

The United Kingdom Supreme Court and Devolution Issues: Towards Constitutional Review?

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In 2015, the United Kingdom will celebrate the 800th anniversary of Magna Carta, an inspirational text for constitutional lawyers throughout the world. Sometimes considered as the very first written constitution, the Great Charter of 1215 has gained a universal dimension. Its provisions regarding freedom from arbitrary arrest and detention as a prelude to the Habeas Corpus Act 1679 or the right of free men to be judged by their own peers paving the way to jury trial are among its most acclaimed provisions. The validity of the Great Charter today reflects the long mainly unbroken constitutional history of the country and the continuity of the common law. Yet the United Kingdom still lacks a codified constitution. Therefore, at first sight, it seems totally irrelevant, not to say absurd, to speak of constitutional review, understood as judging primary legislation against fundamental constitutional principles. This type of control is more commonly known as "a constitutionality control" in countries like France that do have a constitution set out in one single document endowed with the highest possible legal status at the apex of a hierarchy of legal norms requiring a special procedure to be amended different from the one that applies to ordinary laws.

One of the requirements of constitutional review which cannot be effective without clear standards of review is to have the highest possible criterion, generally a fully written constitution, serving as a final legal landmark against which any other kind of law is gauged. In the English common law itself, not all the sources are on the same footing, statute law always prevails over case law whenever disputes arise between the two, and all statutes are no longer equal as constitutional statutes are now being acknowledged but there is still no distinction between the constitution as the fundamental rule used as a legal standard and ordinary legislation passed by the legislature.

In the great majority of countries with a codified constitution, the United Kingdom being a well-known exception along with Israel and New Zealand, "all other law exists in the shadow of, and may be valid only to the extent that it is consistent with, the constitution" according to Dr Mark Elliott of the University of Cambridge in the evidence he gave to the Commons Political and Constitutional Reform Committee, adding that "the role of the judiciary is to determine whether other law is compatible with the constitution" (House of Commons Political and Constitutional Reform Committee, 2014). In his definition of constitutional review, which will be retained for the purpose of the current analysis, Dr Elliott shows that what is really at stake with constitutional review is how to protect constitutional arrangements and fundamental rights in the best possible way.

In the United Kingdom where there is no constitution as a sovereign text, parliamentary sovereignty, though seriously affected by the supremacy of European Union Law today, remains one of the two cornerstones of the British constitution. It could be a further obstacle to any form of constitutional control of primary legislation let alone the possibility of striking down laws voted by Westminster. As it is clearly stated in one of the first official documents devoted to the United Kingdom Supreme Court published by the then Department for Constitutional Affairs: "In our democracy, Parliament is supreme. There is no separate body of constitutional law which takes precedence over all other law, neither membership of the European Union nor devolution nor the Human Rights Act has changed this fundamental position" (Department of Constitutional Affairs, 2003). Even if this statement made in 2003 must be qualified in the 2014 legal context, British judges are not required to pass judgments on the constitutionality of government legislation but are merely expected to give a final interpretation of statutes trying to clarify the intention of Parliament and to protect the Rule of Law while respecting the will of Parliament. In the words of the former President of the United Kingdom Supreme Court, Lord Phillips: "drawing the right line between protecting the rights of the individual and respecting the supremacy of Parliament is, I believe, our greatest challenge" (Lord Phillips, 2010). Thus any suggestion of a constitutional review in the United Kingdom seems to be very remote and totally out of the remit of British courts. Their role is not to review primary legislation for its compatibility with existing constitutional arrangements but to apply the law.

Besides, apart from a constitution with the highest possible legal status, constitutional review requires a court in charge of checking whether norms are in agreement with the constitution. This is generally, but not systematically, a constitutional court, like the Constitutional Council in France. The United Kingdom obviously meets neither of the two prerequisites of constitutional review as it lacks both a constitution with a higher legal status as well as a constitutional court at the apex of its legal system. However, even in countries with a codified constitution, a

constitutional review of laws is not to be taken for granted. That was notably the view of the French legal scholar, Louis Favoreu, who recalled that “Until after the Second World War [...] constitutional justice, which challenges the hegemony of the legislative body, had no place in European Constitutional structures” (Favoreu, 1998). Thus, in France², which shares with the United Kingdom a long tradition of parliamentary sovereignty, such control was not only alien but also fiercely opposed. The law passed by parliament, being considered as “the expression of the infallible general will” as Jean-Jacques Rousseau famously described it in his most influential book entitled *Social Contract* (Rousseau, 1762), could not be subject to any form of control.

Yet, the introduction of the French Constitutional Council in 1958 in the constitution of the Fifth Republic was to pave the way for constitutional justice in France, though the original aim of the court was to protect the executive from any infringement of Parliament legislating beyond its remit. This was introduced as a reaction to the concentration or even confusion of power for the benefit of parliament, the so-called Assembly Regime of the previous republics. In fact, the Constitutional Council was to develop a form of constitutionality control that the constitution of 1958 had not endowed it with via its own case law in 1971 in its famous decision *Freedom of Association*. The review power of the French Constitutional Council was then significantly strengthened by a constitutional amendment in 1974 which extended the right to refer primary legislation to it to sixty members of either the National Assembly or the Senate or more recently with the so-called Preliminary Ruling of Constitutionality/Question Prioritaire de Constitutionnalité (QPR) under the new article 61(i) of the constitution following the July 2008 major re-drafting of the constitution of 1958. It is now possible for court-users themselves to refer a law to the Constitutional Council. What is more, already enacted legislation can now be subject to constitutional review as it is the case in the United States. Thus, through a series of major constitutional change, France has progressively moved from parliamentary sovereignty to constitutional sovereignty. If the law is still the expression of the general will it is now subordinate to the Constitution itself. The current paper will try to examine to what extent the United Kingdom is likely to experience the same evolution.

In the last seventeen years, the United Kingdom has experienced a series of unprecedented constitutional changes that would have a long lasting impact on the country's constitutional settlement. They included the devolution process introduced by the new-elected Labour Prime Minister Tony Blair - after the failed attempt of the Labour government of James Callaghan following unsuccessful referendums in Scotland and Wales in 1979³ - via three separate devolution statutes for Scotland, Wales and Northern Ireland in 1998. These followed pre-legislative referendums⁴ held in the three Celtic nations which aimed at securing popular approval and at enhancing the legitimacy of the whole process. The same year (1998)

also saw the incorporation of the European Convention on Fundamental Freedoms and Human Rights through the Human Rights Act strengthening the protection of Human Rights in the United Kingdom - allowing British people to refer directly to it before their own national courts.

A few years later, the British Government went even further in its endeavour to better comply with the European Convention, especially with one of its most important provisions, partly drafted by British lawyers, section 6(i) guaranteeing everyone the right to a fair trial through an independent judiciary, with the Constitutional Reform Act 2005. The latter introduced the most significant reform of the British judiciary since the nineteenth century, drastically reducing the functions of the Lord Chancellor to a role as a Cabinet Minister, heading what has become the Ministry of Justice⁵. His legal functions have been transferred to the Lord Chief Justice who presides over the courts in England and Wales. In addition, the Lord Chancellor no longer acts as the Speaker of the House of Lords, the Upper Chamber of the Westminster Parliament, as the House now elects the Lord Speaker from within its own ranks. The 2005 Act also introduced more transparency in the way British judges are recruited by setting up an independent commission, the Judicial Appointments Commission (JAC) in charge of the nomination process of the British judiciary. Finally, the Constitutional Reform Act 2005 for the first time ever provided for the creation of a United Kingdom Supreme Court acting as the highest - and final - court of appeal for the whole country with the major exception of Scottish criminal appeals. It was to replace the Appellate Committee of the House of Lords composed of twelve Lords of Appeal in Ordinary more commonly known as Law Lords as they were practicing judges and members of the Upper Chamber at the same time - in charge of that judicial role since 1876. It was to take over the jurisdiction of the Judicial Committee of the Privy Council, the Highest Court of Appeal for Commonwealth countries⁶, but only over devolution issues⁷. The Constitutional Reform Act (CRA) passed in 2005 started to be implemented in 2006 but it took longer to set up the United Kingdom Supreme Court (UKSC) as it was only officially inaugurated in 2009. Constitutional reform was then to be further developed by the Labour government of Gordon Brown (June 2007-May 2010) who was personally more involved and interested in constitutional issues than his predecessor⁸ and then by the Conservative-Liberal Democrat coalition government of David Cameron that was formed after the May 2010 General Election⁹.

Outside party politics, an independent research group at King's College London has worked on constitutional reform, and especially on a codifying process for the British constitution, in partnership with the Commons Select Committee on Political and Constitutional Reform, to better protect human rights notably through a form of constitutional review. It has tried to define more precisely the respective powers of the executive, the legislative and the judiciary and their

relationship following the major constitutional changes that have significantly altered the way the three branches of government operate. The outcome in July 2014 was a document entitled *A New Magna Carta*?

This paper will study the role of the new Supreme Court for the United Kingdom within the framework of the CRA 2005¹⁰ as regards devolution and more particularly devolution issues. It will focus on the Court's devolution jurisdiction trying to see whether this has led to the emergence of judicial review of constitutionality or at least something close to constitutional review. But first the wider constitutional context will be explored, in order to show that various forms of control have progressively developed to better protect the general public interest in a country where, in the words of the current President of the UKSC Lord Neuberger, "the absence of a formal constitution means that Parliament is supreme" (Lord Neuberger, 2013).

Judicial Review, Conventionality Review and an Independent Supreme Court: a favourable legal environment paving the way for Constitutional Review

In the United Kingdom under the traditional arrangements described by Professor Bogdanor as the "Old Constitution" (Bogdanor, 2009) there was no review of primary legislation by the courts and no specially designated constitutional court. The British constitution revolved very much around the doctrine of parliamentary sovereignty as originally defined by Dicey in the nineteenth century in his very English-centred vision of the country and its institutions. Dicey famously wrote that Parliament has "the right to make or unmake any law whatever, and further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of parliament" (Dicey, 1915). In his literal interpretation of parliamentary sovereignty, nothing, let alone a constitution in the French meaning of the word, stood above an ordinary statute passed by the Westminster Parliament and any form of control over Parliament was excluded. In the same way, the latter being sovereign, it was the only one entitled to repeal its own legislation. Since then Dicey's analysis has been very much challenged, though his work is still a major reference for British constitutional lawyers. Moreover, the United Kingdom being a democracy it was bound to have some kind of control to protect its citizens from the arbitrary power of the state. For as Lord Neuberger, the current President of the UKSC argued, and, long before him Montesquieu in the *Spirit of Laws* (1748), "the more power that a government has, the more likely it is that there will be abuses and excesses which result in injustice to citizens and the more important it is for the rule of law that such abuses and excesses can be brought before an impartial and

experienced judge who can deal with them openly, dispassionately and fairly" (Lord Neuberger, 2013). This is more important than ever in contemporary society where individuals are in growing need of protection from the infringement of their rights by a highly centralised and increasingly powerful executive though the regime is still officially parliamentary.

If judges in the three distinct legal systems of the country – England and Wales, Scotland and Northern Ireland – have traditionally been anxious to respect the will of parliament and parliamentary supremacy, trying to avoid any potential criticism of judicial activism, they have sometimes used their wide powers of statutory interpretation to protect the Rule of Law even if it meant departing from the initial intention of parliament and setting aside provisions contrary to the latter¹¹.

Judicial Review "as an independent review of lawfulness" (Street, 2013) and the Rule of Law as the traditional ultimate review standard

Though judges have traditionally showed much deference to the executive branch of government they have used judicial review over administrative action and secondary legislation as "a means of confining state power within its proper legal limits" (Laws, 2014). In the absence of a codified constitution, the so-called Rule of Law was used by British judges as the highest review standard against which the legality of all acts and decisions of the executive had to be tested to protect citizens from the power of the state. As the former Deputy President of the UKSC and Scottish judge, Lord Hope said in a statement that he made as a then Law Lord¹² : "the Rule of Law enforced by the courts is the ultimate controlling factor upon which our constitution is based"¹³. British judges have indeed traditionally performed a type of control more commonly known as judicial review – similar to what is called a control of legality in the French legal terminology. This type of control was – and still is – performed by ordinary courts over public bodies except Parliament. As John Laws explained: "every public body except the Queen in Parliament is subject to its jurisdiction" (Laws, 2014). This applies to both executive action and secondary legislation¹⁴ .

Judges check whether the content or substance but also the form or procedure of administrative decisions, acts of the executive and public bodies in general have been respectful of the law as determined by parliament. In other words they control via judicial review whether administrative authorities have exceeded their authority, have acted *ultra vires* – that is, have acted beyond their remit – or exercised a power without authority or even failed to carry out a statutory duty. Among the main standards of review that they apply, legal certainty, consistency

and proportionality are without doubt some of the most important. Lord Bingham, himself a former senior Law Lord in his much acclaimed book *The Rule of Law* released shortly before his death defined the specific requirements of the Rule of Law in the following way: “ministers and public officers at all levels must exercise the powers conferred on them in good faith, for the purpose for which the powers were conferred, without exceeding the limits if such powers and not unreasonably”. (Lord Bingham, 2010)

Though this type of control is not directed at parliament but in fact protects its will, it can have a significant legal effect, for if the courts rule that executive action is unlawful – therefore contrary to the rule of law – it will be quashed. As the current British Conservative/ Liberal Democrat Coalition Government acknowledged: “Judicial review is a critical check on the power of the State, providing an effective mechanism for challenging the decisions, acts or omissions of public bodies to ensure that they are lawful” .(Ministry of Justice, 2013) In fact, behind the apparent praise of judicial review, there is often strong criticism on the part of the government, because ministers consider it as an obstacle to their decision-making power or even a political tool used against the executive by unelected judges. Thus the government has published a series of proposals aiming at restricting judicial review and it has also tabled the Criminal Justice and Courts Bill 2014, introduced by the Secretary of State for Justice Chris Grayling, which includes provisions about judicial review that might make it harder for courts to scrutinize unlawful acts. It and could possibly be a first step towards the abolition of such an independent control over the executive. It is all the more worrying since, although judicial review is a powerful legal tool that British judges have had for a very long time, the Rule of Law has never been clearly defined and until fairly recently was not enshrined in a statute. The British lawyer, Amy Street, described it as a “creature of the common law”¹⁵ (Street, 2013). To better protect it, and thus to better protect the general public interest, it was incorporated in the same Act which regulates the UKSC, the Constitutional Reform Act 2005. Therefore the 2005 Act wrote into statute the Rule of Law stating in its section 1 that the Act does not fundamentally affect “the existing constitutional principle of the rule of law”. However, if the latter officially acknowledges the Rule of Law it still did not define it, leaving it once again to the interpretation of judges. Besides, nothing could technically prevent the next parliament from repealing the Constitutional Reform Act 2005 as Parliament is sovereign and thus not bound by its predecessor. So the need for a codified constitution entrenching the Rule of Law and judicial review in order to better protect civil liberties and human rights is more urgent than ever.

If judicial review is today “primarily directed at executive government, national and local” (Laws, 2014) as a means of controlling whether public bodies have acted within the powers conferred on them by parliament, the latter is itself no longer uncontrolled, contrary to what Dicey claimed in the nineteenth century. Indeed, Bills

tabled in the Westminster Parliament¹⁶ have to undergo a form of pre-enactment control which is performed not by courts or tribunals but by parliamentary select committees. This type of control comes from within parliament and is exercised by the select committees of both houses of parliament. It is worth noting that the scrutiny powers of the House of Commons select committees have been significantly increased following the recommendation of the Wright Report (Select Committee on Reform of the House of Commons, 2009).

At the national level, since 2000 the House of Lords Constitution Committee, the Commons Political and Constitutional Reform Committee and the Joint Parliamentary Committee on Human Rights have all acted as guardians of the British constitution exercising a form of pre-enactment constitutional review. Indeed, the remit of the House of Lords Constitution Committee, amended early in its existence in 2002, is to examine the constitutional implications of all public Bills coming before the House. As it is recalled in each of its reports “the Constitution Committee is appointed by the House of Lords in each session to examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution”¹⁷. Yet, Rodney Brazier, lamenting the absence of a permanent body fully independent of the government argued that “the Constitution Committee of the House of Lords has an apparently general remit allowing it to keep the whole of the British Constitution under review but peers are mostly part-time legislators with limited resources”. (Brazier, 2008). This point could perhaps be countered by reference to the somewhat greater legal or academic expertise to be found amongst peers compared with the necessarily more miscellaneous character of the membership of the Commons¹⁸. The Lord Chief Justice of England and Wales is invited once a year to give evidence to the House of Lords Select Committee on the Constitution and the current President of the UK Supreme Court as well as the Deputy-President Lady Hale in their judicial capacity went before the Committee in June 2014. As it is stated in the 2014 annual report of the UKSC “we have agreed with the constitutional committee of the House of Lords that the President and Deputy-President will make an annual appearance before the committee” (UKSC, 2014)

In addition, the Joint Parliamentary Committee on Human Rights “scrutinises all government and private Bills introduced into Parliament for their human rights implications and compatibility in order to alert both Houses of Parliament on Bills or provisions of Bills that represent serious interference with Human Rights” (UK Parliament, 2013) Though this form of control is still limited it plays however a very important role in improving the quality of the primary legislation of the Westminster Parliament and in securing its respect of the Rule of Law.

The emergence of a form of conventionality control with the development of international and European Law

Britain's membership of the European Union is at the origin of fundamental constitutional change in the United Kingdom. When at long last, after having faced twice the fierce opposition of President Charles De Gaulle in 1961 and 1967, the United Kingdom joined the European Economic Community on 1 January 1973, the British government of Edward Heath could not have foreseen the impact this European membership would have on the English common law. It seriously challenged the doctrine of parliamentary sovereignty as defined by Dicey in the nineteenth century by introducing into the English legal culture and in British courts the principle of the primacy of European Law – via the European Communities Act 1972 – thus establishing for the first time a form of hierarchy of norms with European Law at the apex having a higher status than laws passed by the Westminster Parliament.

It took the United Kingdom longer to incorporate the European Convention on Human Rights it had helped to draft and despite having been one of the first countries to ratify it in 1951. As previously mentioned, the constitutional reforms introduced under the government of Tony Blair included an essential piece of legislation, the Human Rights Act, passed in 1998 and implemented in 2000, which incorporated into UK law the great bulk of the European Convention providing for the first time a legislative source of basic rights across the United Kingdom. It meant that all laws passed in the United Kingdom had to comply with the European Convention on Human Rights (ECHR). As a consequence British judges' powers of interpretation and authority were significantly strengthened as they were given the right to declare an Act of the Westminster Parliament or some of its legal provisions incompatible with the European Convention via non-legally binding declarations of incompatibility. If judges were still unable to strike down primary legislation failing to comply with the European Convention – with the major exception of Scottish statutes¹⁹ – being themselves constrained by the sovereignty of parliament they could however prevent its application. It was a major step forward in a better protection of the Rule of Law. Judges were to become more assertive with the setting up of an independent Supreme Court for the whole of the United Kingdom that started to operate in 2009. Alan Paterson observed for his part that if “declarations of incompatibility by the final court are not that common [...] the Executive has usually responded with an adjustment to the offending legislation”. (Paterson, 2013) Far from being isolated the introduction of a new Supreme Court was part of the constitutional change initiated by the Labour government of Tony Blair soon after its landslide victory in May 1997. They were to alter significantly the UK's constitutional settlement and could presage the independence of Scotland in 2016.

The United Kingdom Supreme Court as a distinct constitutional entity

The eminent French lawyer and philosopher Montesquieu, himself an anglophile and admirer of British institutions, famously argued “there is no liberty if the power of judging is not separate from legislative and from executive power” (Cohler and Miller, 1989). The United Kingdom followed this precept and severed the ties between the Highest Court of Appeal of the country²⁰ and the Westminster Parliament. It had already done so over ties between the judiciary and the executive with the Act of Settlement 1701 – recently amended by the Succession to the Throne Act 2013. The setting up of the UKSC was part of the provisions of the Constitutional Reform Act 2005 (Part 3) that tried to separate the judiciary from the legislative in order to comply more fully with the requirement of section 6 (1) of the European Convention on Human Rights. The Constitutional Reform Act 2005 also aimed at bringing an end to the frequent risk of confusion from using the single term House of Lords to refer to both the Second Chamber of Parliament and the final Court of Appeal of the country. As the then Secretary of State for Constitutional Affairs and Lord Chancellor, Lord Falconer, declared: “We believe that the time has come to make a clear and transparent separation between the judiciary and the legislature. By creating a Supreme Court we will separate fully the final court of appeal from parliament” (Department for Constitutional Affairs, 2003).

Long before the creation of the “new” United Kingdom Supreme Court, the United Kingdom had what was called a “Supreme Court” but it was limited to the legal system of England and Wales and referred to its senior courts – that is the Court of Appeal and the High Court of Justice²¹. So unlike the old arrangements the new Supreme Court was intended to be a UK-wide court operating not only within the main legal system for England and Wales but also covering Scotland and Northern Ireland. Thus although it is often believed that the Lord Chief Justice of England and Wales²², currently Lord Thomas, is the President of the UKSC it is not the case since the new court falls outside his competence. Yet there was – and to a certain extent still is – a major exception to the UK-wide jurisdiction of the new Supreme Court regarding Scottish criminal appeals. The committee looking at the potential impact of the United Kingdom Supreme Court on the Scottish legal system chaired by Professor Neil Walker²³ of Edinburgh made it clear that: “The new system retains the existing arrangement of a split jurisdiction between London and Edinburgh, now with a single United Kingdom-wide apex court for both civil appellate and constitutional matters²⁴ but still not criminal appellate matters.” (Scottish Government, 2010). Thus, the High Court of Justiciary kept its jurisdiction as the court of last resort in all criminal matters in Scotland. Indeed, section 124 (2) of the Criminal Procedure (Scotland Act) 1995 which states that

“decisions of the (Scottish) High Court of Judiciary shall be final and conclusive and not subject to review by any court whatsoever” was upheld by the Constitutional Reform Act 2005 in its section 40 (3).

Setting up an independent supreme court was far from being a new idea. The need for such a court had been raised long before the Constitutional Reform Act 2005. Walter Bagehot in the mid-nineteenth century made the following recommendation: “The Supreme Court of the English people ought to be a great conspicuous tribunal, ought to rule all other courts, ought to have no competitor; ought to bring our law into unity, ought not to be hidden beneath the robes of a legislative assembly.” (Bagehot, 1964) If the new UKSC has indeed brought more unity to the common law in its final interpretation of national statutes it has done so while being anxious to comply with the ECHR and EU Law. As it is stated in the latest annual report of the UKSC “the Supreme Court is able to ask the Court of Justice of the EU to give preliminary rulings” notably on the interpretation of European treaties under article 267 of the Treaty on the Functioning of the EU (UKSC, 2014). In a way the European Court of Human Rights and the European Court of Justice could be seen as two foreign “competitors” in the words of Bagehot. On the other hand, if the UKSC must take into account the rulings of the European Court of Human Rights, it is not bound by them, and benefits from a certain flexibility of interpretation and therefore some autonomy.

Yet, the UKSC is itself subject to the sovereignty of the Westminster Parliament which means that its power to control parliament and the lawfulness of its statutes can only be fairly limited. Thus, although it has to check whether statutes are in agreement with the ECHR, its declarations of incompatibility are in no way binding. The Justices of the UKSC can refuse to apply statutes or legal provisions in primary legislation declared incompatible but they can in no way strike them down. If declarations of incompatibility do reflect the growing authority of the court, judges themselves are dependent on the good-will of the national legislature to change the flawed legislation and abide by the ECHR.

When the UKSC was set up, there was no will to make it a constitutional court or simply a supreme court as it is generally understood able to strike down primary legislation. As Dawn Oliver of University College London explained when giving evidence to the Commons Political and Constitutional Select Committee “most countries with written or codified constitutions do have supreme courts that have power to strike down legislation or to refuse to give effect to legislation that they consider to be unconstitutional” (Commons Political and Constitutional Committee, 2014). Thus, though the UKSC was not to be modelled on the federal Supreme Court, American Justices were consulted²⁵ in the process leading to the creation of the UK Supreme Court as their benefit from a long valuable legal expertise as Justices of a long-established Supreme Court²⁶. The US Federal

Supreme Court itself did not originally have a constitutional review power it is only through its own case law – the acclaimed judgment *Marbury v. Madison* 1803 – that it developed what became its most important power and what strengthened its constitutional position. Yet Alan Paterson noted: “the judicial contact with the US Supreme Court has been rather limited” adding that “no formal meeting took place between the two” from 2009 to 2013 (Paterson, 2013).

Unlike the American Federal Supreme Court, and in the continuity of the Appellate Committee of the House of Lords, the UKSC was mainly to be the highest court of appeal of the whole country²⁷ hearing civil cases from all parts of the UK, and criminal cases from England, Wales and Northern Ireland, acting as the final arbiter on cases that have already been heard, thus it can focus on points of law of general public importance like the French Court of Cassation. The UKSC was to be a general high court interpreting national statutes not a specialized constitutional court which means that it has a diversity of subject matter jurisdiction. Since 2009 the Supreme Court has heard a great variety of high-profile cases – since it tries to concentrate on “cases of the greatest importance” (UKSC, 2014) – that reflect the evolution of the British society and British people’s preoccupations such as the *Radmacher v. Granatino* case in 2010 about the nature of pre-nuptial agreements (where significantly the only woman, Justice Hale, expressed a dissenting opinion), the *R. v. the Commissioner of Police of the Metropolis* case in 2011 dealing with the highly divisive issue of the retention of fingerprints and DNA by the police and its potential breach of article 8 of the ECHR protecting the right to privacy. Other relevant legal landmarks were the *Assange v. Swedish Prosecution Authority* having to do with a European Arrest Warrant²⁸ issued by the Swedish judiciary in 2012, the *Smith v. the Ministry of Defence* case dealing with the bereaved of British soldiers who had died in Iraq in 2013, or more recently on 25 June 2014 *R (on the application of Nicklinson and another) v. Ministry of Justice* where the lawyers of Mr. Nicklinson who suffered from locked-in syndrome pleaded without success the incompatibility of the 1961 Suicide Act²⁹ assimilating assisted suicide to homicide with article 8 of the ECHR. The judgments of the UKSC on those topical issues have had important repercussions on ordinary citizens’ lives and have significantly contributed to the evolution of the UK law.

Granting the UKSC powers additional to those of the former Appellate Committee of the House of Lords had not been on the agenda except regarding devolution issues, that matters raising questions of constitutional importance about the exercise of devolved powers – regulated by the Scotland Act 1998, the Government of Wales Act 2006 and the Northern Ireland Act 1998 – which, until then, had been adjudicated by the Judicial Committee of the Privy Council. If the new UKSC inherited legal functions from both the Appellate Committee of the House of Lords and the Judicial Committee of the Privy Council the two highest courts of appeal – respectively for the UK and for the Commonwealth countries – were not

merged³⁰. The aim was simply for a single United Kingdom-wide court, the UKSC, to be in charge of all matters of a constitutional nature covering human rights and devolution issues.³¹ As the 2014 annual report of the UKSC clearly states: “in these and some other aspects it represents a constitutional court”. (UKSC, 2014)

In 2009, the Deputy President of the UKSC, Lord Hope, wondered whether “the physical independence of a new building would breed a greater independence of spirit”. (Lord Hope, 2009) In a way he himself provided an answer by describing his work in the UKSC as “a liberating experience”. (Paterson, 2013) It seems indeed that the creation of a separate UKSC has led to more assertive Justices whose authority had already been strengthened by the need to interpret national statutes and make sure they comply with EU Law and the ECHR. The devolution process itself has not only (slightly) increased their workload with devolution issues but has led them to develop a new form of control over the primary legislation of devolved legislatures which has some striking similarities with the type of constitutional review that can be found in France.

Devolution issues: a hybrid type of control between judicial review, conventionality review and constitutional review under a more prominent Supreme Court

In the words of Lord Hope, “the question as to whether Acts of the Scottish parliament and measures passed under devolved powers by the legislatures in Wales and Northern Ireland are amenable to judicial review, and if so on what grounds, is a matter of very great constitutional importance”³². But, first it is important to recall that, when devolution started to operate in 1999, priority was given to unofficial dispute resolution mechanisms and informal bilateral relations, an unwritten “concordat” between the central government and devolved institutions. These were in addition to multilateral ones between devolved administrations themselves such as non-legally binding agreements and a Memorandum of Understanding, to develop cooperation and communication between the different levels of governance. Bringing devolution issues to court was considered as a last resort when negotiations and compromises had failed.

Settling devolution issues out of court

Devolution developed initially fairly smoothly, with the major exception of Northern Ireland where it was part of a wider peace process, having been introduced in an economically and politically favourable context. The Labour Party was then in power holding a majority at the UK level under Tony Blair (from 1997

to 2007) then Gordon Brown (2007-2010) or being part of coalitions in Scotland and Wales³³. The Scottish Labour party was the leading party in Scotland until the 2007 Scottish parliamentary elections when it was defeated by the Scottish National Party (SNP)³⁴ of Alex Salmond and this was also true of Wales³⁵. In 2014, the Welsh nation was the only one that still had a Labour government under the premiership of Carwyn Jones, governing on its own after four years’ coalition with Plaid Cymru. Acknowledging a change towards more litigation in the political and legal devolution process, Alan Trench wrote: “devolved legislation is increasingly finding its way into the courts, so the question of how courts approach devolved laws is important in a way it was not in the first decade of devolution”. (Trench, 2011) In fact, devolution litigation is about whether devolved governments and legislatures have acted within the powers that have been granted under the 1998 - and 2006 - devolution Acts of Parliament.

One has to bear in mind that devolution was not about transferring sovereignty or even sharing sovereignty but rather about delegating limited administrative, executive and/or legislative powers under control, within a legal framework determined beforehand under the three distinct 1998 devolution Acts. The devolution process progressively led to a fairly complex pattern of multi-level legislative powers subject to legal obligations under domestic and EU Law where there is still one single national sovereign parliament, the Westminster Parliament, able to legislate for the whole country including sometimes in devolved areas. The three devolved legislatures – the Scottish Parliament, the Welsh National Assembly and the Assembly for Northern Ireland – though democratically elected are still subordinate bodies subject to the parliamentary sovereignty of the Westminster Parliament. Alan Trench, a strong advocate of devolution, for his part goes as far as describing them as “creatures of Westminster”. (Trench, 2011)

The question of the existence of a form of constitutional review when dealing with devolution issues seems more relevant for Scotland rather than Wales as the former has experienced a more advanced form of devolution since 1999³⁶. Besides, apart from the need to take decisions closer to Scottish people and better take into account their own needs, devolution had also been introduced in Scotland for more party-political reasons. Indeed, the objective was to stop Scottish nationalism from rising further and avoid the threat of independence by meeting some of Scottish nationalists’ key claims starting with representation or the need for a body representing the Scottish nation. A Scottish parliament – more commonly known as Holyrood – was officially inaugurated by the British monarch in 1999 but Scotland has kept some 59 MPs in the Westminster Parliament legislate and vote on matters involving the whole of the UK including English matters. This remains a major source of controversy better known as the “English or West Lothian Question” since this Scottish representation in Westminster is more and more resented in England, especially in a period of hung parliaments.

At first sight, the Scottish Parliament was granted a fairly wide general primary legislative power with everything devolved to Holyrood unless specifically reserved³⁷ and thus a substantial legislative autonomy. It can legislate on all matters except those reserved to the Westminster parliament which are in fact state powers, such as constitutional matters including the conduct of referendums³⁸. The Scottish parliament can legislate but only for Scotland under section 29 (2) (a) of the Scotland Act 1998. Under this Act, the Scottish parliament must not legislate in the field of reserved powers and if it does so its legislation – or some of their provisions – will be nullified and thus will produce no legal effect. So it is only allowed to legislate within its own devolved legislative competence within the Scottish territory and only for the Scottish people. It is possible to challenge an Act of the Scottish parliament as ultra vires, since the Scottish parliament must not legislate for any territory outside Scotland.

Moreover, under the so-called Sewel Convention the Westminster Parliament can legislate in a Scottish devolved matter but only in exceptional circumstances and with the official approval of the Scottish Parliament which is supposed to be a legal safeguard to protect the powers of Holyrood. Yet, as the controversy over Sewel motions shows, drawing the line between reserved and non-reserved matters is not always clear and this is when the UKSC has to be referred to in order to determine whether an issue falls into the competence of the Scottish parliament or not³⁹. Section 33 (1) of the Scotland Act 1998 in that matter is very clear stating that 40 : “The Advocate General, the Lord Advocate or the Attorney General may refer the question of whether a Bill or any provision of a Bill would be within the legislative competence of the Parliament to the Supreme Court for decision”.

Besides, the Scottish parliament cannot modify certain Acts of the Westminster Parliament including the European Communities Act 1972 and the Human Rights Act 1998. It is also prohibited from legislating in any way that is incompatible with any of the European Convention on Human Rights provisions or with Community Law. In fact the Scotland Act 1998 which implemented the ECHR in Scotland went very far since it enabled the Judicial Committee of the Privy Council – and now the UKSC – to strike down Holyrood statutes once declared incompatible with the ECHR. It is the closest possible form to constitutional review even if the Scottish parliament is not a sovereign parliament but a “subordinate”⁴¹ sub-state legislature (Bogdanor, 1979). As Alan Paterson explained: “the courts can strike down statutes of the Scottish Parliament which they deem to be in breach of the ECHR or because they are thought to have transgressed into a reserved area”. (Paterson, 2013)

The Scottish parliament having a fairly wide primary legislative power, legal official mechanisms involving first the Judicial Committee of the Privy Council then the UKSC were introduced at an early stage to regulate its legislative competence and avoid potential abuses of its powers. Yet, it is interesting to note that no Scottish

parliament bills have been referred to the UKSC under section 33(1) prior to being enacted, illustrating the careful drafting of Bills to avoid a fairly long complex scrutiny process delaying the final adoption of Scottish Bills. Indeed, once a Bill has been passed by the Scottish parliament, there is a four week holding period during which the UK or the Scottish Law Officers may refer the question of whether it is within the legislative competence of the Scottish parliament to the Supreme Court – the same time limit applies to the Bills of the Welsh National Assembly.⁴²

Wales, having been granted a more limited type of devolution, it did not include any transfer of primary legislative power to a Welsh legislature but mainly administrative and executive competences and at best secondary legislation. The Welsh National Assembly was originally a body corporate with no clear separation between the executive and the legislative. It neither had any primary legislative power nor potential taxation powers unlike the Scottish parliament. Under the original Government of Wales Act 1998, the National Assembly exercised its powers by passing subordinate legislation made under an Act of the Westminster Parliament which meant that the British legislature continued to legislate for Wales on a case by case basis. The Government of Wales Act 2006 introduced a clearer separation of power following the recommendations of the Richard Commission on the powers and electoral arrangements of the National Assembly for Wales – by creating a separate executive drawn from the Assembly, termed the Welsh Assembly Government⁴³. It also provided for the incremental expansion of the Assembly’s legislative power through Legislative Competence Orders (LCOs) also called Orders in Council a type of secondary legislation which transferred specific powers from the Westminster Parliament to the Assembly.

The real turning point was the March 2011 referendum in Wales – following the Jones-Parry report – which asked Welsh people whether they wanted the National Assembly to have primary legislative power⁴⁴. Their positive answer (63.5%) led to the full implementation of the 2006 Government of Wales Act after the Assembly elections in May 2011. Orders in Council under Part 3 of the GOWA 2006 ceased to have effect, and the Assembly was able to pass legislation known as Acts though only within its devolved fields. As stated in the Assembly of Wales guide to the legislative process: ‘The National Assembly for Wales is the democratically elected body that represents the interests of Wales and its people, makes laws for Wales and holds the Welsh Government to account’. Thus, the National Assembly has gained significant primary legislative power and become more of a legislature developing its own body of law. Hence the proposal to call it a parliament. Yet, the Assembly still does not have a general legislative competence like the Scottish Parliament, for the devolution process in Wales is based on a conferred powers model which means that the Assembly can only legislate in twenty devolved areas. Growing Welsh legislation also led to more referrals of Welsh Bills to the UK Supreme Court. Significantly the very first Bill enacted by the National Assembly for Wales under its new primary legislative power, the Local Government By-laws (Wales) Bill 2012,

was referred to the UKSC by the Attorney General for England and Wales under section 112 of the Government of Wales Act 2006 to check whether sections 6 and 9 of the Bill under consideration were within the (new) legislative competence of the National Assembly for Wales. It was a success for the Welsh Legislature as the UKSC unanimously declared that it had the legislative competence to enact sections 6 and 9 of the Bill. (UKSC 43, 2014)

From arbitration to litigation: The devolution jurisdiction of the UKSC

As it is clearly stated in the second Silk Report “The only formal process for resolving any disputes that may arise between the United Kingdom and the devolved administrations is the provision in the devolution Acts for issues about legislative competence to be decided by the United Kingdom Supreme court”. (Silk Report, 2014) More precisely, under practice direction 10 - updated in April 2013 - the devolution jurisdiction of the UKSC covers, on the one hand, the power “to hear and determine questions referred to as devolution issues” under respectively and for our subject matter the Scotland Act 1998 and the Government of Wales Act 2006 (section 149)⁴⁵. It does so “whether or not the issue arises in proceedings in England and Wales, Scotland and Northern Ireland. Thus, under the sane practice direction, devolution issues concern “whether the devolved executive and legislative authorities in Scotland, Wales - and Northern Ireland - have acted or proposed to act within their powers” or “have failed to comply with any other duty imposed on them” notably with their obligations under EU Law and the ECHR. Devolution cases cover either civil or criminal cases relating to whether legislation passed by the Scottish Parliament or the Welsh Assembly and acts of Scottish or Welsh ministers are outside their competence. It is notable that a devolution issue procedure can be initiated outside legal proceedings, whether or not the issue is subject to litigation in England and Wales, Scotland and Northern Ireland, unlike the French Priority Question of Constitutionality (QPC). Besides, the UKSC cannot take the initiative. It has to be referred either by a “relevant officer” who can be in Scotland the Lord Advocate or the Advocate General, and in Wales the Attorney-General or Counsel General. Thus, ordinary citizens are not the ones who will refer a case to the UKSC. In France by contrast a significant constitutional change was introduced in 2008 to enable ordinary citizens as court-users to refer to the French Constitutional Council in a litigation process when their fundamental rights have been allegedly violated by an existing law under the new article 61(1) of the French Constitution. As is the case with the decisions of the French Constitutional Council, the judgments of the UKSC in devolution matters - which when it adjudicates on devolution issues sits as the court of the whole United Kingdom⁴⁶ - are binding in all three jurisdictions of England and Wales, Scotland and Northern Ireland.

The devolution jurisdiction of the UKSC - as was seen previously regarding Scotland - also concerns the scrutiny of the Bills of the devolved legislatures and can apply

to part of or the whole Bill under the same Practice 10 devoted to “referrals of Bills”. Thus the second component of the devolution jurisdiction of the Supreme Court consists in scrutinising Bills of the Scottish Parliament⁴⁷ - under section 33 of the Scotland Act 1998 - and Bills of the National Assembly of Wales - under section 112 of the Government of Wales Act 2006⁴⁸. The validity of the legislation of the Scottish parliament and now the Welsh Assembly can be raised either post or pre-enactment (Reed, 1998). If the Supreme Court rules that the Act or part of the Act is ultra vires - outside the legislative remit of the devolved legislature - it will not necessarily and automatically be struck down. But the Supreme Court might decide temporarily or even permanently to suspend the legal effect of the unlawful Act or provision. As it is stated in practice 10, the UKSC “may make an order removing or limiting any retrospective effect of that decision or suspending its effect for a period to allow the defect to be corrected”. It thus gives the devolved legislatures to abide by the law. A parallel could be drawn to a certain extent with the declarations of incompatibility British judges make when an Act of the national Parliament or some of its provisions are not in agreement with the ECHR - they invite Parliament to correct the flawed text.

So Acts of the devolved legislatures are reviewed by the UKSC to see whether they comply with the devolution statutes, the Scotland Act 1998 and the Government of Wales Act 2006 passed by the Westminster Parliament. They are not considered themselves as ordinary statutes as they are not subject to the doctrine of implied repeal but fall under the fairly new category of “constitutional statutes” and are therefore part of the written sources of the British non-codified constitution. Besides, the Acts of the sub-state parliament or assemblies are also tested for their compatibility with European treaties and conventions which prevail over domestic legislation. In doing so the UKSC already performs a form of constitutional review as the European Convention can play that role at the national level.

Finally, a way of avoiding going before the UKSC - and thus any form of litigation altogether - as well as having to deprive an Act of a devolved legislature of its legal effect once enacted is to use Orders in Council. This has been done regarding the conduct of the 2014 referendum on the independence of Scotland. Issues relating to the constitution including the conduct of referendums legally fall under the reserved powers of the Westminster Parliament - and outside the competence of the Scottish parliament. Thus an agreement was reached between the British and the Scottish governments, then upheld by their respective parliaments, to allow Holyrood exceptionally and temporarily to be in charge of the conduct of the forthcoming referendum on the independence of Scotland provided it was supervised by the national Electoral Commission. The latter like the French Constitutional Council has to check whether elections and referendums are held in a lawful way. Alan Trench writing in Agenda in the journal of the Institute of Welsh Affairs noted that as many as “half of the Acts of the Scottish parliament have required orders under

the Scotland Act 1998". (Trench, 2011) Yet, the best way of avoiding having to refer a devolution issue to the UKSC is to develop information and co-operation between the decision-making bodies at the national and sub-state levels. Alan Paterson, for his part, advocates intergovernmental dialogue whenever possible to address legal matters and adjust the law between the national government and devolved bodies.

The more assertive Scottish and Welsh legal identities challenging the UKSC in its devolution jurisdiction: a devolution process "out of control"

The emergence of a Welsh legal identity – with a body of Welsh Law

In Wales, with the rapid progress of devolution in the last fifteen years or so and the emergence of a form of legal devolution following the primary legislative power granted to the Welsh Assembly, claims have been made for a Welsh separate legal jurisdiction. It would mean disentangling Welsh Law and courts from the English legal system where they have been enmeshed since the abolition of the Welsh Court of Great Session in 1830. On the same lines, Winston Roddick, QC, former Counsel General for Wales, argued that "devolving justice to an Assembly or Parliament enjoying legislative competence makes great constitutional sense". (Roddick, 2010) In the same way, the Second Silk Report⁴⁹ released in 2014 pointed out as an anomaly the fact that Wales has now a legislature but does not have its own court system. Alan Trench himself is anxious about a potentially too invasive type of scrutiny of the Acts of the Welsh Assembly by the UKSC arguing that "the idea that every clause of every Welsh Bill should be subject to detailed scrutiny, to ensure that its directly relates to the powers set out in Schedule 7 of the 2006 Act, could make legislating very difficult indeed" (Trench, 2011). The primary legislative power of the Assembly is already fairly limited under the conferred powers model which is itself more and more criticised in Wales. Proposals have been made, notably in the second report of the Silk Commission to replace it by a Scottish type of reserved powers model. In the same line, during the second reading of the Wales Bill 2013-2014 in the House of Lords on 22 July 2014, Lord Howarth of Newport (Labour) launched a fierce attack on the conferred powers model for Wales arguing that it "leads to disputes in the courts and creates profound uncertainty" (Hansard, 2014) There are also calls in Wales for developing arbitration instead of litigation before the UKSC. Thus Part 2 of the Report of the "Commission on Devolution in Wales", published in March 2014, advocates "a process of arbitration" between the British and Welsh governments by a person who has held high judicial office prior to a Bill being referred to the Supreme Court"⁵⁰. This can be seen as a reaction against the growing number of Welsh Bills referred to the Supreme Court, especially under the former Secretary of State for Wales David Jones – succeeded by Stephen Crabb after the July 2014 Cabinet reshuffle of David Cameron.⁵¹ Finally, a growing sense of

a Welsh specific legal identity can also be seen in recommendation 29 of the second Silk Report which reads as follows: "there should be at least one judge on the UKSC with particular knowledge and understanding of the distinct requirements of Wales". (Silk, 2014) This would be another way of trying to line up the Welsh devolution settlement with the Scottish one as, by convention, there are two Scottish judges in the UKSC. The President of the Supreme Court has reacted fairly positively to the recommendation of the Silk Commission over the composition of the Supreme Court saying that "on any appeal involving Welsh devolution issues, the Supreme Court will, if possible, include a judge who has specifically Welsh experience and knowledge". But he is much more sceptical about the need for a Welsh judiciary arguing that "at the moment, at any rate, there is, in my view, an insufficient body of Welsh law" (Lord Neuberger, 2013), not a judgment many in Wales would accept.

The introduction of "compatibility issues" separate from "devolution issues" as a step towards a Scottish independent Supreme Court

Scotland has once again taken the lead in trying to break away from the devolution jurisdiction of the Supreme Court or at least part of it. It had long succeeded in maintaining its legal independence under the Act of Union of 1707. Scotland managed to keep the Scottish Law, a hybrid type of law - partly based on the civil law and partly based on the common law - its own legal system and separate courts especially in the field of criminal law as well as its own judiciary. The specificity of the Scottish legal system is used as an additional argument in favour of independence by the Scottish SNP Government of Alex Salmond. Indeed, the White Paper released by the Scottish Government on 26 November 2016 entitled "Scotland's Future: Your Guide to an independent Scotland states that: "The existing independence of Scotland's legal and justice systems ensures a strong starting point for our independent country". (Scottish Government, 2013)

Scotland has successfully negotiated the recognition of a new division within the devolution jurisdiction of the Supreme Court via the introduction of the so-called "compatibility issues". Under the amended Direction 10 mentioned earlier on and in the wake of the implementation of the Scotland Act 2012 (Part 4) - following the recommendations of the McCluskey Commission which released its report on 27 June 2011 - the UKSC can now only hear criminal appeals from Scotland raising Human Rights issues. It means that only questions relating to European Convention rights and EU Law arising in Scottish criminal cases can still be considered as devolution issues whereas "all other aspects of Scottish criminal law and procedure are determined by the High Court of Justiciary"⁵². Though it means limiting the devolution jurisdiction of the UKSC over Scottish criminal cases⁵³,

it is worth remembering that in the early days of the devolution process most devolution issues stemming from Scotland had to do with Human Rights issues⁵⁴. More generally speaking, only 6 per cent of cases heard by the UKSC deal with criminal matters against 14 per cent regarding Human Rights. (Paterson, 2013)

Finally, in Scotland the UK Supreme Court has often been criticised for opening up Scottish criminal law and procedure to external scrutiny by non-Scots. The Scottish Nationalist government, for its part, goes even further than the proposals of the McCluskey Report aiming at limiting the devolution jurisdiction of the UKSC as, under the 2013 White Paper on Scotland's Future. Under the 2014 Scottish Independence Bill "a consultation on an interim constitution for Scotland" the UK Supreme Court would no longer deal with any Scottish cases – and thus would lose its devolution jurisdiction over Scotland altogether as the objective is to give an independent Scotland its own independent Supreme Court. Chapter 7 of the 2013 White Paper on the independence of Scotland reads: "the Inner House of the Court of Session and the High Court of Justiciary sitting as the Court of Criminal Appeal will collectively be Scotland's Supreme Court" hearing appeals from other Scottish courts. (Scottish Government, 2013) Yet, as the Scottish First Minister has expressed his wish to continue applying the ECHR and would also like an independent Scotland to join the European Union as a State, a new Scottish Supreme Court would still have to comply with the final judgments of non-Scottish or foreign courts: the European Court of Justice and the European Court of Human Rights. For, as Gordon Brown argued, in his latest book, "in our globalised world interdependence inside countries and between them prevails over independence". (Brown, 2014)

Conclusion: Towards a codified constitution and declarations of unconstitutionality

If, as the late Lord Bingham argued, the UKSC continues to lack the power most characteristic of Supreme Courts around the world, that of nullifying legislation as unconstitutional" (Bloom-Cooper, Dickson and Drewry, 2009) it could one day have the power to declare Bills unconstitutional (Commons Political and Constitutional Reform Committee, 2014) under a codified Constitution for the United Kingdom. The process is well under way. It would mainly formalize the significant development of the statutory sources of the common law and would also have the merit of entrenching the devolution settlement in Scotland, Wales and Northern Ireland.

Judicial Review is under threat, notably in the 2014 Criminal Justice and Courts Bill tabled in the Westminster Parliament before the summer recess. There is the

potential removal of a conventionality type of control with the proposal of the Coalition Government to repeal the Human Rights Act of 1998 and replace it by a more restrictive British Bill of Rights. There is even a potential withdrawal of the UK from the European Convention on Human Rights and from the European Union in the wake of a 2017 In/Out Referendum on Europe. A British codified constitution including Magna Carta in its preamble is therefore more urgent than ever to protect Human Rights in the United Kingdom, such as it will be after the Scottish voters have spoken in their referendum on the independence of Scotland.

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Abstract in English:

The United Kingdom Supreme Court and Devolution Issues: Towards Constitutional Review?

In 2015, the United Kingdom will celebrate the 800th anniversary of Magna Carta, an emblematic text of a constitutional history British people are proud of. Yet, the country still lacks a separate body of constitutional law and a codified constitution taking precedence over all other law. Therefore, at first sight, it seems irrelevant to speak of constitutional review - judging primary legislation against fundamental constitutional principles - in a country where Parliament is sovereign, and where, until recently, there was no independent supreme court.

However, the development of judicial review, along with the emergence of a conventionality control via the incorporation of EU Law by the European Communities Act of 1972, then that of the European Convention on Human Rights by the Human Rights Act 1998 allowing British judges to declare Acts of Parliament incompatible, have made constitutional review more likely. In 2009 the UK inaugurated its new Supreme Court distinct from parliament, a “liberating experience” for Justices. In particular its jurisdiction over devolution issues has enabled it to hear questions of constitutional importance about the exercise of devolved powers, challenging the Acts of the Scottish, Northern Irish and now Welsh devolved legislatures as ultra vires, depriving them of their legal effect temporarily or permanently if declared unlawful or incompatible with EU Law and the ECHR. As Lady Hale, observed “UK constitutionalism is on the march”. It could indeed lead to a codified constitution including a Supreme Court with the power to declare Bills unconstitutional to protect the Rule of Law.

Mots clés :

Cour suprême du Royaume-Uni – dévolution – souveraineté parlementaire – contrôle de légalité – contrôle de souveraineté

Résumé en français :

Cour suprême (Royaume-Uni) et contentieux de la dévolution : éclosion d’un contrôle de constitutionnalité ?

Depuis des temps immémoriaux, le droit anglais a exalté l’infailibilité législative excluant tout contrôle de constitutionnalité des actes parlementaires. De surcroît, la Constitution britannique n’étant pas formalisée dans un texte écrit à valeur supérieure, ne semblait guère se prêter à un tel contrôle. Jusqu’ici pouvait-on, au mieux, évoquer un contrôle de légalité vis-à-vis des actes normatifs de l’exécutif.

Or, le renouveau sans précédent du droit constitutionnel par l’instauration d’une haute juridiction indépendante du Parlement mais aussi, d’un processus de dévolution, rend possible une forme singulière de contrôle de constitutionnalité. La Chambre des Lords, était, jusqu’en 2009, la juridiction suprême, dans un système où fonctions législative et judiciaire n’étaient pas clairement dissociées. Depuis, sa compétence comme plus haute cour d’appel a été transférée à une Cour suprême indépendante. Cette dernière, bien que non constitutionnelle, statue sur les violations des droits par les législatifs et les exécutifs locaux. La loi de Westminster qui établit les statuts d’autonomie pose que les assemblées infra-étatiques doivent respecter ces derniers, le droit européen et la Convention européenne des Droits de l’Homme. La Cour suprême est ainsi amenée à assurer vis-à-vis des lois des assemblées infra-étatiques un contrôle que ses modalités de mise en œuvre, sa finalité, et ses effets apparentent à un contrôle de constitutionnalité. Plus que jamais peut-on se demander si le Royaume-Uni n’est pas en passe de se doter d’une Constitution écrite assortie d’un contrôle de constitutionnalité.

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