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The Brexit Case and Constitutional Conventions

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In the Brexit case – *R (Miller) v Secretary of State for Exiting the European Union*¹ - the main argument concerned whether the UK Government could give notice of its intention to withdraw from the European Union (EU) in accordance with Article 50 TEU under the prerogative or whether this required statutory approval.² The Supreme Court's ruling on that point - that legislation was required - has been overtaken by the enactment of the European Union (Notification of Withdrawal) Act 2017. The case is likely, however, to have long-term significance in other ways. Here I focus on its implications for the way in which the courts take account of constitutional conventions.

A. THE COURT'S RULING

The issue of conventions arose because the devolved governments, all of whom participated in the proceedings in the Supreme Court, raised questions relating to their respective devolution settlements, including the Sewel convention, and its implications for the process of leaving the EU. The Sewel convention is that the UK Parliament will not normally legislate on devolved matters without the consent of the devolved legislatures. It was argued that withdrawal from the EU would change the competence of the devolved institutions as all are subject to the constraint that they cannot legislate or act in contravention of EU law and so the Sewel convention was engaged. The practical significance was that, if the consent of the devolved institutions was needed, that would give them more influence in the Brexit process. The Court ruled that (i) although the removal of the EU constraints on competence implied by Brexit would alter the competence of the devolved institutions unless new legislative constraints were imposed, the UK's relations with the EU was a reserved matter and the devolved legislatures had no competence in relation to withdrawal from the EU. The Court further ruled that (ii) there was no legal requirement to obtain the consent of the devolved legislatures before notification of leaving the EU was given, but declined to make a ruling on what the Sewel convention might require. The way in which the court dealt with these issues has implications both for the way in which the courts take account of constitutional conventions in general and the Sewel convention in particular.

The court's reluctance to be drawn into commenting on what the requirements of the Sewel convention might be was based on reasons which apply to conventions generally. The key passages from the judgment are as follows:

[146] Judges therefore are neither the parents nor the guardians of political conventions; they are merely observers. As such, they can recognise the operation of a political convention in the context of deciding a legal question (as in the Crossman diaries case - *Attorney General v Jonathan Cape Ltd* [1976] QB 752), but they cannot give legal rulings on its operation or scope, because those matters are determined within the political world. As Professor Colin Munro has stated (1975) 91 LQR 218,

¹ [2017] UKSC 5; [2017] 2 WLR 583. The appeal was heard with two cases from Northern Ireland courts, *In re McCord* and *In re Agnew*.

² For discussion, see MacAmlaigh, in this volume.

228, “the validity of conventions cannot be the subject of proceedings in a court of law”.’

...

[151] In reaching this conclusion we do not underestimate the importance of constitutional conventions, some of which play a fundamental role in the operation of our constitution. The Sewel Convention has an important role in facilitating harmonious relationships between the UK Parliament and the devolved legislatures. But the policing of its scope and the manner of its operation does not lie within the constitutional remit of the judiciary, which is to protect the rule of law.

If taken literally, these comments suggest that the courts should not settle disputed questions as to what a convention means or requires; at most they can note that a convention exists in the context of deciding a legal question. This is a significantly more restrictive line than that taken in earlier cases on conventions, something which the Supreme Court did not acknowledge.

Although refusing to rule on the scope or operation of the convention, the Supreme Court did rule on the meaning and effect of section 28(8) the Scotland Act 1998 which had been added by the Scotland Act 2016 following a recommendation of the Smith Commission.³ Section 27(7) states that “This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland.” The new subsection (8) adds, ‘But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.’

The court decided that, in enacting subsection (8), the UK Parliament was not seeking to convert the Sewel Convention into a rule which could be interpreted or enforced, by the courts; rather, it was:

‘ [148] ... recognising the convention for what it is, namely a political convention, and is effectively declaring that it is a permanent feature of the relevant devolution settlement. That follows from the nature of the content, and is acknowledged by the words (“it is recognised” and “will not normally”), of the relevant subsection. We would have expected UK Parliament to have used other words if it were seeking to convert a convention into a legal rule justiciable by the courts.’

B. CONVENTIONS IN GENERAL

The court began its analysis by saying that is well established that the courts cannot enforce political conventions [para 141] quoting comments of the Supreme Court of Canada in *Re Resolution to amend the Constitution*⁴ to the effect that this flowed from the nature of conventions as political in origin and dependent for their existence on the fact of political actors accepting them as obligatory standards of conduct. The court then noted that attempts to enforce political conventions in the courts had failed, referring to *Madzimbamuto v*

³ *Report of the Smith Commission for further devolution of powers to the Scottish Parliament* (2014) available at: <http://webarchive.nationalarchives.gov.uk/20151202171017/https://www.smith-commission.scot/>

⁴ [1981] 1 SCR 753.

Lardner-Burke,⁵ a case arising from the unilateral declaration of independence by the Government of Southern Rhodesia in 1965.

In the Canadian case, the court had ruled that the federal government was not legally obliged to obtain the consent of the provinces before requesting the patriation of the Canadian constitution in a form which would alter the latter's powers. However, what the Supreme Court omits from its account is that the court went on to rule that to seek amendment of the constitution without the consent of the provinces would be to violate a constitutional convention. The Court stated:⁶

“The federal principle cannot be reconciled with a state of affairs where the modification of provincial legislative powers could be obtained by the unilateral action of the federal authorities.”

What *Re Resolution to amend the Constitution* actually suggests is that there is a range of possibilities between (i) enforcing a convention in the same way as a rule of law, and (ii) merely recognising that a convention exists. These intermediate possibilities have been recognised in earlier cases in the UK courts.

The Supreme Court viewed the Crossman diaries case⁷ as an example of a court merely recognising the operation of a political convention in the context of deciding a legal question. That it did more than that becomes clear from closer study. The High Court was invited to grant an injunction preventing publication of the diaries of a former cabinet minister which included, *inter alia*, accounts of discussions in cabinet. The court held that in principle such an order could be made to restrain the publication of confidential information, accepting the Government's argument that the doctrine of collective responsibility would in general be harmed by such disclosure, but refused to do so on the facts of the case given the length of time that had elapsed since these confidential discussions had taken place.

Lord Widgery traced the development of the equitable doctrine of confidentiality, which was the basis of the government's case, noting its early use as a ground for restraining the unfair use of commercial secrets transmitted in confidence and its extension to domestic secrets such as those passing between husband and wife in the *Duchess of Argyll* case.⁸ He appeared to proceed on the basis that the application of confidentiality to government secrets would be a further extension of the doctrine and his main reason for considering that extension appropriate was the existence of the convention of collective responsibility:

‘Applying those principles to the present case, what do we find? In my judgment, the Attorney-General has made out his claim that the expression of individual opinions by Cabinet Ministers in the course of Cabinet discussion are matters of confidence, the publication of which can be restrained by the court when this is clearly necessary in the public interest.

The maintenance of the doctrine of joint responsibility within the Cabinet is in the public interest, and the application of that doctrine might be prejudiced by premature

⁵ [1969] 1 AC 645.

⁶ [1981] 1 SCR 753 at pp. 905, 906, and 908.

⁷ *Attorney General v Jonathan Cape Ltd* [1976] QB 752.

⁸ *Duchess of Argyll v. Duke of Argyll* [1967] Ch 302.

disclosure of the views of individual Ministers the Minister or ex-Minister concerned.⁹

The references to the ‘doctrine’ of joint responsibility are telling. It is not simply that reflection on what is in the public interest suggests that it would be a good idea to treat cabinet discussions and civil service advice as confidential; it is that there is a *doctrine* which states that such matters are confidential. The fact that there was a constitutional rule, albeit a customary rule rather than a legal rule, was crucial to the court’s decision. More importantly, the court heard evidence and argument as to the existence and scope of the convention. Therefore, its decision that there was in law a confidential relationship and that it was in general in the public interest to enforce it amounted to a ruling on the nature and extent of the convention.

A more recent example of conventions being considered is provided by *Evans v Information Commissioner*.¹⁰ The case concerned letters and memos written by Prince Charles to Government ministers on a range of matters (the so-called “black spider memos”). A request for disclosure of this correspondence had been made by a journalist under the Freedom of Information Act 2000 (FOIA) but had been refused. The Government argued that the correspondence was exempt from disclosure under section 37 of FOIA, which exempted communications with Her Majesty and other members of the Royal Family or the Royal Household. At the time this was a qualified exemption which meant that the information could be withheld only if the public interest in exclusion outweighed that in disclosure.

The Government’s argument that disclosure would not be in the public interest was based on the existence of an “education convention”, namely that the heir to the throne is entitled (and bound) to be instructed in and about the business of government. The Government argued that the convention had been extended to cover all correspondence between government and the heir to the throne. After hearing expert witnesses, the Upper Tribunal decided that there was indeed an education convention but that it did not require all correspondence between government and the heir to the throne be treated as confidential, and hence that what was described as “advocacy correspondence” could be released. There is no doubt that what the Upper Tribunal did was to rule on the operation and scope of a convention; precisely what the Supreme Court said that courts should not do.

The Supreme Court can of course overrule earlier decisions of the Upper Tribunal and the High Court, but, far from being overruled, the approach taken in *Jonathan Cape* and *Evans* was not questioned in any way. The Supreme Court seemed not to recognise that the absolutist position on conventions it had taken was incompatible with those cases.

The question, therefore, is whether this development of the law is to be welcomed; might there be good constitutional reasons sometimes for going beyond mere recognition of the existence of conventions? Might it sometimes be appropriate to interpret them, determine their scope or indicate what they require?

One argument is that there are cases in which it may be *necessary* to decide disputes about the application of conventions in order to settle a disputed question of law or of the application of law to the facts of the case. This is precisely what happened in the *Evans* case.

⁹ *Jonathan Cape* at p. 771 A-C.

¹⁰ [2012] UKUT 313 (AAC).

The Government's argument that the legal test for withholding information had been met – that it was in the public interest to do so – depended upon a particular interpretation of the conventions relating to the heir to the throne. Cases like this will arise only occasionally, but the strict line taken in *Miller* will not accommodate them.

A second reason is that it may make sense to find support from a convention for developing the law in particular areas. That is clearly what the court did in *Jonathan Cape*. The extension of the legal obligation of confidentiality to government secrets had the potential to contribute to good government by supporting the operation of the convention. This is not to say that the subsequent application of the legal obligation of confidentiality to government information has always been justified, but in principle the extension of the doctrine in *Jonathan Cape* made sense.

C. THE JUSTICIABILITY OF THE SEWEL CONVENTION

Miller also raised the issue of the justiciability of the Sewel convention. Even if the general proposition stated by the Supreme Court – that courts should not rule on the operation or scope of conventions – were correct, the addition of subsection 28(8) to the Scotland Act 1998 allowed it to be argued that Sewel had been rendered justiciable by statute. As noted above, the court's decision was in effect that statutory recognition has made no difference to the legal status of the Sewel convention. Legally, it is no more secure against unilateral variation or breach of its requirements than it was before the amendment and the courts have been told not to attempt to resolve disputes about its meaning, scope or effect. Section 28(8) is essentially non-justiciable. Whether that was the intention of the Smith Commission in making the recommendation to put the Sewel convention on a statutory footing, or the intention of Parliament in enacting the clause is unclear. Both look like fudges. The outcome is probably more helpful to UK than to Scottish Governments; not only does the UK Parliament's power to legislate for Scotland continue to be free of legally enforceable procedural restraints, but the courts will not even give their opinion on whether the convention has been complied with in specific cases.

Even if it has not changed the law, might section 28(8) have made a political difference? As there is no process for independent adjudication of compliance, much will depend on the UK government's attitude. It is, of course, still early days but the initial signs, particularly the manner in which Brexit is being handled, suggest that this is not likely.

The UK has refused to guarantee that there will be no loss of current competences as result of the UK's leaving the EU. Indeed, it has stated that common UK frameworks may be required in areas which are currently devolved where they are necessary to protect the freedom of businesses to operate across the UK's single market and to enable the UK to strike free trade deals with third countries.¹¹ The devolved areas most likely to be affected include agriculture and fisheries. Such changes to competence would probably require the consent of the Scottish Parliament under the Sewel convention but thus far it is not clear whether that consent will be sought or whether the UK government would proceed without consent if it were refused.

¹¹ See *Legislating for the United Kingdom's withdrawal from the European Union*, Cm 9446 (2017), paras 4.1-4.6.

In the absence of consent, it might be possible to argue that the “not normally” proviso could be invoked, the argument being that departure from the EU is an exceptional circumstance. If there were a dispute as to whether the proviso applied, its resolution would be left to the usual political channels, but of course all those involved would be interested parties. There would be no independent adjudication of the matter and a majority UK Government would most likely be able to impose its view of the application of the convention. In short section 28(8) does not impose a legal constraint and is very unlikely to impose an additional political constraint on a UK Government’s desire to legislate within devolved competence.

Despite this, I am not suggesting that treating the provision as justiciable would be beneficial. As I suggested above, it would be useful for the courts to be able to rule on conventions in two situations: where that is essential in order to deciding a legal question and where it would be useful in developing legal doctrine. However, a ruling of the court that the Sewel convention either had or had not been complied with when the UK and Scottish Governments were in dispute would tend to drag the courts into potentially damaging political controversy without any compensating benefit in resolving the political dispute. In future, when governments are inclined to ‘translate’ conventions into statute they should do so only where they are willing to create justiciable rules.