

Briefing for Scottish Parliament's Constitution, Europe, External Affairs and Culture Committee Roundtable on Legislative Consent After Brexit

The Evolution and Constitutional Significance of the Sewel Convention

The Sewel Convention (or Legislative Consent Convention) originates in a statement made by a Scottish Office minister, Lord Sewel, during the parliamentary passage of the Scotland Bill, when he stated, in respect of the ongoing right of the UK Parliament to legislate for Scotland, that “we would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament.”¹ His expectation was based on the existence of similar convention in relation to the earlier devolved Parliament of Northern Ireland, between 1921 and 1973.

Lord Sewel's statement was subsequently reflected in, and amplified by, the Memorandum of Understanding agreed between the UK and devolved governments, and various Devolution Guidance Notes (DGNs), first published in December 1999. DGN 10 (concerning Scotland), provides that the Convention applies in two circumstances, where a Bill:

1. “contains provisions applying to Scotland and are for devolved purposes”, or
2. “which alter the legislative competence of the Parliament or the executive competence of the Scottish Ministers”.

Provisions which apply to Scotland but which relate to reserved matters do not require devolved consent, even where they make incidental or consequential changes to Scots law on non-reserved matters, although consultation is still expected.

The Sewel Convention is a fundamentally important part of the devolution settlement, performing two distinct functions:

1. A *defensive* function, providing reassurance to the devolved legislatures that their primary political authority in relation to devolved matters will be respected, despite the continuing assertion of Westminster's legislative omnipotence;
2. A *facilitative* function, enabling co-operation between the UK and devolved institutions in areas of intersecting competence or shared concern.

Its importance was reflected in the recommendation by the Smith Commission that the Sewel Convention should be put on a statutory footing, subsequently implemented by the Scotland Act 2016 and the Wales Act 2017. However, the Supreme Court in the first *Miller* case held that statutory recognition of the Sewel Convention had not converted it into a legal rule which was enforceable by the courts. Rather, it was a recognition of the convention *as a convention*, and a declaration that “it is a permanent feature of the ... devolution settlement.”²

It is important to understand that a convention is not a mere description of constitutional practice, but rather a *rule* which *prescribes* constitutional behaviour, in order to uphold important constitutional principles, albeit that rule may be subject to exceptions.

¹ HL Deb 21 July 1998, vol 592, col 791.

² *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, para 148.

Thus, the statement that “Westminster would not *normally* legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament” (emphasis added), is not a statement that Westminster would usually act with consent but sometimes might not. Rather it is a statement that Westminster *should* legislate only with consent, unless there is a good reason not to do so. Moreover, prior to the Brexit referendum, there was never any suggestion, as far as I am aware, that the obligation imposed by the convention was merely to *seek* consent. Rather, the obligation was to *obtain* consent; i.e., it was understood as conferring a right on the devolved legislatures to *veto* UK legislation affecting devolved matters. This might mean amendment of a Bill so as to enable consent to be given, or if it could not be secured, removal of the provisions affecting devolved competence from the Bill altogether.

While it has always been clear that there might be exceptional cases in which legislation might be enacted despite a refusal of devolved consent, there has never been any official attempt to clarify when those exceptional cases might arise. I have previously suggested,³ on the basis of experience in relation to the Parliament of Northern Ireland, and what little discussion there had been on the issue, that there are two sets of circumstances in which an exception might be made: first, in cases of necessity; and second, in circumstances in which the devolved legislature might be regarded as having abused the power entrusted to it.

It might also be argued that an exception can also be made where protection of devolved autonomy comes into conflict with some other, more important constitutional principle. However, in the absence of a codified constitution, it is difficult to say with certainty what those other principles might be, or how they should be weighed against the importance of devolved autonomy. Certainly, the assertion of Parliamentary sovereignty *by itself* cannot be regarded as sufficient constitutional justification for overriding the requirement for devolved consent, as this would render the Sewel Convention essentially meaningless.

Nor, in my view, is it sufficient to justify acting without devolved consent that the circumstances in question are “unusual”. This tells us nothing, by itself, about the constitutional principles which ought to govern the situation, and certainly does not mean that such principles become unimportant; indeed, it is precisely in unprecedented situations that reference to principle is particularly valuable.

Legislative Consent and the Brexit Process

The Sewel Convention has been severely tested by the Brexit process and its ongoing legislative aftermath. This has been partly due to political disagreement between the UK and devolved institutions about the desirability of Brexit and/or its implications for domestic law and policy. But it is also due to the nature of Brexit itself, as a constitutional change affecting the whole of the United Kingdom, albeit one with particular, and profound, implications for law and policy making in devolved areas and for the devolution arrangements themselves. Thus, while the UK Government accepted that the Sewel Convention was engaged by many pieces of Brexit or Brexit-related legislation, these were not straightforwardly Bills affecting devolved policy areas or involving an adjustment of particular devolution statutes, but rather Bills concerning the broader structural arrangements within which devolution is situated, affecting all parts of the UK. As a consequence, while the devolved institutions had a strong and legitimate interest in influencing the nature and impact of those arrangements, the UK Government was unwilling to concede a veto to them, either individually or

³ ‘Constitutional Change and Territorial Consent: The *Miller* Case and the Sewel Convention’, in M Elliott *et al* (eds), *The UK Constitution After Miller: Brexit and Beyond* (2018).

collectively. The result was, in some cases, that the policy preferences of the UK Government as to the form and domestic consequences of Brexit trumped those of the devolved governments.

The Brexit process thus involved difficult issues of principle about the appropriate balance to be struck between UK-wide and territorial majorities in a system of asymmetric devolution. In my view, this required careful consideration of the nature and implications of particular pieces of Brexit-related legislation, rather than a blanket assertion, or denial, of a devolved veto.

During the Brexit process and its aftermath, constitutional practice in relation to legislative consent has evolved in two main ways.

Primary Legislation

The UK Government and UK Parliament have been willing to enact key pieces of Brexit and Brexit-related legislation without devolved consent, on the basis that it was justifiable to do so in the exceptional circumstances of Brexit. To date, six Acts have been enacted without the consent of one or more of the devolved legislatures:

- European Union (Withdrawal) Act 2018
- European Union (Withdrawal Agreement) Act 2020
- United Kingdom Internal Market Act 2020
- European Union (Future Relationship) Act 2020
- Professional Qualifications Act 2022
- Subsidy Control Act 2022

In only two cases (the Withdrawal Agreement and Future Relationship Acts) was any substantive justification offered for proceeding without devolved consent. In both cases, the urgency of the legislative timetable was cited, in relation to the Withdrawal Agreement Act, in order to avoid leaving the European Union without an agreement, and in relation to the Future Relationship Act, to meet the UK's international commitment to implement the Trade and Co-operation Agreement by the end of 2020. In these two cases, in my view, an exception to the Sewel Convention could justifiably be made on grounds of necessity. Given that the negotiation of international agreements is clearly a reserved matter, conceding a devolved veto over the implementation of such agreements might also be thought to be inappropriate in principle.

For the other four Bills, though, it is difficult to see any compelling constitutional justification for legislating without devolved consent. In each of these cases, the focus of the legislation was purely domestic; there were no compelling grounds of urgency; nor any absolute necessity to adopt a UK-wide legal framework. Accordingly, the decision to act without devolved consent seems simply to reflect the UK Government's preference for a UK-wide legislative approach, and one which gave effect to its own, rather than agreed, policy choices. What distinguishes these Bills from others where a devolved veto has been conceded is not self-evident.

Secondary Legislation

A practice has also developed of creating consent mechanisms under particular statutory provision for the exercise of secondary legislative powers by UK Ministers affecting devolved matters (in some cases, including powers to amend devolved legislation or the devolution statutes themselves). This type of provision was first enacted in s.12 of the European Union (Withdrawal) Act 2018, but also appears in other Brexit-related legislation (including: United Kingdom Internal Market Act 2020, ss.10 and 18; Direct Payments to Farmers (Legislative Continuity) Act 2020, s.3; and Professional Qualifications Act 2022, s.17).

This is a positive development insofar as the Sewel Convention does not apply to secondary legislation. However, it is problematic in a number of respects:

1. The practice in relation to secondary legislative powers potentially affecting devolved competences is *ad hoc* and inconsistent. Where consent obligations are imposed, these are differently worded. In some cases, an obligation is imposed merely to *consult* relevant devolved authorities (e.g., the Healthcare (European Economic Area and Switzerland Arrangements) Act 2019, s.5). In other cases, UK ministers are expressly prohibited from legislating in devolved areas (e.g., the Fisheries Act 2020, ss.36 and 38), while in some cases no constraints are imposed at all (see e.g., the power to correct deficiencies in retained EU law conferred by s.8 of the European Union (Withdrawal) Act 2018).
2. Even where subject to a requirement for devolved consent, such powers normalise the idea that it is constitutionally acceptable for UK Ministers to exercise powers, including Henry VIII powers, in devolved areas. While the residual power of the UK Parliament to legislate in relation to devolved matters derives from the principle of Parliamentary sovereignty, this does not apply to ministerial powers. In other words, unlike the UK Parliament, UK Ministers do not hold residual powers to act in devolved areas. Nor are UK Ministers accountable to the Scottish Parliament for their exercise of such powers. Accordingly, any decision to confer powers on UK Ministers to act in devolved areas should require particularly strong justification.
3. With the exception of the provision in s.3 of the Direct Payments to Farmers (Legislative Continuity) Act 2020, the requirement to seek devolved consent is a misnomer, since Ministers may proceed to legislate on devolved matters even if consent is not granted, albeit with an obligation to justify that decision. On one view, this simply reflects the fact that the Sewel Convention does not create an absolute obligation to obtain devolved consent in all circumstances. However, once again the circumstances in which a lack of devolved consent may justifiably be ignored are not specified. In addition, it is more objectionable in principle for a Minister to be able to decide to dispense with devolved consent than for the UK Parliament to be able to do so.

The Sewel Convention After Brexit

The combined effect of these developments is recast the Sewel convention (and the idea of devolved consent more generally) from an obligation to *obtain* consent, subject to exceptions, into an obligation to *seek* consent, leaving it up to the UK Government to decide whether consent has been reasonably or unreasonably withheld.

It is unclear whether this new approach is limited to Brexit-related legislation; or whether it will apply to analogous changes to the UK-wide constitutional framework which have implications for devolution; or whether it applies to the practice of devolved consent generally.

In relation to non-Brexit related legislation, the Sewel Convention does appear to be applying as it did prior to 2018. In other words, Bills have been amended to remove provisions relating to devolved matters when consent has not been granted (Covert Human Intelligence Sources (Criminal Conduct) Act 2021; Elections Act 2022), or alternatively amended in such a way as to allow consent to be granted (e.g., Health and Care Act 2022; Advanced Research and Invention Agency Act 2022), albeit there have been disputes about whether devolved consent is required in respect of particular provisions (e.g., in relation to aspects of the Nationality and Immigration Act 2022 and the Police, Crime, Sentencing and

Courts Act 2022). Nevertheless, this is consistent with an understanding of the Convention which allows UK Ministers to decide whether consent has been reasonably or unreasonably withheld. In any case, it is not difficult to anticipate further Brexit-related or analogous constitutional Bills where disputes about devolved consent might arise (e.g., the Brexit Freedoms Bill or the Bill of Rights promised in the Queen's Speech).

If this is an approach which is likely to continue to apply, either in general or in relation to specific categories of legislation, then it amounts to a fundamental weakening of the constitutional protection for devolved decision-making autonomy. It also implies a top-down rather than collaborative approach to the development of the constitutional framework within which the devolved institutions operate. Rather than a mechanism for mediating potential tensions between the UK and devolved institutions, the legislative consent process has itself become a site of constitutional contestation.

In order to restore the ability of the Sewel Convention to perform its defensive and facilitative functions in relation to the devolution arrangements, the following steps should be taken:

1. A clear statement, agreed between the UK and devolved Governments and endorsed by the UK and devolved legislatures, of the constitutional importance and obligatory nature of the Sewel Convention, together with a statement of the circumstances in which, or reasons for which, a refusal of devolved consent can legitimately be overridden;
2. The development of a mechanism in the UK Parliament for justifying and scrutinising decisions to proceed with legislation affecting devolved matters in the absence of devolved consent;
3. The development of a mechanism for resolving disputes about whether the Sewel Convention applies to particular Bills, or particular provisions within Bills; and
4. Agreement between the UK and devolved governments (and endorsed by the respective legislatures) of a consistent, principled, and mandatory approach to the making of secondary legislation by UK Ministers affecting devolved matters.

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16 May 2022