TO BREAK THE FOURTH WALL: A COMPARATIVE APPROACH TO *SCOTTISH MINISTERS, PETITIONERS*

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A. INTRODUCTION

In December 2023, the Outer House determined the fate of the Gender Recognition Reform (Scotland) Bill (GRR Bill) in finding that the use of an order made pursuant to s 35(1)(b) of the Scotland Act 1998 was 'reasonable' and as such the challenge brought by way of judicial review was to fail.[1]

The saga of the GRR Bill and the unprecedented use of a s 35 order has been a fraught politico-legal affair, and yet another which has been shrouded in distortion and misinformation. In effect, the order acts as a veto power exercisable by the Secretary of State[2] should certain requirements be met.[3] The use of the order was met with shock, being described by the relevant Cabinet Secretary as a 'sad day for democracy'[4] and by others as the beginning of a 'slippery slope from devolution to direct rule'.[5] From hyperbole, we also find blatant misunderstandings of what s 35 actually does such as this question asked in the Scottish Parliament:

'It seems that if Westminster is allowed to veto this legislation, it could veto *any* legislation. Can [the Cabinet Secretary] confirm that that is the case and that it could stop the budget or anything else?'[6]

Only a cursory read of s 35 of the Scotland Act 1998 would confirm that the answer is an obvious 'no' however this has not stopped widespread confusion about

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[1] *Scottish Ministers, Petitioners* [2023] CSOH 89 at paras 81-82 per Lady Haldane

[2] Not necessarily but most likely the Secretary of State for Scotland.

[3] See Pt B (1)

[4] Scottish Parliament Official Report (SP OR) 17 January 2023 col 70 (The Cabinet Secretary for Social Justice, Housing and Local Government (Shona Robison MSP))

[5] Hansard HC Deb 18 January 2023 [Engagements] col 358 (Stephen Flynn MP)

[6] SP OR 19 April 2023 col 35 (John Mason MSP) (my emphasis)

what s 35 is especially compared to how other countries maintain territorial control within their respective polities. This article will draw on examples from the United States – to demonstrate that territorial control devices like s 35 are not unusual and a far cry from the 'attack on devolution' that many have likened it to.

While an executive veto power can be styled as an intolerable assault on the institution of the Scottish Parliament, Lady Haldane stated that s 35 is an instrument 'described and delineated within the four walls of the 1998 Act'.[7] For public lawyers it is therefore of interest to explore how (or if) other countries can break the fourth wall.

B. SECTION 35: ITS COUSINS AND ANCESTORS

(1) Scotland Act 1998

The order made by the Secretary of State for Scotland was pursuant to s 35(1)(b) of the Scotland Act 1998 which reads as follows:

35 Power to intervene in certain cases.

(1) If a Bill contains provisions –

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

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

There is therefore a bipartite test; (1) does the Bill contain provisions which *modify* the law as it applies to reserved matters?; and (2) are there *reasonable grounds* for the Secretary of State to believe that those modifications would have an *adverse effect* on the operation of law as it applies to reserved matters?[8] Logic would dictate that if part (1) of the test is answered in the negative, then part (2) falls with it. Lady Haldane also recognises a common law duty for the Secretary of State to acquaint himself with the relevant information before making the order.[9] As the adage goes; with great power, comes great (common law and statutory) responsibility.

(2) Government of Wales Act 2006

Neither history nor geography make provisions such as s 35 in any way unique. One needs not travel any further than Wales to find a more permissive variant of s 35 requiring only that the Secretary of State have 'reasonable grounds to believe' that the legislation 'would have an adverse effect on a reserved matter' or 'would have an

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[7] *Scottish Ministers, Petr* at para 70

[8] David Torrance and Doug Pyper 'The Secretary of State's veto and the Gender Recognition Reform (Scotland) Bill' (House of Commons Library: Research Briefings 2023) 5

[9] *Scottish Ministers* at para 72. See also *Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014*

adverse effect on the operation of law as it applies to England'.[10] There is no requirement that it must make modifications to the law but it would be difficult to conclude that a bill can confer an adverse effect without modifying the operation of law.[11]

(3) The British Empire

Torrance and Pyper make mention of colonial legislation particularly in Canada and Australia where colonial laws that were within the *vires* of the legislatures were disallowed as UK law applied by 'paramount force'.[12] Most striking is the situation in Northern Ireland where an attempt to change the voting system was withheld by the Governor of Northern Ireland generating a political crisis between Westminster and Stormont. In language that echoes the response of the Scottish Government in the present case, Winston Churchill noted that vetoing legislation that was within the competence of the Northern Irish Parliament 'would form a dangerous precedent'.[13]

Taking the UK's broader geographic and historical backdrop into consideration, it is clear that s 35 is not an alien power and exists as an inherent part of the devolution settlement. This is not something that is unique, not even controversial in the overwhelming majority of countries that employ some form of multilevel government.[14] Article 31 of Das Grundgesetz für die Bundesrepublik Deutschland simply says, 'Bundesrecht bricht Landesrecht'.[15] Rather than being an impermissible intrusion on the autonomy of the Länder, this is accepted as being a necessary ingredient for the existence of a multi-level state with individual territorial identities. Interestingly, in Germany the breaking up of territories was beneficial to the centre as it prevented regional challenges, most importantly in Prussia which does itself not exist as a federal unit in Germany.[16] This will be further demonstrated by reference to jurisprudence of the Supreme Court of the United States of America.

C. THE AMERICAN EXPERIENCE

(1) Territorial control with the federation

Territorial control within the polity is neither a historical anomaly nor a colonial relic considering that today's federal systems are engaged in similar exercises. The

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[10] Government of Wales Act 2006 s 114(1)(a), (c). See also David Torrance and Doug Pyper 'The Secretary of State's veto and the Gender Recognition Reform (Scotland) Bill' (House of Commons Library: Research Briefings) (December 2023) 8

[11] See S. Wortley (@Scott_Wortley), "Modify in the Scotland Act …", (17th January 2023), (X, f.k.a. Twitter) https://twitter.com/scott_wortley/status/1615423125314801683?s=61&t=ff7Kn0w9VWCgcvHmhmbPVw..

[12] Torrance and Pyper, 'Secretary of State's Veto', 11. See also the Colonial Laws Validity Act 1865

[13] Ibid, 13. See also Brendan O'Leary, A Treatise on Northern Ireland Volume 2: Control (Oxford University Press, 2019) 35.

[14] Daniel Elazar goes as far as to contend that in the around 80% of the global population lived under some kind of federal arrangement in the mid-1990's. See D. Elazar, *Federal Systems of the World: A Handbook of Federal, Confederal and Autonomy Arrangements,* 2nd edn (Harlow: Longman, 1994) xv. The exact definition of what constitutes a 'federal' country is contested but as we know, the issues of multilevel government are not exclusive to federal systems and play out in devolved governments as in Scotland.

[15] 'Federal law takes priority over Land/state law.'

[16] C. Clark, *Iron Kingdom*: *The Rise and Downfall of Prussia, 1600-1947* (Cambridge MA: Harvard), 687. Cited in S Tierney, *The Federal Contract: A Constitutional Theory of Federalism*, (Oxford University Press 2022) 16

Supreme Court of the United States in the case of *Rice v. Santa Fe Elevator Corp*[17] considered the how Congress could legislate 'in a field which the States have traditionally occupied'.[18] The intention of Congress is important as it could demonstrate either subsidiarity or collaboration between state and federal levels. Equally, the express purpose of Congress could be to adopt a federal policy even if it supersedes terrain traditionally occupied by the states. For federal systems like the USA, paramountcy at the federal level is the adhesive that allows the conglomerate of fifty states to exist as a union especially in the post-war era where the state only got bigger.

The implementation of the New Deal is important in this regard. At the beginning of the 20th century, the federal government only took responsibility for the 'nightwatchman' functions of the state such as international relations and defence.[19] By 1934, the Roosevelt Administration attempted to resuscitate the ailing American economy following the Great Depression with sweeping federal grants. This process of centralisation effectively nationalised the American polity leading to the conclusion that 'federalism is no longer an operative principle in the United States'.[20]

The same is true of the Civil Rights movement where the idea of racial *equality* becomes something of a misnomer if there are fifty different Civil Rights Acts rather than a unitary federal one.[21] Nowadays, it is such that the prospect of reproductive rights being decided at state level is met with widespread apprehension as fundamental reproductive rights are entrusted by many only at the federal level.

(2) The Fourteenth Amendment

Fourteenth Amendment jurisprudence is enlightening in this regard. Section 1 reads that 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States'. These are, of course, words written in the days before the abolition of slavery and the universal adult suffrage. As such, the Fourteenth Amendment has been subject to selective elastication and restriction by the United States Supreme Court.[22]

In the landmark 2015 ruling in *Obergefell v Hodges*,[23] the US Supreme Court held 5-4 that the Fourteenth Amendment required states to licence and recognise marriages between two persons of the same sex. The dissent feared that the majority result would encroach 'upon the legislative prerogatives of the states'.[24] We therefore

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[17] 331 U.S. 218 (1947). Cited in S. Tierney 'The Gender Recognition Reform (Scotland) Bill: Time for the United Kingdom to Learn from Other Federal Systems?' IACL-AIDC Blog (23 March 2023)

[18] Ibid, page 331 U.S. 230

[19] J.J. Wallis and W.E. Oates, 'The Impact of the New Deal on American Federalism', in M.D. Bordo, C. Goldin, and E.N. White (eds), *The Defining Moment: The Great Depression and the American Economy in the Twentieth Century* (Chicago: University of Chicago Press, 1998), 163.

[20] Feeley and Rubin, *On Federalism: Federalism as Tragic Choice*, Preface ix and 152. Cited in S Tierney, *The Federal Contract: A Constitutional Theory of Federalism*, (Oxford University Press 2022) 8

[21] Notwithstanding the recalcitrance towards the Civil Rights Act in many southern States at the time of its promulgation.

[22] See generally, WE Nelson, *The Fourteenth Amendment: from political principle to judicial doctrine*, (Harvard University Press 1988), 1-12. Nelsons book covers important Fourteenth Amendment cases such as *Brown v. Board of Education* 347 U.S. 483 (declared racial segregation in public schools to be unconstitutional) and *Muller v. Oregon* 208 U.S. 412 (sustained an Oregon statute setting maximum working hours for women) but predates others such as *Lawrence v. Texas* 539 U.S. 558 (declared a Texas anti-sodomy law to be unconstitutional).

[23] 576 U.S. 644 (2015)

[24] F Palermo and K Kössler, *Comparative Federalism: Constitutional Arrangements and Case Law*, (Hart Publishing, 2017) 326

see that the tension between the protection of nationwide fundamental rights and the autonomy of sub-state units.

The inverse is true considering the politico-legal rupture that was caused by the overturning of *Roe v. Wade* which has resulted in a radical segmentation of reproductive rights across America.[25] This demonstrates the consequences of abrogating federal control in favour of state-level decision making.

The dissent in *Dobbs v Jackson Women's Health Organization* is perhaps indicative of the potential reverse direction that the United States may be embarking on. The dissent[26] says that SCOTUS 'does not act "neutrally" when it leaves everything up to the states. Rather, the Court acts neutrally when it protects the right against all comers'.[27] Where interracial[28] and same sex[29] marriage are protected (at least for now) through judicial pronouncement in the United States, the direction signalled by this disproportionately conservative Supreme Court may leave these federal protections at the chopping block.

While *Dobbs* is only a sample of one, Justice Clarence Thomas in his concurring judgment, described *Obergefell v. Hodges* as 'erroneous' and worth 'reconsidering'.[30] It is doubtful whether Justice Thomas is the only Supreme Court judge who is of the same view. Considering this, it might not be premature to describe *Dobbs* as an inflection point concerning protection of rights in the American Constitution.

(3) From Philadelphia to Edinburgh

This comparative backdrop shows the importance, indeed the necessity of ensuring federal conformity rendering it unsurprising why the Scotland Act 1998 would seek to employ similar mechanisms through s 35 to protect the Equality Act 2010. In this light, talk of it being an 'outrage' or an 'attack on devolution' fails to explain why the examples listed above are not an 'attack on state autonomy' in the same way. Surely any *Equality* Act worth its name would merit universal application across the four UK nations. The author reserves serious doubts as to whether those who describe the use of s 35 as an 'attack on devolution' would view *Obergefell* in the same light. What ought or ought not to be subject to nationwide protection is thus a values question. It falls to each individual polity as to which rights deserve nationwide protection and which don't.

How does the 'attack on devolution' argument deal with the idea that individual American states should have total discretion on same-sex marriage if *Obergefell* were overturned? It is thus difficult to resist the conclusion that the opposition to s 35 in this specific case is more about the strength of feeling about a particular piece of legislation rather than any principled understanding about territorial control.

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[25] See *Dobbs v. Jackson Women's Health Organization,* No. 19-1392, 597 U.S. 215 (2022). Some states such as Texas implemented 'trigger laws' rendering abortion a felony punishable by up to life in prison, the trigger being the overturning of *Roe v. Wade*, 410 U.S. 113. See Texas Health and Safety Code Sec. 170A drafted in anticipation of *Roe v. Wade* being overturned. Thirteen other states such as Mississippi, Oklahoma and Louisiana have taken similar measures. A recent development has been the near total ban on abortion instituted in the state of Arizona in resurrecting a law from 1864. Twenty states including New York, Minnesota and Hawaii have strengthened their abortion access laws following *Dobbs*.

[26] The dissent consists of Breyer, Sotomayor, and Kagan JJ.

[27] 597 U.S. 20 (2022)

[28] *Loving v. Virginia* 388 U.S. 1 (1967)

[29] *Obergefell v. Hodges*, 576 U.S. 644 (2015)

[30] *Dobbs v. Jackson Women's Health Organization,* 597 U.S. 3 (2022)

D. APPROPRIATE STANDARD OF REVIEW

(1) The Scottish Ministers position

Dawn Oliver raises an interesting point about how judicial review could respond to increased constitutionalisation in saying that 'the constitutional implications or the impact of a decision on public policy and administration could be ventilated in court and taken into account when a decision is made'.[31] This chimes with the Scottish Ministers in their note of argument. The intention of the Scotland Act 1998 is the creation of 'a constitutional structure which is intended to be stable and coherent'[32] and it is within this context that they argue for a more exacting standard of review by the courts.[33]

The democratic pedigree of the Scottish Parliament has found judicial recognition in the past, most notably in *AXA General Insurance Ltd v Lord Advocate*.[34] Here, Lord Hope of Craighead said that '[t]he dominant characteristic of the Scottish Parliament is its firm rooting in the traditions of a universal democracy'.[35] It is this which distinguishes the Scottish Parliament from, say, a taxi licencing sub-committee in its decision-making authority since the Scottish Parliament is imbued with democratic recognition.

Lord Hope is making the point that the Scottish Parliament has joined the club of parliaments across the world. With that membership comes the perk of democratic recognition. In eerie resonance with the present case, Lord Hope issues a warning that the 'democratic process is liable to be subverted if, on a question of political or moral judgment, opponents of an Act achieve through the courts what that could not achieve through parliament'.[36]

(2) The UK Government's position

Lady Haldane notes that the Scottish Ministers and UK Government 'adopted entirely opposing positions on [the] question' of intensity of review.[37] The UK Government is dismissive of any extra-legislative or constitutional interpretative aids in relation to the Scotland Act in saying that '[n]o special approach applies to the interpretation of the SA'.[38]

The Scottish Minsters assert that the decision of the Secretary of State 'rests upon a policy disagreement'.[39] As such, the standard of review would need to be more

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[31] D. Oliver *Constitutional Reform in the United Kingdom*, (Oxford University Press, 2003) 106
[32] Scottish Ministers, Gender recognition reform: Section 35 Order challenge – petition (9 August 2023) at para.19
[33] Ibid, para.35
[34] [2011] UKSC 46
[35] *AXA* at para 49
[36] Ibid
[37] *Scottish Ministers, Petr* at para 69
[38] Office of the Advocate General for Scotland and the Office of the Secretary of State for Scotland, Note of argument for Judicial Review of the Gender Recognition Reform (Scotland) Bill (6 September 2023). Available at *https://www.gov.uk/government/publications/answers-and-note-of-argument-for-judicial-review-of-the-gender-recognition-reform-scotland-bill/note-of-argument-for-judicial-review-of-the-gender-recognition-reform-scotland-bill* <accessed 15th April 2023>
[39] Scottish Ministers note of argument (n 32) at para.31

searching since Order would more plainly offend against the devolution settlement. To this, the UK Government refers to the black-letter of s 35 itself. It could hardly be seen as a bare policy disagreement if the 'adverse effects' requirement is engaged.[40]

While there was no great need for any comparative exercise in the averments, counsel for the UK government nonetheless contend that there was nothing 'sinister' about s 35 with it being 'part of the machinery of how parliaments work'.[41] This is perhaps an implicit assertion about the division of powers within multilevel states generally and the need to ensure the nationwide protection of fundamental rights such as those contained in the Equality Act 2010 but neither party goes any further than this.

(3) The prevailing view and reflecting thoughts

Lady Haldane ultimately determined the intensity of review according to 'good old-fashioned rationality' on the administrative law front.[42] On the constitutional law front, she determined that '[t]he nature of the power that has been invoked, whilst a constitutional one, is described and delineated within the four walls of the 1998 Act'.[43] Given that the 1998 Act contains mechanisms to allow the Secretary of State to police the (albeit now hazy) boundaries between devolved and reserved competences, it is an 'intrinsic part' of the devolution settlement rather than an 'impermissible intrusion' upon it.[44]

As Foran put it, 's.35 becomes the manifestation of democratic choices about how best to devolve and retain power between the various organs of state'.[45] As the American experience has demonstrated, it is a matter of deep controversy about how best decision making can be taken particularly given the fraught judicial history of the Fourteenth Amendment. Outside the Fourteenth Amendment, the nationalisation of rights be that the right to a fair trial, to free speech or (one might daresay) to bear arms is relatively settled.

Donald Dewar was not naïve to the possibility of tension during the development of the Scotland Act 1998 in saying that 'there are no exact demarcations or neat barriers that cannot be crossed—so legislation in a devolved area of responsibility will often have implications for reserved areas and reserved functions'.[46] Though the likelihood for tension becomes greater in attempting to navigate the 'complex mosaic with overlapping concurrent powers' that devolution has turned into since 1999 as additional powers have accrued to Scotland in two separate tranches.[47]

(4) The decision not to appeal

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[40] See S Wortley (@Scott_Wortley), 'If simply about policy disagreement and "culture war" [the Scottish Ministers] would have lost…' (8th December 2023) (X f.k.a. Twitter) available at *https://x.com/scott_wortley/status/1733240629759500426?s=46&t=AWUTqm6kx-c_QOXku2hiiQ*

[41] *Scottish Ministers, Petr* at para 38

[42] P Daly, 'The Section 35 Order was Lawful After All: Re The Scottish Ministers' Petition 2023 CSOH 89', (Administrative Law Matters Blog) 8th December 2023)

[43] *Scottish Ministers, Petr* at para 70

[44] Ibid

[45] M. Foran, 'Section 35 and the Separation of Powers: On the Role of Unwritten Constitutional Principles in the Interpretation of the Scotland Act', (U.K. Const. L. Blog) (13th December 2023)

[46] HC Deb 12 May 1998 Vol 312 c267 [Power to intervene in certain cases]

[47] S. Tierney, 'The Gender Recognition Reform (Scotland) Bill: Time for the United Kingdom to Learn from Other Federal Systems?' (n 17). See also Scotland Act 2012 and Scotland Act 2016.

The Court of Session rules stipulate a 21-day time limit to reclaim (appeal to the Inner House) following the decision of the Outer House.[48] At time of writing[49] we are on day 131 so the chance for further judicial pronouncement on this issue is well behind us. The decision is a disappointing one since the constitutional issues – particularly relating to intensity of review – could have been more thoroughly interrogated all the way to the United Kingdom Supreme Court. All the Scottish Ministers' arguments on the administrative law front were rejected by Lady Haldane, leaving them with the chance to drill into the meaning of a 'stable, coherent and workable' system of devolution more robustly. Interestingly, Lord Reed who issued a concurring judgment in *AXA*[50] happens to be the current President of the United Kingdom Supreme Court. As such the Scottish Government seems to have cost itself the chance to test the outer boundaries of the dicta in *AXA*.

An appeal would carry both reward and risk. There is reward of a narrow and constrained interpretation of s.35 which would allow the Scottish Government to draw a line in the sand. This, however, comes with the risk of a wide and permissive view of s.35 that could embolden the UK Government to use it again.[51] But alas, the strength of feeling on this issue has left this thistle too thorny even for the Scottish Government to grasp.

E. CONCLUSIONS

The well-worn word 'unprecedented' is used almost *ad nauseum* in our changing constitution. Though it is worth pointing out that after 25 years, Scottish devolution is - constitutionally speaking - in its relative infancy. It is germane, therefore, to look to other countries like the United States with not a 25-year linage, but an almost 250-year lineage to see how the issue of territorial control is managed. Unlike Scotland, the United States has a Bill of Rights but today, a disproportionately conservative Supreme Court has decided that the issue of reproductive rights no longer deserves federal protection.

In Scotland, the primacy of the Equality Act 2010 has formed the battleground for yet another dispute over devolved law-making competence. In helping to reset the boundaries, the UK Supreme Court could adopt similar language such as that used in the case of *Maryland v. Louisiana*[52] which declared that 'all conflicting state provisions

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[48] Court of Session Rules r38.2

[49] 17th April 2024

[50] *AXA* at para 148 per Lord Reed: 'Law-making by a democratically elected legislature is the paradigm of a political activity, and the reasonableness of the resultant decisions is inevitably a matter of political judgment. In my opinion it would not be constitutionally appropriate for the courts to review such decisions on the ground of irrationality. Such review would fail to recognise that courts and legislatures each have their own particular role to play in our constitution, and that each must be careful to respect the sphere of action of the other.'

[51] C. McCorkindale and A. McHarg, 'Rescuing the Gender Recognition Reform (Scotland) Bill? The Scottish Government's Challenge to the Section 35 Order', (U.K. Const. L. Blog, 25th April 2023)

[52] 451 U.S. 725

be without effect'.[53] Alternatively, Parliament could step in to replicate something not dissimilar to the American Supremacy Clause.[54]

This would ensure that the Equality Act 2010 is well beyond the reach of cross border tinkering by the Scottish Government. For example, the American Supremacy Clause is allows for a situation where the 'federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject'.[55] It is true that s 28(7) allows the UK Government to continue to legislate in devolved matters but as Tierney points out, beyond its 'oblique' wording, it does little to clearly establish the UK's constitutional pecking order with the same clarity as the United States.[56]

Clarity would be warmly welcomed given that one MSP said, following *Scottish Ministers, Petr* that the judgment 'makes a mockery of any vote or decision that we as parliamentarians take at Holyrood from now on in the result is knowing that Westminster will veto anything they don't like'.[57] The reader can decide for themselves whether this is informed by individual strength of feeling, or weakness of legislative clarity.

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[53] *Maryland* at 746

[54] Article VI, Clause 2: 'This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all the Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'

[55] *Gade v. National Solid Wastes Management Association* 505 U.S. 88, 98 (1992)

[56] S. Tierney 'The Gender Recognition Reform (Scotland) Bill: Time for the United Kingdom to Learn from Other Federal Systems?' (n 17)

[57] D Torrance and D Pyper, 'The Secretary of State's veto and the Gender Recognition Reform (Scotland) Bill, (House of Commons Library: Research Briefings, 2023) 49.