations on competence set out in section 29(2) of that Act.

57. *Axa Insurance Ltd v HM Advocate* [2011] UKSC 46 began as a petition for judicial review. As the Advocate General notes[21] this is the first reference under section 33(1) of the Scotland Act 1998. Section 33 (and the analogous provisions for Northern Ireland and Wales[22]) establish a specific statutory procedure. Both section 33 and section 29 of the Scotland Act 1998 employ the specific expression 'legislative competence' and to this expression a particular meaning is assigned by section 29(2) of that Act.

58. It is suggested that the residual category of review identified by this Court in *Axa* is designed or prescribed for a polity that is constitutionally *in extremis*. Removing that category from the scope of section 33, where it has no appearance of textually belonging, does nothing to remove it from the armoury of those, including law officers, who can otherwise invoke it in an application for judicial review.

59. The significant political blockage that is automatically placed before a Bill by virtue of section 32(2)(b) whenever a reference is made[23] is a factor that points to the need for a construction of section 33(1) that does not over-broadly place this power in the way of those entitled to use it.

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[21] Footnote 1 to paragraph [1] of his case
[22] S.11 of the Northern Ireland Act 1998 and s.112 Government of Wales Act 2006
[23] In *Local Government Byelaws (Wales) Bill 2012* [2012] UKSC 53 at [77] Lord Hope says "Any delay in the submitting of a Bill that has been passed for Royal Assent is, of course, to be regretted."

Conclusion: a suggested disposition

60. It is submitted that the 2018 Bill and all of its provisions are within the legislative competence of the Scottish Parliament and this reference should be disposed of accordingly.

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