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Does Westminster need Holyrood's consent to repeal the Human Rights Act 1998?

Under the Sewel convention, does Westminster need Holyrood's consent to repeal the Human Rights Act 1998? Although superficially technical-sounding, this constitutional question is shaping up to be one of the most controversial to face the Westminster parliament elected on the 7th of May. The Conservative Party's 2015 manifesto was categorical: "the next Conservative Government will scrap the Human Rights Act, and introduce a British Bill of Rights." "This," the Tories argued, "will break the formal link between British courts and the European Court of Human Rights, and make our own Supreme Court the ultimate arbiter of human rights matters in the UK." Strikingly absent from this statement of political intent was any reflection on the implications of devolution. Such elisions may work perfectly well in a political campaign. Having been re-elected, however, the new Lord Chancellor, Michael Gove, must now come down to brass tacks and establish how this ambition can be realised politically, within the law and the constitution. On the evidence that has emerged since May's poll, the new Conservative majority approaches the devolved dimensions of its human rights plans curiously unprepared.

The 2012 report of the coalition government's incoherent Bill of Rights Commission, which consisted of a near balance of HRA retentionists and abolitionists, placed considerable emphasis on the importance and challenges of devolution for UK human rights reform. However, this insight has been largely missing from the UK government's scrutiny of the issues since. The Conservative Party's *Protecting Human Rights in the UK* (2014) paper mentions devolution only in passing, observing that Chris Grayling wished to "work with the devolved administrations and legislatures as necessary to make sure there is an effective new settlement

across the UK.” Beyond this vague aspiration towards cooperation, during his tenure the outgoing Lord Chancellor was silent on how the division of powers *within* the United Kingdom might help or hinder his aspiration to “axe Labour’s Human Rights Act.” More recent remarks by UK ministers suggest continuing uncertainty and confusion on the law, but also on the constitutional conventions which lubricate relations between Westminster and the devolved parliaments. These misconceptions are not limited to ministers of the Crown. In October 2014, the *Scotsman* published an article headlined “Scotland exempt from Tories’ Human Rights Act axe,” which quoted a Scotland Office spokesman, who claimed “human rights legislation is devolved to the Scottish Parliament because it was ‘built into the 1998 Scotland Act [and] cannot be removed [by Westminster].”” As this article demonstrates, this comment, and a number of other, more recent comments, show a fundamental misunderstanding of the true nature of the devolution settlement, the division of responsibility for human rights between Westminster and Holyrood, and the significance of the constitutional conventions which have evolved since 1998.

The Scotland Act, the Human Rights Act and the Sewel convention: untangling the knots

The legal situation is complex. Under the Scotland, Wales and Northern Ireland Acts, the legislative and executive competence of Holyrood, Cardiff Bay and Stormont are limited by the European Convention on Human Rights. In their actions and their legislation, Scottish, Welsh and Northern Irish ministers and parliamentarians must respect the Convention. If they do not, the courts are empowered to intervene and to reduce the offending decisions or laws in judicial review. Acts of the Scottish Parliament are also invalid, under the Scotland Act, if they “relate to reserved matters” listed in Schedule 5 or if they purport to modify enactments protected by Schedule 4. Similar restrictions can be found in the Welsh and Northern Irish devolution legislation. These are distinct from the provisions of the Human Rights Act, section 6 of which extends the application of Convention rights far more widely, to every “public

authority” in the land save for the Houses of Parliament themselves. Under section 126(1) of the Scotland Act, the concept of “Convention rights” is given the same meaning as in section 1 of the Human Rights Act 1998. However, a careful reading of the Scottish devolution statute suggests two important conclusions which have not been widely or well understood in the public debate on HRA repeal in the Scottish and wider UK media. Firstly, the Human Rights Act is not “written into” the Scotland Act in the way many commentators and politicians have suggested; and secondly, human rights are not a reserved matter under the Scotland Act.

The only reference to human rights to be found in Schedule 5 of the Act, which lists powers reserved to Westminster, emphasises that “observing and implementing international obligations,” including “obligations under the Human Rights Convention,” are not reserved matters. The concept of human rights merit no second reference in the text, and they do not fall under the “constitutional” reservations found in the Schedule’s first paragraph. The ineluctable conclusion follows: human rights are not a matter reserved to Westminster. They fall within Holyrood’s legislative competence. If, for example, the parliament came under pressure to subject Scottish public authorities to additional human rights strictures beyond the Convention rights, this would be perfectly in order. Reflecting this division of responsibilities, in 2006 Holyrood exercised its legislative responsibility for human rights to pass the Scottish Commission on Human Rights Act, establishing the functions and responsibilities of Scotland’s national human rights institution. However, Holyrood’s powers in the field are not limitless. Paragraph 1(2)(f) of Schedule 4 to the Scotland Act, which lists statutes protected from modification or repeal by Holyrood, provides that the parliament cannot disapply or amend the Human Rights Act, which currently requires every Scottish public authority – every state school, local council, university, court, police officer, public hospital, prison – to uphold Convention rights.

The final piece in this complex constitutional jigsaw puzzle is the Sewel convention. Based on commitments made by Lord Sewel in the House of Lords during the passage of the devolution legislation in 1998, the convention addresses the tension between devolution of plenary legislative power to devolved legislatures on one hand, and Westminster's continuing sovereignty on the other. As section 28(7) of the Scotland Act itself makes clear, devolution "does not affect the power of the Parliament of the United Kingdom to make laws for Scotland" – even concerning devolved matters. However, Sewel articulated the principle – and now, the constitutional convention – that Westminster will not legislate concerning devolved matters without first securing the assent of the devolved legislature.

This procedure has been employed on a number of occasions since the Scottish Parliament first met on the 12th of May 1999. The Labour-Liberal Democrat administration invited the Blair government to introduce the Civil Partnership Act 2004, despite the fact that family law falls clearly within Holyrood's responsibilities. In 2011, the parliament declined to give consent to devolved aspects of the Welfare Reform Bill, and the offending provisions were limited to England and Wales only. Section 2 of the new Scotland Bill seeks to "recognise" the Sewel convention in law, providing "that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament." The concept of "devolved matters" has not been used before in the Scotland Acts since 1998, which have hitherto emphasised devolved *legislative competence* being limited by reserved *matters*. Nor has the concept been defined in the draft legislation, at the time of writing. More significantly, this rendering of the convention also fails to reflect the emerging understanding of the scope of the convention in constitutional practice. In the years since the establishment of the Scottish Parliament, the convention has been extended. It has been accepted that the Sewel convention applies not only where the proposed legislation relates to matters which are not reserved, but also where the provisions of Westminster Bill will alter the legislative

competence of the devolved parliament or the executive competence of Scottish ministers. This understanding is reflected in the Scottish Parliament's *Standing Orders*, Chapter 9B of which envisages that the legislative consent motion procedures apply to any:

“Bill under consideration in the UK Parliament which makes provision (“relevant provision”) applying to Scotland for any purpose within the legislative competence of the Parliament, or which alters that legislative competence or the executive competence of the Scottish Ministers.”

Thus, for example, Holyrood was invited to give its assent before Westminster passed the Scotland Act 2012 which, amongst other things, extended the Scottish Parliament's legislative competence over income tax, airgun regulation, and re-reserved Antarctica. This process is now being pursued with the Scotland Bill currently before the UK parliament. Reflecting the conventional expectations, MSPs can be expected to indicate their approval before the latest iteration of devolution is enacted.

Is consent needed for repeal? The critical arguments

Pulling together these disparate threads returns us to my opening question: under the Sewel convention, does Westminster need Holyrood's consent to repeal the Human Rights Act 1998? Would the repeal involve Westminster in exercising powers devolved to the Scottish Parliament, or alter its legislative competence or the executive competence of Scottish ministers? On one interpretation, it clearly does. This view has been articulated in the House of Commons by the newly-elected MP for Edinburgh South West, and SNP justice spokesperson, Joanna Cherry QC. In a Westminster Hall debate on the 30th of June 2015, the former advocate pressed the UK government in the following terms, neatly summarising the argument that even repealing the Human Rights Act would require Holyrood's consent:

"The SNP has been deeply concerned by recent statements from Ministers that suggest that they believe that the UK Government could repeal the Human Rights Act without reference to the Scottish Parliament. They argue that the Sewel convention would not be engaged because human rights are a reserved matter. That is wrong and legally illiterate. Human rights are not a reserved matter and are not listed as such in schedule 5 to the Scotland Act 1998. Schedule 4 to the Scotland Act protects the Human Rights Act against modification by the Scottish Parliament, but human rights *per se* are not a reserved matter. It was part of Donald Dewar's scheme that all matters would be devolved unless they were specifically reserved. Human rights are not specifically reserved.

Moreover, human rights are written into the Scotland Act. The European convention on human rights is entrenched in the Act through section 29(2)(d), which provides that an Act of the Scottish Parliament that is incompatible with the ECHR is actually outwith the legislative competence of the Scottish Parliament. Section 57(2) states: A member of the Scottish Executive has no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with" the ECHR. It is therefore incorrect to say that human rights are a reserved matter. They are devolved and I urge the Minister to think carefully about the statements made by his colleagues to the effect that the Sewel convention would not be engaged.

The Prime Minister has repeatedly spoken of a "respect" agenda, and I stand here as one of 56 SNP Members elected at the general election. I urge the Government to consider their respect agenda, to return to the Scotland Act 1998 and to get their lawyers to look at it carefully. They will find that human rights are not a reserved matter and are devolved, and that the Human Rights Act should not be repealed or otherwise

interfered with by the British Parliament without first seeking the consent of the Scottish Parliament.”

This approach seems perfectly logical. Holyrood cannot legislate with respect to reserved matters. Human rights are not reserved. The Sewel convention recognises that Westminster will not legislate on reserved matters without Holyrood’s consent. Repeal will have a significant impact on the powers of institutions and public bodies under devolved responsibility. Therefore, Westminster requires Holyrood’s consent to repeal the Human Rights Act 1998. The UK government’s counter-argument depends on a particular answer to the following question: for the purposes of the Sewel convention, should the statutes listed in Schedule 4 to be treated as reserved matters, alongside those listed in Schedule 5? Their counter-argument would run as follows. Human rights are not a reserved matter, but the Human Rights *Act* should be treated as such by dint of the protection from modification extended to it by Schedule 4. Accordingly, the Sewel convention does not apply. Westminster is free to repeal the Act without reference to Holyrood – without securing their consent or over their objections – because the matter is reserved.

Comments at the dispatch box since the election suggest that this is the UK government’s current understanding of the distribution in political responsibility for human rights – though it remains far from clear that ministerial statements are supported by robust legal analysis. Resisting an SNP amendment to the Scotland Bill, which would have deleted the Human Rights Act from the enactments protected by Schedule 4, Deputy Leader of the House, Theresa Coffey, told MPs that the repeal of the Human Rights Act was “not directly a matter for the Scottish Parliament,” claiming “that this is a reserved for the UK Parliament and not a devolved matter.” This analysis was later echoed in the Commons by the Secretary of State for Justice. On the 23rd of June, Aberdeen North MP, Kirsty Blackman, invited Michael Gove to “make a

commitment to not imposing the repeal on Scotland against the will of our people.” Gove responded:

“I think it is important to stress that in this United Kingdom Parliament, human rights are a reserved matter, and parties that support reform of the Human Rights Act secured more than 50% of the votes at the last general election.”

In an interview with BBC Radio Scotland in May, David Mundell MP, articulated a similar view that the devolution aspects of the policy are uncomplicated. The Secretary of State for Scotland said: “new legislation replaces existing legislation and therefore the new Act will apply in Scotland.” None of these remarks suggest the new UK government has taken a “careful look”, in Cherry’s phrase, at the devolved dimension of HRA repeal.

This diagnosis is supported by a distinct line of arguments developed by Iain Jamieson for the UK Constitutional Law Association, that Sewel consent is necessary for Westminster to repeal the Human Rights Act. Jamieson – a retired UK and Scottish Government lawyer who headed a small team of lawyers who instructed the drafting of the Scotland Act 1998 – has made three key points distinct from the question of whether or not Schedule 4 statutes should be treated as reserved matters for the purpose of Sewel. Firstly, he points out that *even if* we treat the Human Rights Act’s inclusion in Schedule 4 as denoting that it should be treated as a reserved matter for the purposes of Sewel, deleting it from Schedule 4 would have the indirect consequence of increasing Holyrood’s legislative competence. Thereafter, Holyrood would, for example, be able to empower Scottish public authorities to ignore Convention rights which currently restrict their decision-making and practices. This alone, he suggests, should “trigger” Holyrood’s consent being sought for repeal.

Jamieson also points out that the Human Rights Act operates in a number of respect as the Scotland Act’s “dictionary.” Its repeal would erase the Scotland Act’s definitions of both

“Convention rights” – which have “the same meaning as the Human Rights Act” under section 126(1) of the Scotland Act – and of “devolution issues.” Would the courts step in to lend these now legislatively empty terms meaning after HRA repeal? Or would these provisions be left, “batting the air”? If the latter, Jamieson suggests, repeal could risk robbing section 29 of the Scotland Act of its substance, freeing the Scottish parliament and government to ignore the Convention rights currently enshrined in the Scotland Act. More significantly, Jamieson also points out that HRA repeal would also extend the powers of the Secretary of State to intervene under section 35(1) of the Scotland Act to prevent Holyrood legislation from being submitted for royal assent if the Secretary “has reasonable grounds to believe would be incompatible with any international obligations or the interests of defence or national security.” Under section 126(10) Scotland Act, “international obligations” are currently defined as “any international obligations of the United Kingdom other than obligations to observe and implement EU Law or the Convention rights.” He argues that the implicit deletion of the Convention provisions from the Scotland Act’s understanding of the scope of “international obligations” “would have the effect of restricting the competence of the Scottish Parliament and Scottish Ministers by subjecting them to an increased control by the UK government” – and therefore also triggering the convention.

UK ministers have offered only limited argument to support their claims that “in this United Kingdom Parliament, human rights are a reserved matter,” but none of their public comments have begun to tangle with these arguments about repeal indirectly tampering with Holyrood’s legislative and executive competence. Although the Scottish Government has indicated that it intends to “robustly oppose” the Conservative government’s repeal plans, ministers have not advanced any reasoned case along the lines articulated by Jamieson. What is clear, however, is that the case for Sewel consent being necessary has not just one prong, but many, and cannot

be saved – as Therese Coffey and Michael Gove seem to suggest – simply by arguing that Schedule 4 protected enactments fall outside of the convention’s scope.

It is questionable, however, whether the interpretation and application of the convention would be a justiciable matter between the UK and Scottish parliaments. As Professor Mark Elliot has argued, even the Scotland Bill provisions seeking to enshrine Sewel in law will not “turn the political constraint” into a “legal constraint” enforceable by the courts. They recognise, but arguably leave “the convention as a convention.” It is worth pointing out, however, that neither party to the conflict – the Scottish or UK government – has a straightforward monopoly over the interpretation of this convention. We are in the debatable lands of constitutionality morality rather than strict law, and both pugilists retain considerable room for manoeuvre.

If the Westminster majority decided to exercise the sovereignty of the Crown in Parliament to override Holyrood’s objections – the repeal would be legally effective. But in parallel, the UK government has no control whatever over whether or when a legislative consent motion is tabled in the Scottish Parliament. Concerning more consensual Westminster Bills touching on devolved matters, the process is coordinated between Scottish and UK ministers. But in the scenario that is now unfolding, *even if* Gove’s Ministry of Justice believes HRA repeal is not covered by Sewel, the Sturgeon government could nevertheless present a consent motion on its own initiative, on its own interpretation of the convention, and invite MSPs to decline to give their consent. Legally, this might represent an ineffective act of protest. Politically, it is pungent and would leave the Cameron government facing no choice but to drop the policy, to exempt Scottish public authorities from the repeal agenda, or to override an explicit lack of consent in a policy area which is – arguably – substantively devolved. In the wake of the independence referendum, in the context of an ongoing and often passionate debate about Scotland’s constitutional future and its place within the United Kingdom – Lord Chancellor

Gove may soon find that to continue to ignore the devolved dimensions of this policy is to play with fire.

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