



Devolution in Reverse?

Sam Fowles

Cornerstone Public Law Day 2024

- 1. The UNCRC Case**
- 2. The Referendum Case**
- 3. The Section 35 Case**
- 4. What next for devolution?**



Three Themes

**Empowering
statutes
become
constraining
statutes**

**Selective
application/
weight for soft
norms**

**Surface level
treatment of
parliamentary
sovereignty**



The UNCRC Case



Reference re. United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill [2021] UKSC 42

Background

- The UNCRC Bill incorporated the UNCRC into Scots law.
- 3 key provisions:
 - S. 19 - Acts of Parliament (within devolved competence) must, so far as possible, be read and given effect so as to be compatible with the UNCRC (based on s. 3 HRA 1998)
 - S. 20 – Power for courts to strike down laws which cannot be read compatibly (goes further than s. 4 HRA 1998)
 - S. 21 – Power to issue (effectively) a declaration of incompatibility in respect of laws which cannot be read compatibly.

Reference re. United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill [2021] UKSC 42

Key Issues

- S. 28(7) Scotland Act 1998:

This section [legislative competence of the Scottish Parliament] does not affect the power of the Parliament of the United Kingdom to make laws for Scotland.

- Extent of legislative competence: **Robinson v Secretary of State for Northern Ireland [2002] UKHL 32**

Devolution legislation should be "interpreted generously and purposively"

Reference re. United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill [2021] UKSC 42

Decision

- Retreat from Robinson: Devolution legislation must be interpreted “as the same way as any other statute... according to its ordinary words.”
 - Doctrine 1 - “unqualified power” to legislate.
 - Doctrine 2 – “qualification of sovereignty”
- = All three provisions lie outside the Scottish Parliament’s competence.

Reference re. United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill [2021] UKSC 42

Impacts

- Constrained competence for devolved legislatures.
- Nature of the “reserved powers” model altered.
- Different approach to “soft norms”



The Referendum Case



Reference re. Devolution issues under paragraph 34 sch. 6 to the Scotland Act 1998 [2022] UKSC 31

Background

- UK Gov wouldn't let Scotland have a referendum on independence, so Scot Gov proposed to hold a non-binding referendum instead.
- The union is a “reserved matter” (sch. 5 paras. 1(b) and (c))
- Test: Does it “relate to” a reserved matter – question of purpose and effect.

Reference re. Devolution issues under paragraph 34 sch. 6 to the Scotland Act 1998 [2022] UKSC 31

Decision

- “Relates to” means anything more than a “loose or consequential” association.
- The referendum would carry political weight – this is enough for it to “relate to” the reserved matter of the union.
- The right to self-determination doesn’t bite because it is limited to post-colonial contexts.

Reference re. Devolution issues under paragraph 34 sch. 6 to the Scotland Act 1998 [2022] UKSC 31

Impacts

- Effectively broadens the scope of “reserved” matters.
- Redefines self-determination and creates a self-determination “Catch-22”.
- Creates a new context for soft norms to carry weight.



The Section 35 Case



Scottish Ministers v Secretary of State for Scotland [2023] CSOH 29

Background

- The Gender Recognition Reform (Scotland) Bill would have made it easier for trans people to obtain a gender recognition certificate.
- It was one of the most consulted-upon and debated bills in the Scottish Parliament's history.
- The Secretary of State, for the first time, used his power under s. 35 of the Scotland Act 1998 to prevent Royal Assent.
- Reasons: (1) Negative impacts on single-sex clubs or associations, (2) different application of the PSED, (3) different comparators for equal pay claims.

Scottish Ministers v Secretary of State for Scotland [2023] CSOH 29

Power to intervene in certain cases.

(1) If a Bill contains provisions—

(a) which the Secretary of State has reasonable grounds to believe would be incompatible with any international obligations or the interests of defence or national security, or

(b) which make modifications of the law as it applies to reserved matters and which the Secretary of State has reasonable grounds to believe would have an adverse effect on the operation of the law as it applies to reserved matters,

he may make an order prohibiting the Presiding Officer from submitting the Bill for Royal Assent.

(2) The order must identify the Bill and the provisions in question and state the reasons for making the order.

...

Scottish Ministers v Secretary of State for Scotland [2023] CSOH 29

Issue 1: The Standard of Assessment

R (Evans) v Attorney General [2015] AC 1787

Freedom of Information Act 2000, s. 53(2)

A decision notice or enforcement notice to which this section applies shall cease to have effect if, not later than the twentieth working day following the effective date, the accountable person in relation to that authority gives the Commissioner a certificate signed by him stating that he has on reasonable grounds formed the opinion that, in respect of the request or requests concerned, there was no failure falling within subsection (1)(b).

- The words “reasonable grounds” impose “on any view... a higher hurdle than mere rationality would be” [§129];
- The court must be able to scrutinise the Attorney General’s reasons more intensively than the *Wednesbury* test permits [§128].
- Where the Attorney General uses the section 53(2) power to veto the decision of a tribunal that has undertaken the full judicial process, the courts will be slow to prefer the view of a member of the executive who has done no more than discussed the matter internally [§130].

Scottish Ministers v Secretary of State for Scotland [2023] CSOH 29

Issue 1: The Standard of Assessment

Lady Haldane's Decision

The principle of legality has no application in the present case where the question is not whether the executive is seeking to override the rule of law, or otherwise interfere with a reasoned decision of a court or other Tribunal. In other words, whether the executive is using a statutory power to interfere with a fundamental or constitutional right. Rather the question is whether a statutory power, enshrined in the 1998 Act, is engaged, and, if so, whether the Order pronounced thereunder has been promulgated lawfully. Section 35 does not, in and of itself, impact on the separation of powers or other fundamental constitutional principle. Rather it is itself part of the constitutional framework. The political context is an important one and the touchstone remains that of rationality. The level of intensity of review has to be viewed in that context and is as a consequence less than that employed where fundamental human rights are at stake, or where there is a challenge to the rule of law as was the case in Evans, albeit the subject matter of the present case, and its' context are weighty ones.

Scottish Ministers v Secretary of State for Scotland [2023] CSOH 29

Issue 1: The Standard of Assessment

Impact

- The right of those living under devolved parliaments to express their will through those parliaments is not a “fundamental or constitutional right”
- The appropriate test is *Wednesbury*
- Clash with *Miller II*?
- Clash with *Evans*?
- Distinction between “constitutional principle” and “part of the constitutional framework”?

Scottish Ministers v Secretary of State for Scotland [2023] CSOH 29

Issue 2: The Weight of MOU

However, as was ultimately not seriously contested between parties, the Memorandum of Understanding is a political agreement and compliance or otherwise therewith is not justiciable (R (Miller) v Secretary of State (SC(E&NI)) [2018]AC 61).

If parties breach one of the MOU = no consequence.

Three Themes

**Empowering
statutes
become
constraining
statutes**

**Selective
application/
weight for soft
norms**

**Surface level
treatment of
parliamentary
sovereignty**

Parliamentary Sovereignty

Let us remind ourselves of the foundations of our constitution. We live in a representative democracy. The House of Commons exists because the people have elected its members . . . The Government exists because it has the confidence of the House of Commons. It has no democratic legitimacy other than that.

- per Lady Hale, Miller v Prime Minister [2020] AC 373

The principle of parliamentary sovereignty which in the absence of higher authority, has been created by the common law is built upon the assumption that Parliament represents the people whom it exists to serve.

- per Lord Hope, Jackson v Attorney General [2005] UKHL 56



What next for devolution?





Manifesto time!



Conservatives

Devolution is where it should be – no change

Lib Dems

Towards a federal constitution

Manifesto time!

Labour

Brown Review

- Sewell convention on statutory basis
- Assembly of the Nations and Regions
- Further devolution (e.g. youth justice to Wales)
- Power to engage in (limited) international relations

Reality

- Council of Nations and Regions
- New MOU on Sewell
- "Consider"/"Collaborate" on youth justice and IR

Questions?

