Scotland and the UK Constitution

The 1998 devolution acts brought about the most significant change in the constitution of the United Kingdom since at least the passage of the 1972 European Communities Act. Under those statutes devolved legislatures and administrations were created in Wales, Northern Ireland, and Scotland. The documents below have been selected to give an overview of the constitutional settlement established by the devolution acts and by the Courts. Scotland has been chosen as a case study for this examination, both because the Scottish Parliament has been granted the most extensive range of powers and legislative competences of the three devolved areas, but also because the ongoing debate on Scottish independence means that the powers and competencies of the Scottish Parliament are very much live questions.

The devolution of certain legislative and political powers to Scotland was effected by the Scotland Act 1998. That statute, enacted by the Westminster Parliament, creates the Scottish Parliament and the Scottish Executive (now the "Scottish Government"), and establishes the limits on the Parliament's legislative competence. Schedule 5 of the Act, interpolated by Section 30(1), lists those powers which are reserved to the Westminster Parliament, and delegates all other matters to the devolved organs. Thus, while constitutional matters, foreign affairs, and national defence are explicitly reserved to Westminster, all matters not listed—including the education system, the health service, the legal system, environmental policy and other areas—are placed under the purview of the Scottish Parliament.

Significantly, and unlike the Westminster Parliament, the Scottish Parliament does not have *Kompetenz-Kompetenz*. Rather, its legitimate sphere of operation is strictly defined, and Section 29(2) declares that acts (a) applying outside of Scotland, (b) in relation to reserved matters, (c) which relate to certain Statutes explicitly listed as outwith the competence of the Parliament in Schedule 4, (d) which conflict with EU Law or the ECHR, or (e) which would remove the Lord Advocate from his position are *ultra vires*, while Section 29(1) declares that the *ultra vires* acts of the Scottish Parliament shall not have the character of law.

A line of cases has examined the ability of the Courts to review the acts of the Scottish Parliament, and have found that (contrary to some submissions) the Courts of Scotland (and the Supreme Court, which remains the highest Court of Appeal of the Scottish legal system) may review acts of the Scottish Parliament to establish *vires*. Thus, in *Whaley v Lord Watson*, the Inner House of the Court of Session declared that, contrary to the submission of Lord Watson, the mere fact that the Scottish Parliament is a democratically elected body does not render its acts immune from legal challenge on grounds of *vires*. The later case of *AXA General Insurance v The Lord Advocate* also considered the ability of the Courts to review acts of the Scottish Parliament. There the Supreme Court held that while acts of the Scottish Parliament are reviewable on grounds of *vires*, they nevertheless remain different in quality to secondary legislation or to the acts of public decision-makers, and are thus not susceptible to review against the *Wednesbury* standard of irrationality, unreasonableness or arbitrariness.

The Act confirms, too, that the Westminster Parliament remains sovereign, and that its ability to legislate for Scotland on the devolved matters has not (formally, at least) been excluded. Section 28(7) of the Act declares that '[t]his section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland'. However, it is generally accepted that Westminster will not normally substitute its competence to legislate on Scottish matters for that of Holyrood without the consent of the latter. This principle, known as the Sewell Convention, has been formalised first in the Memorandum of Understanding between the UK and the Devolved Administrations, which declares (at paragraph 14) that although Westminster retains the power to legislate for Scotland at its absolute discretion, it will normally seek the agreement of the Scottish Parliament by means of a Legislative Consent Motion beforehand. The Scotland Act 2016 has interpolated that principle into the Scotland Act 1998 by the addition of Section 28(8), which states that 'it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.'

From the point of view of Scotland, therefore, the Scotland act has been characterised as a constitution: a legal document which sets the parameters of the State and which is superior to the organs whose competences are established within it. Whatever the appropriateness of this characterisation, its functional accuracy cannot be denied: the Scotland act did not give birth to a Parliament and legal system of greater or broader scope than that stated by its terms, but rather created a limited system subject to legal and political control, and subordinate to the Westminster Parliament.

The degree of that subordination also remains an active question, however. While few would contest that the Westminster Parliament has the power to repeal the Scotland Act, and in so doing to abolish the devolved Scottish institutions, it may be that there are now formal restrictions on its power to do so. In the case of *Thoburn v Sunderland City Council* Lord Justice Laws mooted the idea of constitutional statutes. Speaking of the European Communities Act, Laws LJ said that

> There are now classes or types of legislative provision which cannot be repealed by mere implication. These instances are given, and can only be given, by our own courts, to which the scope and nature of Parliamentary sovereignty are ultimately confided. The courts may say – have said – that there are certain circumstances in which the legislature may only enact what it desires to enact if it does so by express, or at any rate specific, provision. [60]

He explained, further, that

> Ordinary statutes may be impliedly repealed. Constitutional statutes may not. For the repeal of a constitutional Act or the abrogation of a fundamental right to be effected by statute, the court would apply this test: is it shown that the legislature's actual – not imputed, constructive or presumed – intention was to effect the repeal or abrogation? I think the test

> could only be met by express words in the later statute, or by words so specific that the inference of an actual determination to effect the result contended for was irresistible. The ordinary rule of implied repeal does not satisfy this test. Accordingly, it has no application to constitutional statutes. [63]

Laws LJ did not specify a list of constitutional statutes, but it seems likely that the Scotland act would be among those protected as he describes from implied repeal.

Many of the same themes were revisited in the House of Lords in *Jackson v Attorney General*. There several of the Judges made *obiter* comments concerning the ability of the Houses of Parliament to legislate. Lord Steyn, Lord Hope and Baroness Hale each declared their belief that the power of Parliament to legislate is not longer—if ever it were—unlimited. Rather, as Steyn said,

> [T]he supremacy of Parliament is still the general principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism. In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish. [102]

Untested as this principle is, it is difficult or impossible to say what practical consequences it might hold if every applied. It may be, however, that the *dicta* in *Jackson*, like the principle in *Thoburn*, may limit the power of Westminster to remove the democratic institutions in Scotland.

Scotland Act 1998 c.46

Whaley v Lord Watson [2000] ScotCS 41, pp.348-349.

Axa General Insurance Limited and Others v The Lord Advocate and others [2011] UKSC 46, [2012] 1 AC 868, [51-52, 152].

Memorandum of Understanding between the United Kingdom and the Devolved Administrations

Thoburn v Sunderland City Council [2003] QB 151, [2002] 3 WLR 247, [60, 63].

Jackson v Attorney General [2005] UKHL 56, [2006] 1 AC 262, [102, 104-7, 159].

R (on the application of Miller and another) v Secretary of State for Exiting the European Union [2017] UKSC 5, [2017] 2 WLR 583.

Lord Neuberger of Abbotsbury, Master of the Rolls, 'Who are the Masters Now?' Second Lord Alexander of Weedon Lecture, 6 April 2011.

Fenwick and Phillipson, 'Devolution, Federalism and "Quasi-Federalism"', in *Texts, Cases and Materials on Public Law and Human Rights* (3rd edn., Routledge 2011) pp.255-259.