



**QUEEN'S
UNIVERSITY
BELFAST**

Devolution Issues, Legislative Power, and Legal Sovereignty

Anthony, G. (2015). Devolution Issues, Legislative Power, and Legal Sovereignty. In *Le Droit public britannique : État des lieux et perspectives* (pp. 95-115). Société de Législation Comparée/Lextenso. <http://www.lgdj.fr/le-droit-public-britannique-9782365170529.html>

Published in:

Le Droit public britannique : État des lieux et perspectives

Document Version:

Publisher's PDF, also known as Version of record

Queen's University Belfast - Research Portal:

[Link to publication record in Queen's University Belfast Research Portal](#)

Publisher rights

Copyright the author 2015.

General rights

Copyright for the publications made accessible via the Queen's University Belfast Research Portal is retained by the author(s) and / or other copyright owners and it is a condition of accessing these publications that users recognise and abide by the legal requirements associated with these rights.

Take down policy

The Research Portal is Queen's institutional repository that provides access to Queen's research output. Every effort has been made to ensure that content in the Research Portal does not infringe any person's rights, or applicable UK laws. If you discover content in the Research Portal that you believe breaches copyright or violates any law, please contact openaccess@qub.ac.uk.

Open Access

This research has been made openly available by Queen's academics and its Open Research team. We would love to hear how access to this research benefits you. – Share your feedback with us: <http://go.qub.ac.uk/oa-feedback>

DEVOLUTION ISSUES, LEGISLATIVE POWER, AND LEGAL SOVEREIGNTY

Gordon ANTHONY*

INTRODUCTION

This is a chapter about disputes that are fundamental to understanding much about the nature of legal sovereignty in the contemporary UK constitution: so-called « devolution issues ». The focus of the chapter is on disputes that occur at the boundaries of primary legislative power between, on the one hand, the Westminster Parliament and, on the other hand, any of the devolved legislatures in Northern Ireland, Scotland, and Wales. Although devolution issues can also arise in other ways - notably out of exercises/non-exercises of Ministerial power or the making of secondary legislation at the devolved levels¹ - it is disputes about primary legislative competence that are of first importance to debates about legal sovereignty. The concept of legal sovereignty is of course that which attributes ultimate law-making authority to a particular institution within a state, where UK constitutional orthodoxy would regard the Westminster Parliament as sovereign and the devolved legislatures as able to act only within the parameters of the powers that have been given to them. However, while that understanding still informs much of the case law of the courts, it is axiomatic that the political context to devolution is changing and that approaches to legal sovereignty may need to be adapted to reflect that fact.

* Professeur de Droit public, Queen's University, Belfast. My thanks to Professors Antoine and Perroud for their kind invitation to the Saint-Étienne workshop at which an earlier version of this paper was first presented.

¹ Northern Ireland Act 1998, Sch 10, para 1; Scotland Act 1998, Sch 6, para 1; Government of Wales Act 2006, Sch 9, para 1.

The point is most obviously true given developments in post-referendum Scotland, although developments in Northern Ireland and Wales perhaps also have the potential to test orthodoxy².

The corresponding argument of this chapter is one that is (at least superficially) simple: that the courts, through the common law, have already done as much as they might legitimately do to address the emerging realities of devolution and that they should do no more within the current structures. The words « the common law » are here to be emphasised, as it will be seen that much of the chapter is ultimately concerned with the potential of, and the problems with, « common law constitutionalism »³. While there is no single definition of such constitutionalism, it is typically associated with the understanding that the common law underpins much of the UK constitution, including its concept of legal sovereignty⁴. At its height, such constitutionalism would posit that the courts would be able to reinvent legal sovereignty in the light of prevailing political realities, where experience with EU membership has already given some insight into how this might be done⁵. However, to the extent that this suggests that the common law could easily develop an operative concept of « divided sovereignty » within the UK⁶, the leading case law on devolution issues has so far only really touched upon that possibility. This will be seen to beg questions about whether the courts should do more by way of developing a « federalising » jurisprudence for the UK, or whether the challenge of a « divided sovereignty » might better be addressed within the framework of a written constitution for the UK. In suggesting that that second option is to be

² See, at the time of writing, the report of the ‘Smith Commission’ on devolution in Scotland at

https://www.smith-commission.scot/wp-content/uploads/2014/11/The_Smith_Commission_Report-1.pdf; the Wales Act 2014; and the « Stormont House Agreement » of 23 December 2014, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/390672/Stormont_House_Agreement.pdf. For the argument that Northern Ireland has long challenged orthodoxy see J. MORISON, S. LIVINGSTONE, *Reshaping Public Power: Northern Ireland the British Constitutional Crisis* (Sweet & Maxwell, London, 1995).

³ For a survey of the leading literature, see J. LESLIE, « Vindicating Common Law Constitutionalism » (2010) 30 *Legal Studies* 301.

⁴ For historical context, see HWR WADE, « The Basis of Legal Sovereignty » (1955) 13 *Cambridge Law Journal* 172.

⁵ HWR WADE, « Sovereignty - Revolution or Evolution ? » (1996) 112 *Law Quarterly Review* 56; *Thoburn v Sunderland CC* [2003] QB 151 ; and *R (Buckinghamshire CC) v Secretary of State for Transport* [2014] UKSC 3, [2014] 1 WLR 324, 382-3, Lords Neuberger and Mance. But compare the European Union Act 2011, s 18.

⁶ The term was used by Lord STEYN in *Jackson v Attorney-General* [2005] UKHL 56, [2006] 1 AC 262, 302, para 102. On the range of possibilities see R. RAWLINGS, P. LEYLAND, A. YOUNG (ed), *Sovereignty and the Law: Domestic, European and International Perspectives* (Oxford University Press, 2013).

preferred, the chapter argues that the common law would in that way be left to play a role that would be much more in keeping with democratic principle - in other words, the common law would complement legal sovereignty rather than purport to be the thing that grounds it.

The analysis proceeds as follows. The next section provides an overview of the legal rules that govern devolution issues and how the exercise of primary legislative power at the devolved levels can give rise to such issues. There then follow two sections that consider, respectively, a range of common law statements about the nature of the devolved legislatures, and case law on the courts' approach to statutory interpretation when resolving devolution issues. As will become apparent, the courts have in these cases made some far-reaching assertions about the democratic legitimacy and importance of the devolved legislatures while at the same time stopping short of recognising them as legally sovereign, even within a « divided » setting. The final substantive section thus analyses those assertions and statements with reference to wider considerations of constitutional reform, while the conclusion offers some (inevitably speculative) comments about likely future developments in the constitution.

I. DEVOLUTION AND THE PARAMETERS OF PRIMARY LEGISLATIVE POWER

One of the first points that is often made about devolution in the UK is that it is asymmetrical in form in the sense that there are significant differences between the discrete pieces of Westminster legislation - often referred to collectively as « the devolution Acts » - that have devolved power to Northern Ireland, Scotland and Wales⁷. This is true not just of the policy areas in respect of which primary legislative competence has been devolved, but also of how that competence is described and defined within the various devolution Acts. For instance, under the Northern Ireland Act 1998 and the Scotland Act 1998, the Northern Ireland Assembly and the Scottish Parliament have been said to enjoy competence on the basis of a « reserved powers » model whereby they can legislate in all policy areas save for those that have been reserved to the Westminster Parliament⁸ (although both Acts recognise that exercises of devolved competence may

⁷ For an account written at the time when devolution commenced, see N. BURROWS, *Devolution* (Sweet and Maxwell, London, 2000).

⁸ *Re Agricultural Sector (Wales) Bill* [2014] UKSC 43, [2014] 1 WLR 2622, 2629, para 29, Lords Reed and Thomas.

touch upon excluded matters but that that need not automatically mean that devolved competence has been exceeded)⁹. This « reserved powers » model has then been contrasted with that which applies under the Government of Wales Act 2006, which has been described as a « conferred powers » model that enumerates the competences of the National Assembly for Wales and allows it to enact primary legislation only in the policy areas listed in Part 1 of Schedule 7 to the Act of 2006¹⁰ (the 2006 Act also recognises that not all devolved choices that touch upon excluded matters need automatically be deemed *ultra vires*)¹¹. This Welsh model is plainly different insofar as it suggests a more closely defined devolution of power to the National Assembly for Wales, although elements of that modelling can arguably also be seen in parts of the Northern Ireland Act 1998. This is the result of that Act's distinction between « reserved » and « excepted » matters whereby reserved matters can be transferred to the Northern Ireland Assembly under favourable political circumstances - as happened with policing and criminal justice in 2010 - but where excepted matters can be expected only ever to remain with the Westminster Parliament¹². On this reading, excepted matters under the Northern Ireland Act 1998 would fall within the parameters of the reserved powers model in its strict sense - the Scotland Act 1998 in fact here uses the term « reserved » instead of « excepted » - while reserved matters that are transferred to the Northern Ireland Assembly might be said to have been conferred upon it.

Within the framework set by such structural differences, the devolution Acts do, however, have many features that are similar, if not identical, in their effects. One is the inclusion of a proviso whereby nothing in the devolution scheme is to be taken to affect the power of the Westminster Parliament to make law for Northern Ireland, Scotland and Wales¹³. This proviso is interesting insofar as it gives some insight into the tension that exists between constitutional theory and political reality under the devolution settlement. For instance, from a theoretical perspective, the

⁹ Northern Ireland Act 1998, s 6(3) ; Scotland Act 1998, s 29(3).

¹⁰ *Re Agricultural Sector (Wales) Bill* [2014] UKSC 43, [2014] 1 WLR 2622, 2629, para 29, Lords REED and THOMAS.

¹¹ Government of Wales Act 2006, s 108(5).

¹² Reserved matters are listed in Sch 3 to the Northern Ireland Act 1998, where transfer is governed by s 4 (which also provides for a process whereby transferred matters can become reserved). Excepted matters are listed in Sch 2. On the devolution of policing and criminal justice see G. ANTHONY « Northern Ireland : The Devolution of Policing and Criminal Justice » (2011) 17 *European Public Law* 197. Note also that the Northern Ireland Assembly can legislate in relation to a reserved matter or an excepted matter with the consent of the Secretary of State for Northern Ireland and under the conditions specified in ss 8 & 15 of the Northern Ireland Act 1998.

¹³ Northern Ireland Act 1998, s 5(6) ; Scotland Act 1998, s 28(7) ; Government of Wales Act 2006, s 107(5).

proviso does nothing other than reflect orthodox understandings of legal sovereignty under the UK constitution and the view that the Westminster Parliament « can make or unmake any law whatever »¹⁴. However, in a practical sense, it is a commonplace that the Westminster Parliament will not legislate in an area of devolved competence save where one or more of the devolved legislatures by motion asks it to do so. This is the content of the Sewel Convention that was first discussed in the context of Scottish devolution and according to which « Westminster [will] not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament »¹⁵. This convention has since been written into a Memorandum of Understanding that addresses inter-governmental relations under devolution, where it applies not just to the Scottish Parliament but also to the Northern Ireland Assembly and the National Assembly for Wales¹⁶. While the Memorandum of Understanding again notes that ultimate legislative power rests with the Westminster Parliament, the political reality has been very much that Sewel has been observed and that it has worked at the initiative of the devolved institutions. In a memorably titled article that analysed Sewel in the early years of devolution, Batey and Page thus referred to Westminster as « Scotland's other parliament »¹⁷.

Similarities can also be found in the provisions of the devolution Acts that expressly delimit the competence of the legislatures in Northern Ireland, Scotland and Wales and which are central to devolution issues in the courts. Although the provisions in the Acts inevitably reflect the reserved/conferred differences as well as other differences borne of historical experience - for instance, the Northern Ireland Assembly is subject to an express prohibition on religious or political discrimination that is not replicated in the legislation that applies to Scotland and Wales¹⁸ - there are a number of co-equivalent limitations that reflect the wider (contemporary) context within which legislative choices might be made. The most germane of these concern EU law and the European Convention on Human Rights (ECHR), where each of the devolved legislatures is constrained by the UK's Treaty obligations as have effect in domestic law under the European Communities Act 1972 and

¹⁴ A.V. DICEY, *An Introduction to the Study of the Law of the Constitution* (Macmillan, London, 10th ed, 1959) p. 40.

¹⁵ HL Debates, vol 592, part 191, 21 July 1998, col 791.

¹⁶ *Devolution : Memorandum of Understanding and Supplementary Agreements*, para 14, available at

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/316157/MoU_between_the_UK_and_the_Devolved_Administrations.pdf.

¹⁷ A. BATEY, A. PAGE, « Scotland's other parliament : Westminster legislation about devolved matters in Scotland since devolution » (2002) *Public Law* 501.

¹⁸ Northern Ireland Act 1998, s 6(2)(e).

the Human Rights Act 1998, respectively¹⁹. These limitations are of course intended to ensure not just that the devolved legislatures observe the UK's obligations but also (and thereby) to offer some protection to the UK government which would otherwise be the named respondent in any proceedings that might be brought in the Luxembourg or Strasbourg courts²⁰. However, of more immediate relevance here is the possibility that either EU law and/or the ECHR might be used to challenge legislation in the UK courts themselves, whether through pre-enactment referral of a Bill to the Supreme Court by a Law Officer or through post-enactment challenge in a concrete case²¹. While the nature of any referral or challenge will always depend on the content to the devolved choice at hand, the legislation will inevitably have a policy component that corresponds with the preferred position of the devolved legislature. Under those circumstances - and in particular where the facts of a case engage the proportionality principle - the reviewing court will have to address questions of relative institutional expertise and the domestic law relevance of European law's « margin of appreciation » doctrine²².

Referrals of, and challenges to, legislation can also engage interpretive obligations under each of the devolution Acts that, while not imposed in directly equivalent terms, have essentially the same practical effects²³. The obligations in question become relevant where legislation is, on a literal reading, outside the competence of a devolved legislature, when the devolution Acts require the courts to adopt an interpretive approach that will, where possible, give the legislation a meaning that is within the competence of the relevant legislature. Where the legislation in question is challenged for the reason that it is contrary to EU law and/or the ECHR, there will inevitably be some overlap with interpretive obligations that are

¹⁹ Northern Ireland Act 1998, s 6(2)(c)-(d); Scotland Act 1998, s 29(d); Government of Wales Act 2006, s 108(6)(c). Note that the devolved legislatures are each limited by a territorial rule whereby they can legislate only in respect of Northern Ireland, Scotland, and Wales respectively: Northern Ireland Act 1998, s 6(2)(a), as read with s 98; Scotland Act 1998, s 29(a), as read with s 126; Government of Wales Act 2006, s 108(4)(b), as read with s 158(1).

²⁰ On the corresponding approach to costs in EU law cases see *Devolution: Memorandum of Understanding and Supplementary Agreements*, at n 16 above, part B4.25.

²¹ On the referral of Bills see Northern Ireland Act 1998, s 11; Scotland Act 1998, s 33; and the Government of Wales Act 2006, s 112. It might be noted that, on a narrow reading of the devolution Acts, referrals of Bills do not come within the meaning of « devolution issues », as the relevant statutory definitions refer only to « Acts » of the legislatures: Northern Ireland Act 1998, Sch 10, para 1; Scotland Act 1998, Sch 6, para 1; and the Government of Wales Act 2006, Sch 9, para 1.

²² See, on EU law, see, *mutatis mutandis*, *Re McParland's Application* [2002] NI 292. On the ECHR see *R v Secretary of State for the Home Department, ex p Daly* [2001] 2 AC 532.

²³ Northern Ireland Act 1998, s 83; Scotland Act 1998, s 101; Government of Wales Act 2006, s 154.

found in the European Communities Act 1972 and/or the Human Rights Act 1998, and arguments may be developed with first reference to those Acts rather than the devolution Acts²⁴. However, where the obligation arises because the legislation transgresses (where relevant) the reserved or conferred powers models that delimit the respective competences of the devolved legislatures, the matter of interpretation can be resolved only with reference to the terms of the devolution Acts themselves. The corresponding provisions have since given rise to an important body of Supreme Court case law that has identified some general principles that should guide the courts when interpreting legislation enacted by the devolved legislatures, where an orthodox view of legal sovereignty has been influential²⁵. The corresponding significance of this link to orthodoxy is returned to below, but the point to be noted here is that the courts start from the position that it is not for them « to say whether legislation on any particular issue is better made by [a devolved legislature] or by the UK Parliament at Westminster »²⁶. Where, on this basis, a court concludes, through interpretation, that a piece of devolved legislation cannot be read as within the competence the relevant devolved legislature, it may therefore grant any of the forms of relief that are available to it (albeit that it may also remove or limit any retrospective effect of a ruling)²⁷. Where the transgression is in respect of EU law and/or the ECHR, a court may also first consider whether to grant remedies in accordance with the terms of the European Communities Act 1972 and/or the Human Rights Act 1998²⁸.

Of course, the above provides only a summary of some of the key aspects of the devolution Acts and there are many more points of detail that might be explored in any fuller account of the current arrangements for devolution²⁹. Nevertheless, those aspects that have been outlined above have

²⁴ European Communities Act 1972, s 3(1) ; Human Rights Act 1998, s 3. For recognition of the scope for overlap, albeit at the level of challenges to the exercise of executive powers, see, eg, *H v Lord Advocate* [2012] UKSC 24, [2013] 1 AC 413, 434, para 26, Lord HOPE.

²⁵ See, most notably, *Attorney General v National Assembly for Wales Commission* [2012] UKSC 53, [2013] 1 AC 792 and *Imperial Tobacco Ltd v Lord Advocate* [2012] UKSC 61, (2013) SC (UKSC) 153.

²⁶ *Martin v HM Advocate* [2010] UKSC 10, (2010) SC (UKSC) 40, 44, para 5, Lord HOPE.

²⁷ Northern Ireland Act 1998, s 81 ; Scotland Act 1998, s 102 ; Government of Wales Act 2006, s 153. And see, eg, *Salvesen v Riddell* [2013] UKSC 22, (2013) SC (UKSC) 236 (Supreme Court suspending the effect of its finding that section 72 of the Agricultural Holdings [Scotland] Act 2003 was incompatible with Article 1 of Protocol 1 ECHR for 12 months or such shorter period as was necessary for the legislation to be amended).

²⁸ European Communities Act 1972, s 3 ; Human Rights Act 1998, ss 3-4, & 8.

²⁹ See, as regards, Scotland and Wales, P. CRAIG, *Administrative Law* (Sweet & Maxwell, London, 7th ed, 2012), ch 7 ; and on Northern Ireland see G. ANTHONY, *Judicial Review in Northern Ireland* (Hart Publishing, Oxford, 2nd ed, 2014), pp. 22-24 & 156-165.

a particular relevance insofar as they explain how devolution issues can arise and how a law/politics tension can surround their resolution. The point here is that, while the courts may be of the view that it is not for them to decide whether legislation is better made by a devolved legislature or the Westminster Parliament, that matter is fundamental to understanding where legal sovereignty rests found within the contemporary constitution. Moreover, to the extent that the courts have said that it is not their function to determine who should make which law, and when, their recourse to orthodoxy can have only that very effect because it safeguards the historically dominant position of the Westminster Parliament. Given the point, the question, once more, is whether the courts should continue to safeguard orthodoxy or whether they should jettison that orthodoxy in favour of a more nuanced common law conception of «divided sovereignty».

II. THE (COMMON LAW) STATUS OF THE DEVOLVED LEGISLATURES

Turning to the case law that has considered the constitutional significance of devolution, there are two rulings that are often cited as of particular note, namely *Robinson v Secretary of State for Northern Ireland*³⁰ and *Axa General Insurance v HM Advocate*³¹. In these cases, the House of Lords and Supreme Court, respectively, made expansive statements about the nature and reach of the devolution settlements and their basis in democratic principle. However, to the extent that the judgments suggested the emergence of a creative body of devolution case law³², there have since been other cases in which the Supreme Court has perhaps been less inventive in its reasoning. *Robinson* and *Axa* might therefore best be described as the «high-water mark» of a more generally cautious constitutional jurisprudence³³.

The facts of the *Robinson* case were unique in the sense that they arose out of the Northern Ireland peace process and were concerned not with a

³⁰ [2002] UKHL 32, [2002] NI 390.

³¹ [2011] UKSC 46, [2012] 1 AC 868.

³² For the point as regards *Robinson*, M. ELLIOTT, « Embracing Constitutional Legislation : Towards Fundamental Law ? » (2003) 54 *Northern Ireland Legal Quarterly* 25, at 41. For more general public law analysis of *Axa*, see P. RONCHI, « *Axa v Lord Advocate* : putting the axa to parliamentary sovereignty » (2013) 19 *European Public Law* 61.

³³ A. TOMKINS, « Confusion and Retreat : The Supreme Court on Devolution », UK Const L Blog (19th Feb 2015) (available at <http://ukconstitutionallaw.org/>).

devolution issue as described above but rather with the interpretation of key provisions of the Northern Ireland Act 1998 itself. The proceedings were brought by the Democratic Unionist Party which was at that time (though is no longer) opposed to the peace process, and it hoped, through the proceedings, to undermine the workings of the Northern Ireland Assembly that had been established pursuant to the Good Friday Agreement of 1998. The central issue in the case was the reading to be given to a six-week time-limit in the Act for the election by the Northern Ireland Assembly of the First and Deputy First Ministers and a corresponding duty on the Secretary of State to set a date for fresh public elections to the Assembly in the event that the Ministers were not elected within that time-frame³⁴. On the facts of the case the First and Deputy First Ministers had been elected shortly outside the six-week time-limit and the Democratic Unionist Party argued that this should have led the Secretary of State for Northern Ireland to call prompt Assembly elections rather than to set the delayed date that he had chosen given that the Ministers had been elected. Of course, had the Democratic Unionist Party succeeded in its arguments, this would have caused considerable political instability in Northern Ireland, and it was that prospect that provided much of the backdrop to the House of Lords ruling. In a judgment that very much sought to safeguard political stability, Lord Hoffmann held that the relevant provisions of the Northern Ireland Act 1998 should be given a purposive interpretation because the Good Friday Agreement « was the product of multi-party negotiations to devise constitutional arrangements for a fresh start in Northern Ireland ... The 1998 Act is a constitution for Northern Ireland, framed to create a continuing form of government against the history of the territory and the principles agreed in Belfast »³⁵. Lord Bingham to like effect stated that :

« The 1998 Act does not set out all the constitutional provisions applicable to Northern Ireland, but it is in effect a constitution. So to categorise the 1998 Act is not to relieve the courts of their duty to interpret the constitutional provisions in issue. But the provisions should, consistently with the language used, be interpreted generously and purposively, bearing in mind the values which the constitutional provisions are intended to embody »³⁶.

³⁴ Northern Ireland Act 1998, ss 16(8) & 32(3). Note that s 16 has since been repealed and replaced by ss 16 (A)-(C) : Northern Ireland (St Andrews Agreement) Act 2006, s 8.

³⁵ [2002] NI 390, 402, para 25.

³⁶ [2002] NI 390, 398, para 11.

This reasoning provides some insight into the nature of common law constitutionalism and, in particular, its approach to the interpretation of statutes³⁷. While statutory interpretation is not the sole concern of common law constitutionalism - it also addresses itself to the protection of fundamental rights and, indeed, does so even in the era of the Human Rights Act 1998³⁸ - the judicial approach to statutes is key to understanding any argument about how the courts might reconfigure the constitution. Of particular importance here is the concept of « common law constitutional statutes », which was first developed in the context of EU membership and which finds clear parallels in *Robinson*³⁹. According to that concept, there are a number of statutes, including the devolution Acts, that constitute a higher form of law and are not subject to the doctrine of implied repeal whereby later Acts of the Westminster Parliament override earlier Acts in the event that there is a conflict between the two⁴⁰. While the case law has not yet suggested that the Westminster Parliament cannot repeal the constitutional statutes under any circumstances, it has said that it can repeal the statutes only where it uses express words to achieve that outcome or « words so specific that the inference of an actual determination to effect the result contended for [is] irresistible »⁴¹. Common law constitutional statutes have, in that way, apparently imposed formal limitations on legal sovereignty and, given this development, it may well be that the courts could also impose substantive limitations on the Westminster Parliament's powers given the emerging political realities of devolution⁴².

The *Axa* ruling of the Supreme Court then came close to considering this possibility. The facts of this case concerned a challenge to the lawfulness of an Act of the Scottish Parliament that had been enacted to allow individuals to sue for particular harms that they had suffered while working in Scotland's heavy industries (the legislation - the Damages (Asbestos-related Conditions) (Scotland) Act 2009 - reversed the effects of an earlier House of Lords ruling that had held that the harms in question

³⁷ See further, G. ANTHONY, « Statutory Interpretation and the Judicial Role in the United Kingdom » (2012) 24 *European Review of Public Law* 1387.

³⁸ M. ELLIOTT, « Beyond the European Convention : Human Rights and the Common Law » (2015) 68 *Current Legal Problems* (forthcoming).

³⁹ *Thoburn v Sunderland CC* [2003] QB 151 ; and *R (Buckinghamshire CC) v Secretary of State for Transport* [2014] UKSC 3, [2014] 1 WLR 324, 382-3, Lords NEUBERGER and MANCE. But see also the European Union Act 2011, s 18.

⁴⁰ *Thoburn v Sunderland CC* [2003] QB 151, 186-7, Laws LJ. On implied repeal see *Ellen Street Estates v Minister of Health* [1934] 1 KB 590, 597, Maugham LJ.

⁴¹ *Thoburn v Sunderland CC* [2003] QB 151, 187, Laws LJ.

⁴² For the logic of this argument see M. ELLIOTT, n 32 above.

were not actionable under the law of tort)⁴³. In real terms, this meant that Axa and a number of other insurance companies would have to meet a very large number of claims against employers, and they challenged the legislation on the basis that it was both disproportionate in its interference with their property rights under Article 1 of Protocol 1 ECHR and irrational at common law. In rejecting the challenge, the Supreme Court centred much of its reasoning upon democratic principle and the need for the courts to avoid any undue interference with the choices of an elected legislature. In relation to Article 1 of Protocol 1 ECHR, the Supreme Court thus noted that property rights are qualified rights; that the case law of the European Court of Human Rights accords states a wide margin of appreciation when limiting such rights for reasons of « the public interest »⁴⁴; and that judicial intervention on ECHR grounds in this case could not be justified because it could not be said that the Scottish legislation lacked a « reasonable foundation » or was « manifestly unreasonable »⁴⁵. The arguments based upon irrationality then likewise failed because the Court was of the view that the constitutional nature of the Scottish Parliament meant that its legislative choices should not be open to challenge on that ground. While Lords Hope and Reed stated that the Scottish Parliament cannot be regarded as legally sovereign in the sense that the Westminster Parliament can be so regarded, they emphasised that the broader design of the Scotland Act 1998 entails that the Scottish Parliament should be taken to have very wide powers within the areas of competence that have been devolved to it. For Lord Hope, this resulted from the Scottish Parliament's status as a « self-standing democratically elected legislature. Its democratic mandate to make laws for the people of Scotland is beyond question »⁴⁶; while Lord Reed considered that, « (w)ithin the limits set by section 29(2) ... its power to legislate is as ample as it could possibly be: there is no indication in the Scotland Act of any specific purposes which are to guide it in its law-making or of any specific matters to which it is to have regard »⁴⁷.

It is important to be clear quite where the significance of the *Axa* ruling lies. Certainly, it might, on one reading, be said that the judgment did little to unsettle constitutional orthodoxy as it reiterated that the Scottish Parliament is not legally sovereign and is « subordinate to the United Kingdom Parliament : its powers can be modified, extended or revoked by

⁴³ *Rothwell v Chemical & Insulating Co Ltd* [2007] UKHL 39, [2008] 1 AC 281.

⁴⁴ Citing, most prominently, *James v UK* (1986) 8 EHRR 123.

⁴⁵ See [2012] 1 AC 868, 907-8, para 33, Lord HOPE.

⁴⁶ See [2012] 1 AC 868, 911, para 46.

⁴⁷ See [2012] 1 AC 868, 944, para 146.

an Act of the United Kingdom Parliament »⁴⁸. On the other hand, the judgment might also be said to be one of the leading authorities on common law constitutionalism, as it not only acknowledged that the Scottish Parliament is a « self-standing democratically elected legislature » but also that its powers, and those of the Westminster Parliament, may potentially be subject to equivalent common law constraints. This was a point about the common law's protection of fundamental rights that has been alluded to above, as, to the extent that the Supreme Court held that common law irrationality is not available to challenge Acts of the Scottish Parliament, it stated that the common law would intervene if the Scottish Parliament enacted legislation that interfered with a common law fundamental right such as access to justice⁴⁹. This is an approach that has previously been advocated in relation to Acts of the Westminster Parliament that threaten such rights and, by adapting the relevant *dicta* to the devolved context, the Supreme Court made clear that the rule of law will be the organising principle of the UK's constitution, come what may⁵⁰. *Axa*, in that way, has made clear that the current concept of legal sovereignty is mediated by the prior force of the rule of law and that the same would be true in any constitution that might be centred upon a conception of « divided sovereignty ».

III. STATUTORY INTERPRETATION AND THE RESOLUTION OF « DEVOLUTION ISSUES »

The less inventive line of judicial reasoning that was noted above can also be associated with two main rulings, both of which were delivered in 2012. The first was given in *Attorney General v National Assembly for Wales Commission*⁵¹, which was a pre-enactment reference to the Supreme Court of provisions of the Local Government Byelaws (Wales) Bill 2012. That Bill - now Act - had sought to « spring-clean » the process of making certain byelaws for Wales by (a) removing the requirement that byelaws in a Schedule to the Bill would need to be confirmed by either Welsh Ministers

⁴⁸ See [2012] 1 AC 868, 944, para 146, Lord REED.

⁴⁹ See, eg, [2012] 1 AC 868, 913, para 51, Lord HOPE. For a subsequent - unsuccessful - attempt to develop this aspect of *Axa* in the context of legislation enacted by the Northern Ireland Assembly, see *Re CM's Application for Leave* [2013] NIQB 145 (challenge to time-limits contained in the Historical Institutional Abuse Act (Northern Ireland) 2013, s 19).

⁵⁰ See [2012] 1 AC 868, 913, paras 50-51, Lord HOPE, citing *R (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 AC 262.

⁵¹ [2012] UKSC 53, [2013] 1 AC 792.

and/or the Secretary of State for Wales and (b) allowing the Welsh Ministers to add to the relevant Schedule of byelaws⁵². The Attorney General referred the Bill to the Supreme Court for the reason that it purported to remove the functions of a Minister of the Crown, which is a matter falling outside the competence of the National Assembly for Wales under the Government of Wales Act 2006⁵³. However, the Supreme Court held that the provisions of the Bill were within the competence of National Assembly and that they could therefore lawfully be enacted. Noting that the primary, lawful purpose of the Bill was to remove the need for confirmation of byelaws by Welsh Ministers, it held that those provisions that affected Ministers of the Crown were « incidental to, or consequential on » that primary purpose⁵⁴. While the Supreme Court also acknowledged that the power to add byelaws to the Schedule was potentially open-ended and could thereby be read as *ultra vires*, it held that the corresponding provision should be read « as narrowly as is required for it to be within competence »⁵⁵. In real terms, this meant that the power to add byelaws could be exercised only where the primary purpose was, again, to reduce the need for Welsh Ministers to confirm byelaws.

The second ruling was given in *Imperial Tobacco Ltd v Lord Advocate*⁵⁶, which concerned the *vires* of sections 1 and 9 of the Tobacco and Primary Medical Services (Scotland) Act 2010. According to those sections, it is a criminal offence either to advertise tobacco products in the course of business (section 1) or to have a vending machine available for use on premises under one's management or control (section 9). Imperial Tobacco argued that the legislation thereby regulated aspects of consumer protection and Scots criminal law and that it was *ultra vires* the Scotland Act 1998 because the aspects in question were reserved matters within the meaning of Schedule 5 to the Scotland Act 1998. However, the Supreme Court rejected that argument when holding that the Act of 2010 did not in any way relate to reserved matters and that, on a true construction of the legislation, it fell squarely within the competence of the Scottish Parliament. Sections 1 & 9 were thus said to have the objective of reducing levels of smoking and were thereby about public health - a devolved matter - rather than consumer protection and/or reserved matters of criminal law.

The parts of the rulings that revealed a less inventive judicial approach to devolution issues were concerned with the interpretation of the devolution

⁵² See ss 6 & 9 of the Bill/Act.

⁵³ See Sch 7, Part 2, para 1(1).

⁵⁴ Government of Wales Act 2006, s 108(5).

⁵⁵ Government of Wales Act 2006, s 154.

⁵⁶ [2012] UKSC 61, (2013) SC (UKSC) 153.

Acts. While the Supreme Court did not doubt in either case that the devolution Acts have a particular constitutional significance - it referred to them as « constitutional statutes » - it cautioned that the ordinary rules of statutory interpretation still apply and that a more expansive interpretive approach is not inevitable just because the Court is dealing with devolution issues. In doing so, the Supreme Court used language that was reflective of the (orthodox) reality that the devolution Acts were enacted by the Westminster Parliament and that that legislature's intentions must be observed when resolving disputes about competence. In the *Welsh Byelaws* case, Lord Hope thus said that the question whether devolved legislation is within competence « must be determined simply by examining the provisions by which the scheme for devolution has been laid out »⁵⁷. And in *Imperial Tobacco*, his Lordship identified three general principles that should guide the courts when ruling on devolution issues:

« First, the question of competence must be determined in each case according to the particular rules that have been set out in [the relevant devolution Act]. It is not for the courts to say whether legislation on any particular issue is better made by the [devolved legislatures] or by the Parliament of the United Kingdom at Westminster ... How that issue is to be dealt with has been addressed and determined by the United Kingdom Parliament ... its task was to define the legislative competence of the [devolved legislatures], while itself continuing as the sovereign legislature of the United Kingdom ... So it is to the rules that the [devolution Acts lay] down that the court must address its attention, bearing in mind that a provision may have a devolved purpose and yet be outside competence because it contravenes one of the rules...

Second, those rules must be interpreted in the same way as any other rules that are found in a UK statute. The system that those rules laid down must, of course, be taken to have been intended to create a system for the exercise of legislative power by the [devolved legislatures] that was coherent, stable and workable. This is a factor that it is proper to have in mind. But it is not a principle of construction that is peculiar to the [devolution Acts]. It is a factor that is common to any other statute that has been enacted by the legislature, whether at Westminster or at [Cardiff, Holyrood, or Stormont]. The best way of ensuring that a coherent, stable and workable outcome is achieved is to adopt an approach to the meaning of a statute that is constant and predictable.

⁵⁷ *Attorney General v National Assembly for Wales Commission* [2012] UKSC 53, [2013] 1 AC 792, 815, para 80, Lord HOPE.

This will be achieved if the legislation is construed according to the ordinary meaning of the words used.

Third, the description of [an] Act as a constitutional statute cannot be taken, in itself, to be a guide to its interpretation. The statute must be interpreted like any other statute. But the purpose of the Act has informed the statutory language. Its concern must be taken to have been that [a devolved legislature] should be able to legislate effectively about matters that were intended to be devolved to it, while ensuring that there were adequate safeguards for those matters that were intended to be reserved [or excepted]. That purpose provides the context for any discussion about legislative competence. So it is proper to have regard to the purpose if help is needed as to what the words actually mean. The fact that [the devolution Acts provide mechanisms] for determining whether a provision [in an Act] is outside, rather than inside, competence does not create a presumption in favour of competence. But it helps to show that one of the purposes of [the devolution Acts] was to enable the [devolved legislatures] to make such laws within the powers given to [them] as [they] thought fit. It was intended, within carefully defined limits, to be a generous settlement of legislative authority »⁵⁸.

These *dicta* clearly imply that the Supreme Court will not be inclined to use devolution issues to reinvent legal sovereignty under the constitution, even if *Robinson* and *Axa* had previously given some insight into how common law constitutionalism might facilitate a process of change. This then inevitably begs the question whether there is something of a disjunction in the wider body of devolution case law, where the Supreme Court's recent ruling in the *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* case would suggest that there is⁵⁹. This case arose when the Counsel General for Wales referred to the Supreme Court the legality of a Bill that would allow the Welsh Ministers to recover from employers and their insurance companies the costs of treating persons on the National Health Service where the employers agree, in the future, to pay compensation to those persons for injuries falling under the Bill (the Bill was in that sense prospective; it also had a retrospective element in that it applied to insurance policies issued both before and after the legislation would come into force). The Supreme Court found itself divided over the two main questions before

⁵⁸ [2012] UKSC 61, (2013) SC (UKSC) 153, 159, paras 13-15, citing, among others, *Gallagher v Lynn* [1937] AC 863 and *Martin v Most* [2010] SLT 412. For application of the principles see, eg, *Re Agriculture Sector (Wales) Bill* [2014] UKSC 43, [2014] 1 WLR 2622.

⁵⁹ [2015] UKSC 3, [2015] 2 WLR 481.

it, namely : (1) whether the National Assembly for Wales had competence to enact the Bill as something falling within a policy area that had been conferred upon it (*viz* « organisation and funding of the national health service »⁶⁰) ; and (2) whether the Bill constituted a disproportionate interference with the rights of employers and insurers under Article 1 of Protocol 1 ECHR. The reasoning of the majority of the Court in relation to (1) was that the Bill fell outside the competence of the Assembly because the expression « organisation and funding of the national health service » could not have been intended to include a power to impose what was, in effect, a quasi-tortious statutory liability (the minority considered that at least part of the Bill related to the organisation and so on of the health service and could therefore be read as within competence). However, it was in relation to question (2) that the differences in constitutional approach between the majority and minority were most pronounced, notably on the matter of how the Court should assess the fairness of the « public interest » choice that had been made by the Welsh legislature. Lord Mance, for the majority, holding that the Bill was disproportionate, noted that the fact that « a measure is within a national legislature's margin of appreciation is not conclusive of proportionality » and that there is still a judicial role in assessing the lawfulness of a legislative choice⁶¹. While his Lordship agreed that « weight » should be given to the Welsh Assembly's judgment when conducting that exercise⁶², he reached his conclusions about the Bill without elaborating upon the status of the Welsh Assembly and the « difficult » matter whether « there is a relevant distinction between cases concerning primary legislation by the United Kingdom Parliament and other legislative and executive decisions »⁶³. In contrast, Lord Thomas, for the minority, examined this constitutional question in some detail and in language that was reflective of that in *Robinson v Axa*. Finding that not all aspects of the Bill were disproportionate in their effects, his Lordship stated that « great weight » should be given to the public interest choice of the National Assembly for Wales and that he « would find it difficult to make any logical distinction in the context of the United Kingdom's devolved constitutional structure between [the devolved] legislatures and the United Kingdom Parliament in according weight to the evaluation of the different choices and interests in respect of matters which are within the primary competence of the legislatures »⁶⁴. Although his Lordship noted that « this is an issue which it

⁶⁰ Government of Wales Act 2006, Sch 7, Part I, para 9.

⁶¹ [2015] UKSC 3, [2015] 2 WLR 481, 501, para 54.

⁶² [2015] UKSC 3, [2015] 2 WLR 481, 507, para 67.

⁶³ [2015] UKSC 3, [2015] 2 WLR 481, 502, para 56.

⁶⁴ [2015] UKSC 3, [2015] 2 WLR 481, 520, paras 118-119.

may not be desirable to have to consider at the present time », he was of the view that « the issue plainly arises as to how the court is to treat the judgment of the Welsh Assembly, in contradistinction to the United Kingdom Parliament, in relation to matter of social and economic policy such as the funding of the national health service »⁶⁵. He concluded that he could not « see why in principle the United Kingdom Parliament in making legislative choices in relation to England (in relation to matters such as the funding of the NHS in England) is to be accorded a status which commands greater weight than would be accorded to the Scottish Parliament and the Northern Ireland and Welsh Assemblies in relation respectively to Scotland, Northern Ireland and Wales »⁶⁶.

IV. LEGAL SOVEREIGNTY AND DEVOLUTION : WHAT ROLE FOR THE COURTS ?

Lord Thomas' comments are undoubtedly the most far-reaching that have so far been made about devolution and, in particular, the constitutional relationship between the devolved legislatures and the Westminster Parliament. Although his Lordship's comments apparently leave open the status of Acts of the Westminster Parliament that are of UK wide-application, his approach to Acts that apply only to England arguably envisages something akin to a federal distribution of competence under the constitution. Of course, in a strict sense, this observation rather assumes a link between devolution and federalism that does not really exist, as that latter model has been said to « require the exclusive allocation of powers by a written constitution to federal and state/provincial legislatures of co-ordinate status with each other »⁶⁷. Nevertheless, the importance of Lord Thomas' comments lies not in the fact that they may touch upon a state of affairs that has not been realised under the UK constitution, but rather in what they reveal about the judicial role in remoulding that constitution. The nature of common law constitutionalism as has been outlined in this chapter is very much that it allows the courts to revisit core precepts of the constitution, including legal sovereignty, and to reinvent them in the light of changed political circumstances. Given the point, it might be asked whether Lord Thomas' comments should provide a starting point for a jurisprudence

⁶⁵ [2015] UKSC 3, [2015] 2 WLR 481, 521, para 121.

⁶⁶ [2015] UKSC 3, [2015] 2 WLR 481, 521, para 122.

⁶⁷ B. HADFIELD « The Foundations of Review, Devolved Power and Delegated Power », in C. FORSYTH (eds), *Judicial Review and the Constitution* (Hart Publishing, Oxford, 2000), pp. 193, 194.

that would recognise a concept of « divided sovereignty » in the UK and which would seek further to embed the position and authority of the devolved legislatures. Is this something that it would be desirable for the courts to engage in, or is this something that might legitimately be realised only through the political process and, for instance, the adoption of a written constitution ? And, if this is a matter that would better be addressed through a written constitutional text, what role might the common law play in the interim and within the framework of a written constitution ?

Taking first the question whether Lord Thomas' comments might mark the beginning of a more activist jurisprudence, there are normative and practical dimensions to any possible answers. Certainly, at a normative level, the argument in favour of his comments would focus upon common law constitutionalism's flexibility in the face of legal and political challenges and its ability to refashion principles and doctrines to « fit » with their emerging context⁶⁸. This has already been said, above, to have occurred in relation to the common law's protection of fundamental rights and its approach to EU membership, and it might, for that reason, be thought that a recasting of legal sovereignty in the context of devolution would merely complement such developments. However, the contrasting normative view is that such arguments take an essentially uncritical approach to an elevated role for the courts and that they thereby give insufficient attention to the primacy of the democratic political process⁶⁹. While arguments about the primacy of the political process can sometimes become disingenuous when matters of rights are involved - where there is the peril of majoritarianism⁷⁰ - it might reasonably be doubted whether it could ever be legitimate for the courts to settle foundational disputes about the balance of power between political institutions, at least where there is no written text that requires them to do so. Indeed, in this context, the challenge of EU membership might be distinguished from that which is currently presented by devolution: while the European Communities Act 1972 requires the courts to give effect to the doctrine of the primacy of EU law that clearly contradicts the sovereignty of the Westminster Parliament - a requirement that led the very idea of « constitutional statutes »⁷¹ - the devolution Acts

⁶⁸ See further ELLIOTT, n. 32 above. See also, eg, *Re Perry's Application* [1997] NI 282, 300, GIRVAN J. : « It is a feature of the richness of the common law that old concepts and practices in danger of becoming outdated can be dusted down, repolished and reinvigorated in the evolutionary process of case law ».

⁶⁹ For such themes see R. BELLAMY, *Political Constitutionalism : A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, 2007).

⁷⁰ See *Re P* [2008] UKHL 38, [2009] 1 AC 173.

⁷¹ European Communities Act 1972, s 3(1) ; *R v Secretary of State for Transport, ex p Factortame Ltd (No 2)* [1991] 1 AC 603, 658-9, Lord BRIDGE ; *Thoburn v Sunderland CC* [2003]

have been written in such a way as is intended to leave legal sovereignty solely with that Parliament.

The practical dimension focuses upon the obvious difficulty in designing a workable concept of « divided sovereignty » that might be mobilised within an unwritten constitution that would have federalising tendencies as defined by the common law. For instance, Lord Thomas' apparent distinction between Acts of the Westminster Parliament that have UK-wide application and those that would apply only to England would, if acted upon, raise the question whether the latter category is of a lesser sovereign quality because of its territorial application and because it is to be equated with legislation enacted in Northern Ireland, Scotland and Wales. However, if it is not of a lesser quality and is, in fact, to be equated to an Act of UK-wide application, then it might surely be argued that legislation that has been enacted in Northern Ireland, Scotland and Wales is also sovereign by virtue of the fact that it can be equated to Westminster legislation that is of application in only England. Of course, the very idea of legal sovereignty would at this stage start to become circular, and it thus here that the second question that was posed above - whether there is a need for a written constitution - becomes relevant. The suggestion that the UK might benefit from adopting a written constitution is one that has become increasingly prominent in recent times - primarily, though by no means exclusively, because of developments in post-referendum Scotland⁷² - and the adoption of a constitution would provide one means for the people(s) of the UK to endorse a sovereign text. While much would remain to be decided about precisely how an allocation of competence would be organised within the constitution, a text could surely provide for a reconfiguration of power along federal lines that would recognise the existence of co-equivalent « state » legislatures in England, Northern Ireland, Scotland and Wales, as well as a federal legislature at Westminster that is subject to the provisions of the constitution. The constitution might in this way be expected to recognise the state legislatures as permanent within the framework of the constitution and thereby exceed recent post-referendum proposals about the merit of Westminster legislating to acknowledge the permanence of the Scottish Parliament⁷³.

QB 151 ; and *R (Buckinghamshire CC) v Secretary of State for Transport* [2014] UKSC 3, [2014] 1 WLR 324, 382-3, Lords NEUBERGER and MANCE. But compare the European Union Act 2011, s 18.

⁷² For proposals that precede the Scottish referendum and which address the full range of issues associated with adopting a constitution, see R. GORDON, *Repairing British Politics : A Blueprint for Constitutional Change* (Hart Publishing, Oxford, 2010).

⁷³ See the Smith Report at n. 2 above.

And what of the third question that was noted above, *viz* the role that the courts might play in the interim and if/when a constitution is adopted? Certainly, in the interim, it might be said that the courts should not seek to develop a more expansive body of devolution case law, as it would appear that there would be significant challenges in developing a concept of « divided sovereignty » that would be meaningful in practice. Moreover, were the courts to seek to progress the law beyond the already creative *dicta* of *Robinson*, *Axa*, and *Costs for Asbestos Diseases*, they might well - and rightly - encounter criticisms of undue judicial activism. As things presently stand within the case law, the courts have made it clear that the devolved legislatures occupy a unique (if ultimately subordinate) place within the constitution, while at the same time creating pressure points that hint at the diminishing strength of constitutional orthodoxy. In real terms, that is a hint that the political settlement that has underpinned the place of the Westminster Parliament is no longer guaranteed and that the challenge of devolution needs to be addressed in a more fundamental way. While it may well be that common law constitutionalism would wish to facilitate or hasten that process of change, normative concerns about legitimacy should mean that the courts should wait for the political process to fashion a written constitution before they develop any reinvigorated body of case law. In that circumstance, their rulings could be said simply to complement whatever concept of legal sovereignty is written into the constitution rather than to be the thing that grounds it.

CONCLUSION

This chapter started by observing that the case law on devolution issues is central to understanding the nature of legal sovereignty in the contemporary UK constitution. Its resulting argument - that the courts have done as much as they might legitimately do within the given structures and that any tensions around legal sovereignty would better be addressed through a written constitution - plainly presupposes the existence of a political will to rebalance the UK's constitution. Whether that political will exists is, however, something of an unknown, and it may be that a written constitution is some distance off. While there have certainly been political efforts to address the need for fuller devolution in post-referendum Scotland⁷⁴, the general election results of May 2015 have seen a shift towards an increasingly muscular nationalism in Scotland and the

⁷⁴ See the Smith Report at n 2 above.

emergence of Conservative party dominance in England. This has led Stephen Tierney to ask whether such competing political philosophies will militate against a written constitution for the UK and perhaps even lead to the break-up of the Union, for the very reason that it would not be in the interests of the emerging political blocs to lock themselves into a new constitutional framework⁷⁵. Whether or not his analysis is right, it is clear that the politics that underlie the UK constitution have changed fundamentally and forever. For the courts, this is the political reality within which they must work and within which they must exercise restraint.

⁷⁵ « Can the Union Survive the Election ? », UK Const L Blog, (9 May 2015), available through <http://ukconstitutionallaw.org>.

