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AITHISG OIFIGEIL

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Thursday 19 May 2022

Session 6

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CONSTITUTION, EUROPE, EXTERNAL AFFAIRS AND CULTURE COMMITTEE
13th Meeting 2022, Session 6

CONVENER

*Clare Adamson (Motherwell and Wishaw) (SNP)

DEPUTY CONVENER

*Donald Cameron (Highlands and Islands) (Con)

COMMITTEE MEMBERS

*Alasdair Allan (Na h-Eileanan an Iar) (SNP)
*Sarah Boyack (Lothian) (Lab)
*Maurice Golden (North East Scotland) (Con)
*Jenni Minto (Argyll and Bute) (SNP)
*Mark Ruskell (Mid Scotland and Fife) (Green)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Michael Clancy (Law Society of Scotland)
Dr Christopher McCorkindale (Committee Adviser)
Professor Nicola McEwen (University of Edinburgh)
Professor Aileen McHarg (Durham University)
Stuart McMillan (Greenock and Inverclyde) (SNP)
Professor Alan Page (University of Dundee)
Akash Paun (Institute for Government)
Professor Stephen Tierney (University of Edinburgh)

CLERK TO THE COMMITTEE

James Johnston

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament

Constitution, Europe, External Affairs and Culture Committee

Thursday 19 May 2022

[The Convener opened the meeting at 09:33]

Parliamentary Partnership Assembly

The Convener (Clare Adamson): Good morning, everyone, and a very warm welcome to the 13th meeting in 2022 of the Constitution, Europe, External Affairs and Culture Committee.

Our first agenda item is an update on the meeting of the Parliamentary Partnership Assembly that the deputy convener and I attended last week in Brussels. It was the first meeting of the assembly. The agenda was very much a scene-setting one on deciding a way forward and possible future topics. A note of the meeting has been prepared by the clerks and will be distributed to members and published on the Parliament website, so I will not spend too much time talking about it.

There was a very good debate on the Friday afternoon on Ukraine, with a lot of consensus across Europe about the work that is being done by the United Kingdom and the European Union in that respect. There was also a very interesting discussion on energy co-operation and energy security going forward. However, on the first day it was absolutely clear—and I will invite Donald Cameron to say a few words on this as well—that there was a complete impasse between the UK and Europe in relation to the Northern Ireland protocol. As an observer—colleagues from the Welsh Senedd were represented as observers as well—my observation was that the issue dominated the two days and it was very disappointing that there was not a Northern Irish voice in the room. If our Northern Irish colleagues had been there, they would not have had speaking rights at it. Everybody was talking about them but we heard very little about the actual experience of the people who were being talked about.

The assembly meeting was very interesting and I am looking forward to seeing how the assembly develops. I invite Donald Cameron to say a few words.

Donald Cameron (Highlands and Islands) (Con): I do not have much to add. I will reinforce what the convener said about the events, certainly on the first day, being overshadowed by the dispute about the Northern Ireland protocol, which I think was a great shame. However, it was good to be there in person and to be in the same room as delegates from the UK Parliament and the European Parliament.

There were some practical suggestions about how things might develop thereafter, rather than just a general discussion. There was talk about working groups being set up to look at specific policy areas, which would be a good thing from my point of view.

As the convener said, there were two very good sessions, one on EU-UK co-operation on defence and intelligence in relation to Ukraine, and another excellent session on energy and co-operation, particularly around things such as new energy technologies.

All in all, it was a worthwhile and fascinating visit.

The Convener: As I said, a note of the meeting will be published on the website for anyone who has an interest and committee members will have the opportunity to read that.

Legislative Consent after Brexit

09:36

The Convener: The convener of the Delegated Powers and Law Reform Committee, our colleague Stuart McMillan, who has an interest in what we are doing today, is joining us for the second agenda item. A very warm welcome to you.

We are taking evidence in a round-table format on legislative consent after Brexit. This is the first in a series of round tables that we have planned on post-EU constitutional issues. I am delighted to be joined by Professor Nicola McEwen, who is professor of territorial politics at the University of Edinburgh, and senior research fellow on UK in a changing Europe; Professor Stephen Tierney, who is professor of constitutional theory at the University of Edinburgh; Professor Aileen McHarg, who is professor of public law and human rights at Durham University; Akash Paun, who is senior fellow at the Institute for Government; and Professor Alan Page, who is emeritus professor of public law at the University of Dundee. Also—this is my first time managing a hybrid round table, so bear with me, people—Michael Clancy, who is director of law reform at the Law Society of Scotland, is joining us online.

Our committee adviser, Dr Christopher McCorkindale, who is a senior lecturer in law at the University of Strathclyde, is also here. We have four topics to cover. As always, I am afraid that we must have a sharp close because of First Minister's question time on a Thursday morning, but we are hoping to have a discussion of around 20 minutes on each of the four topics. I invite Dr McCorkindale to introduce the topics.

Dr Christopher McCorkindale (Committee Adviser): The committee has identified four topics of particular interest. First, what is the constitutional purpose of the Sewel convention and what principles and values underpin its proper operation? Underpinning that, as some of the evidence has highlighted, is that until roughly 2016, until the Brexit process, the convention operated largely uncontroversially. On the one hand, it got the business of government and legislation done but, on the other hand, it meant that some of the key principles and values and meanings that underpin the convention never had to be stress tested—they never had to be unpacked. We are now in a stressful situation and we are finding that there is lots of conflict and conversation about these things when we need them most.

Some of the issues that might be covered in the first 20-minute discussion are: has there been a shift in the purpose of Sewel from protecting devolved autonomy and facilitating shared governance towards the articulation and continuation of conflict? Can Sewel meaningfully protect devolved autonomy and meaningfully facilitate shared governance, particularly given its nature as a political rule? Also, following the Supreme Court decision in Miller v Secretary of State for Exiting the European Union, can the imbalance of political power between the UK and the devolved Administrations be addressed by a political as opposed to a legal and justiciable rule?

Secondly, we will go on to discuss different issues around the meaning of consent in the context of the Sewel convention. That might include whether there is a shared meaning of consent across political actors, whether that meaning is consistent across the proliferating consent requirements, and to what extent the is meaning evolving, particularly through the Brexit process.

The third topic is about what constitutes a not-normal context, such that the UK Parliament need not obtain devolved consent. That might include questions such as, is this a normative exception to the general rule or is it a purely descriptive one? Is it enough to describe Covid or Brexit as not-normal situations that, therefore, justify the override of consent on its facts?

Finally, we will discuss the following questions: to what extent has the behaviour of the Scottish Government and the UK Government towards consent impacted the legislative and scrutiny functions of this Parliament? To what extent has the trend, in certain contexts, to override the withholding of consent impacted the proper exercise of the Parliament's functions? To what extent has the Scottish Government's willingness to recommend consent impacted on the proper exercise of the Parliament's functions? Also, how significant, if at all, is the problem of consent as a means of post-Brexit constitutional regulation? Is that a fundamental shift in the application or is it a particular response to the heat of the moment?

The Convener: Thank you very much, Dr McCorkindale. I ask those in the room to indicate to me or the clerks if they want to come in, and those online to put an R in the chat—that will be relayed to me by the clerks. We will try to get everybody in.

I invite Mr Ruskell to open questions from the committee.

Mark Ruskell (Mid Scotland and Fife) (Green): I want to pick up on the final topic, because I have been thinking about Professor Nicola McEwen's comments about there being an age of former glory in relation to use of the Sewel convention, obviously in very different political

times and, as Chris McCorkindale has said, perhaps at a time when it was not being stress tested quite so much.

I am interested in parliamentary scrutiny and in getting thoughts from around the table about whether there is more parliamentary scrutiny now or whether there was more in the past and less today, and about what the opportunities for parliamentary scrutiny might be in future. I see that Professor Page is nodding—you have invited yourself to make the first comment.

Professor Alan Page (University of Dundee): First, it is possible to overanalyse the convention and to get too worked up about what it means. The essential point is that the convention is very careful not to exclude the possibility of legislation in devolved areas being made without the Parliament's consent. If it did, we would not be talking about devolution; we would be talking about federalism. Before Brexit, it was very difficult to imagine the UK Parliament legislating without the consent of the Scottish Parliament because of the political backlash that that would inevitably provoke. However, with Brexit, as we have seen, that has become not common, but not uncommon.

On behaviour, another point to be borne in mind is that the Scottish Government—and, by extension, the Scottish Parliament—has always found it convenient to be able to rely on Westminster legislation, both primary and secondary, in devolved areas. That was true before Brexit, it was true in the preparations for Brexit and it will continue to be true in the future.

I think that talk of power grabs conceals a great deal of active co-operation. That seems to have been true even of the less harmonious relations between the UK and Scottish Governments in the preparations for Brexit. A brief reading of this session's legislative consent memoranda shows that quite a lot of them refer to changes in bills that have been made as a result of discussions between the UK and Scottish Governments.

Coming to your question, against that background I think that the difficulty that Parliament faces and has always faced is that of effectively scrutinising lawmaking in devolved areas other than lawmaking by the Scottish Parliament and the Scottish ministers. That has always been a difficulty. It was a difficulty in the first decade of devolution. It took 10 years to get a procedure put in place whereby legislative consent memoranda and legislative consent motions are submitted to the Parliament. Before that, there was a great deal of uncertainty about what exactly was happening, what the substance of negotiations was, who was saying what to whom and what the results were in terms of legislation.

09:45

I will give another example. Was Westminster legislation on EU obligations and their implementation secondary legislation? I remember thinking in 2007 that there was absolutely no information about what was happening there. All we knew was that there was a presumption in favour of Scottish secondary legislation, but it was clear that the Scottish Government continued to rely heavily on Westminster legislation in those areas. I thought that, with a change of Government, all that will change, but not a bit of it. There continued to be next to no information about what was actually happening—or there was a promise of information and then it was late and all the rest of it.

I agree with what Dr McCorkindale said about the importance of the Parliament being vigilant, to ensure that its role is not hollowed out. You can say that in relation primary legislation, but I would say that the real key is secondary legislation. Therefore, I endorse what the Scottish Parliament information centre says in the briefing paper about the need to get that sorted out. The statutory instruments protocol, in its current form—the second version of it—is clearly incomplete, and I think that that needs to be addressed.

Mark Ruskell: That is very useful.

Professor Nicola McEwen (University of Edinburgh): I will leave it to my colleagues to talk about the secondary legislation aspect.

I was thinking a little bit about Chris McCorkindale's point about stress testing and I agree with that description. Professor Aileen McHarg has made a very helpful distinction around the defensive and facilitative aspects of the Sewel convention. I agree that, where the UK Government was legislating in devolved matters with the consent of the Scottish Parliament and the Scottish Government, that was not particularly stressful. It was quite stressful on the defensive side though.

The broader definition of Sewel—the one that is in the devolution guidance notes—is about legislating with consent when devolved powers are involved. It is not a devolved matter—it is a reserved matter—when you are legislating on the constitutional settlement. However, the convention has, through its use, been broadened out to encompass securing consent before the powers of devolution are changed, and that has been quite stressful sometimes.

I remember sitting around this table discussing the Scotland Act 2016, which was an illustration of where the Parliament and the Government could use the convention to get significant leverage in shaping Westminster legislation—on that occasion, on a reserved matter. I think that even

though the European Union (Withdrawal) Act 2018 was an incident—to be repeated—of the UK Parliament legislating without the consent of this Parliament, the process that led up to that still created the opportunities for influencing and changing that legislation, albeit not to the point at which the Parliament felt that it could grant consent.

I am not sure that we are in that place now, and I worry that the opportunities for exercising that defensive aspect of Sewel have been diminished, in part because of the number of times that it has been tested, and the ambiguity around when the circumstances are normal and not normal—I am sure we will come back to that.

That aspect has also been diminished because, for the Sewel convention to work, there must be willingness on the part of both Governments. It is essentially a legislative tool, but it is an intergovernmental process and an awful lot of intergovernmental interaction takes place prior to the decision to grant or withhold consent. If that process is not working and is not functioning effectively, you have a problem—and I think that we have a problem.

Professor Stephen Tierney (University of Edinburgh): I will begin by agreeing with Professor Alan Page that we have to be careful about reifying the convention itself. Conventions are a reflection of constitutional practice, and as constitutional practice changes, the nature of the convention changes. This particular convention is a pragmatic solution to policing the borders of devolved competence, to some extent. That is common in any territorialised system or federal system, and in any such system you find a long-stop power that lies with the centre. In federal systems, we see that in supremacy clauses, residual power clauses and in a right of pre-emption, whereby if the centre moves in a particular area it occupies that territory and no one else can exercise that power. The Scotland Act 2016 is a more progressive approach, in that it does not explicitly authorise that power, which operates through the convention.

I think that one of the reasons why there is such stress on the convention in recent times is because of the expansion of devolved power. We saw that in 2012 and 2016, and now in a sense through Brexit, with the return of powers. We have found that whereas the Scotland Act 2016 demarcated quite carefully the different areas in which devolved and central Government operated, there are now many areas in which there is a lot more shared competence. We see that in cross-border transactions under the United Kingdom Internal Market Act 2020 and in the current Procurement Bill. There are many areas in which there is a need for far closer co-operation on how to operate powers that are now much more clearly shared.

To return to the question, I think that there are real challenges for Parliaments, the first of which is to identify where the limits are now to manage the vast swathe of legislation that is coming out of Westminster post Brexit. That is not only a practical matter; fundamentally, so much of that legislation is secondary legislation. I think that the big gap is that the Sewel convention does not apply to delegated powers. A large amount of EU legislation is now being revoked: it was introduced through secondary legislation and it is being revoked through secondary legislation, and that is where the real gap is.

It seems to me that we may take our eye off the ball if we focus too much on the convention when the solutions have to be intergovernmental at the executive level and, in particular, interparliamentary, in terms of better timing, more heads up and more stages in the process whereby amendments can be brought forward. I am sure that we will come back to all of that.

I think that we need to see the convention in a much broader context in terms of the nature of devolution, where the residual power lies with the Scottish Parliament, and in terms of the pragmatics of there being far more shared powers post Brexit.

Professor Aileen McHarg (Durham University): I agree with some of the things that have already been said and will make a few additional comments.

We have talked about the constitutional function of the convention. I think that Brexit has revealed the limits of the convention's ability to manage shared rule. It seems to cope fairly well when we are talking about standard policy issues, but what is distinct about Brexit is that it is a change to the constitutional framework. Of course it has impacts—very important impacts—on devolution, but it has impacts for the whole of the UK, and it is in relation to those aspects of the shared constitutional framework that I think that we are seeing the limitations of the convention.

I said in my briefing that lots of different kinds of questions were thrown up in the Brexit process, and in some respects I think that it was legitimate and acceptable to operate without devolved consent; in other respects, I think not. We need to be quite nuanced and careful about how we approach these issues.

On process, I agree that the major issues are around secondary legislation. On primary legislation, good processes operate in this Parliament and other devolved Parliaments. They are often constrained by time, but that is a feature

of the legislative process in general and is difficult to cope with.

Secondary legislation is really problematic. There are no general principles at play here. The mechanisms that have developed are very ad hoc. I think that different issues of principle apply to secondary legislation in comparison with primary legislation. That is because the UK ministers are not the same as the UK Parliament; they are not in the same constitutional position. Stephen Tierney said that any federal system has a long-stop position for the centre, and we have that in the form of parliamentary sovereignty. However, that is not the same as saying that it is fine for there to be a residual right for UK ministers to act in devolved areas, which I think raises very different issues.

The final point that I want to make on process is that it is not just a matter of process in this Parliament; there are also big questions about process in the UK Parliament. I think that that is where there are significant gaps. I know that the Institute for Government has made some good suggestions in that area.

The Convener: I can neatly bring Akash Paun in at this point.

Akash Paun (Institute for Government): Thanks for the invitation, convener. It is nice to be back in the Scottish Parliament for the first time in more than two years.

To go back to the question of the purpose of the Sewel convention, I think that it is quite useful to draw the distinction between the core constitutional purpose of protecting the political autonomy of the devolved institutions and then the more practical purpose, maybe, of facilitating co-operation and ensuring that there is a common standard of law in certain areas where there is political agreement.

As far as the defensive purpose, as Professor McHarg has put it, is concerned, of course it was always known that the convention was framed in such terms as to mean that it was not judiciable, there was potential for exceptions in not normal circumstances and so on. Parliamentary sovereignty was retained—everybody knew that all along. However, it is hard to look back sometimes and remember by how much perceptions of the convention have changed. Prior to Brexit, parliamentary sovereignty was intact and all the rest of it, but the Sewel convention was seen by a lot of people as being close to a veto—not a legal veto, but as more or less inviolable.

There is a Political and Constitutional Reform Select Committee report from 2015-16, which the committee might have seen, that looked at the Scotland Bill as it was going through. It concluded that the way that Sewel was put into statute was "legally vacuous", as the committee put it, and that proved to be the case when it was looked at in Miller.

However, the select committee also said that hardly anyone could envisage a circumstance when Westminster would deliberately legislate without consent. I think that that was the view at the time, and it is reflected in the fact that—from what I can recall, anyway—in the negotiations over the Scotland Bill the Scottish Government did not really put up much of a fight on the way that Sewel was written into the bill. The focus was on the fiscal powers, the surrounding fiscal framework and so on—that is what most of the attention was placed upon. People thought that the Sewel convention worked, basically, and it did. Therefore, there has been a big shift—I think that it has been very significant.

10:00

People have talked about the ways in which that has happened. Going back to the passage of the European Union (Withdrawal) Act 2018, I think that it is quite clear that the UK Government really did not want to breach the Sewel convention. As Professor McEwen mentioned, lots of amendments were made to address Scottish Government concerns. Consent was secured from Wales, which was seen as a big thing from the UK Government perspective, which really did not want the situation to end with an open breach of the convention. However, having done it that once without the sky falling in—from a Whitehall perspective—has made it much easier for the UK Government to justify it publicly, and maybe to itself as well, on a series of subsequent occasions. Now we see the commitment to the convention really watered down and the Government talking about it much more, as some of the papers note, as good practice, a nicety or a courtesy, rather than actually some kind of obligation.

The Convener: Michael Clancy joins us online.

Michael Clancy (Law Society of Scotland): Thank you, convener.

There is so much in all of this. We have had many diverse comments but I will pick up on only a couple, because I know that we are well over our 20 minutes on this section.

I was present in the House of Lords on that day in July 1998, in the Opposition advisers' box, when Lord Sewel made the declaration that has become associated with his name, but even in the context of that declaration, he acknowledged that there was precedent for such an arrangement in Northern Ireland. It might be instructive at some point to look closely at the experience of the Northern Ireland Parliament from 1921 through to the 1970s. I happen to have come across a

comment about a Treasury document for official use, which stated:

> "In practice the UK Parliament refrains from legislating on matters with which the Northern Ireland Parliament can deal, except at the request and with the consent of Northern Ireland. It is recognised that any departure from this practice would be open to objection as impairing the responsibility which has been placed on the Northern Ireland Parliament and Government."

That is an interesting take on the convention: it is about the balancing of sovereignty and the restraints on its exercise by the sovereign legislative power where the devolved legislature has been invested with power and responsibility in defined areas and has a democratic basis for doing so.

If we look at that in a more contextualised way, we can see it cropping up, of course, in imperial law and in the case that was referred to in Miller of Madzimbamuto v Lardner-Burke, which was about the Rhodesian Parliament. However, when we get to point that I think that Professor McEwen expressed about the intergovernmental relations aspect, Miller tells us that the application of the convention was adopted as

> "a means of establishing co-operative relationships between the UK Parliament and the devolved institutions."

Following Dr McCorkindale's call to get back to basics on this, that might be where we have to readdress matters. In the context of intergovernmental relations, it is important to ensure a co-operative relationship, in terms of consent by the Scottish Parliament and the other devolved legislatures.

When the Scotland Act 2016 was passing through Parliament—I was there, again in the Opposition advisers' box—the whole concept of the Sewel convention was narrowed down to that which was represented by Lord Sewel in July 1998. The incorporation into the bill of the additional aspects, which we find in devolution guidance note 10, around the impact on the Parliament's legislative competence and the Scottish ministers' executive competence, was staunchly objected to by the Advocate General on behalf of the UK Government.

I think that anyone who was there and actively involved in analysing the bill—and most of the people around this table were—would be able to tell you that it was almost entirely predictable that the Government of the day then would interpret the Sewel convention in a narrow way, which would mean that issues about the competence of the Parliament and of ministers could be put to one side. Those issues were not even referenced in the declaration in the Scotland Act 1998 that came out of the 2016 act.

The Convener: Although we were trying to stick to 20 minutes for each topic, we have already had quite a good mix of all four, so I am relaxed about that. A number of members want to contribute, however, so I will call Alasdair Allan and Donald Cameron and then bring in others from the wider group.

Alasdair Allan (Na h-Eileanan an Iar) (SNP): Convener, I am glad to hear that you are relaxed about us wandering from subject to subject.

I wonder whether people watching—if there are any people watching—are curious, as I think a lot of people are, about the extent to which constitutional practice rests on conventions. I am conscious that that word is used in different ways, but I am interested to know—perhaps from Professor McEwen, perhaps from Professor Tierney as they are both sitting next to me—where the Sewel convention sits in the food chain or the hierarchy of conventions, if there is one. At one end sit conventions that have not been challenged for a long time, such as the convention that the Queen has to appoint a Prime Minister who has some support in the House of Commons. At the other end, there are conventions such as Sewel, which the UK Supreme Court seems to characterise as a political convention. Where does Sewel sit in that hierarchy for those of us, myself included, who find the whole idea of the British constitution mysterious and sometimes offensive?

Donald Cameron: I do not find the British constitution offensive, but Alasdair Allan makes a good point. There is a wider question about the utility of conventions—not just Sewel—and I would be fascinated to know what our witnesses think about that.

I was quite struck by something that Professor Page said, and this is perhaps a contrarian view, but are we in danger of overstating the problem? Undoubtedly we have had some very high-profile examples of the convention under strain, particularly around Brexit but, day in, day out, when we see legislative consent motions here in the Parliament, mostly on secondary legislation, that is relatively uncontroversial. In fact, LCMs go through the Parliament almost without a vote, having been agreed between the Scottish and the UK Governments, and it is just as a matter of administrative practicality and in everyone's interest for that to happen. I put that to our witnesses.

Lastly, this is a question for the lawyers in the room. We have had some recent decisions, particularly in the United Nations Convention on the Rights of the Child case, where the courts have quite firmly taken a view and have restated section 28(7) of the Scotland Act 1998 on the UK Government's ability to legislate "for Scotland", I think it says. That is not directly on Sewel, but

does it have any bearing on a court's view of these various issues?

Professor McEwen: I will let Stephen Tierney deal with the question about where the convention sits.

If we were talking only about the uncontroversial technical and facilitative function, then yes, we would be overstating the problem, but the Sewel convention would be hollowed out considerably if it worked only when nobody disagreed. If you are talking about a problem where you reduce something to a technical exercise or there is no controversy anyway and it becomes an efficient tool for doing things—which is an important aspect of the convention—if that is continuing to work, that is fine.

The problem emerges when there is a matter of controversy and disagreement and there are differences, for whatever reasons. Those reasons could be political or institutional, or there could be stakeholder divergences, where there is a desire to do something differently. What is coming up at the moment is that it is more difficult to find the compromises that would enable something to be done UK-wide, where that might be desirable. Sewel does not really work if the only way you can do that is if everyone falls into line.

I am aware of an issue that you will have dealt with—I do not know the details of the bill—that seemed on the face of it to be a relatively uncontroversial issue about cultural objects. In the case of the Senedd, I know that it wanted the matter to be dealt with on a UK-wide basis, but it had a problem with a particular aspect and it struggled to get the kind of agreement in the intergovernmental space that would have enabled that to happen. That is why I stressed earlier—Michael Clancy also talked about it—the need to look at the intergovernmental space where these sorts of decisions take place. That space raises issues for the Parliament because it tends to be closed and not as subject to scrutiny as it arguably could and should be.

When we are thinking about Sewel and development, it is helpful to think about its different functions. Sometimes there is a problem and sometimes less so.

Professor Tierney: I will answer Alasdair Allan's very interesting question. The first point is on the nature of a convention. In the Miller case, the UK Supreme Court said, "This is just a political restriction, therefore we're not going to touch it." I think that that underestimates what a convention is. A convention is a rule. It might be a political rule, but it is binding and the court could have gone further and said, "Yes, we can't enforce this convention, but we can say it exists, we can articulate its content and we can declare it has been breached." The court did not go those steps.

The Supreme Court in Canada has done that in the past, however, and it is an option open to courts. When the Supreme Court in Canada did that in 1982, it put enormous political pressure on the centre not to proceed. It forced Pierre Trudeau to completely rethink how he was changing the constitution.

The other very interesting question that you asked was whether Sewel is more important than other conventions. The problem is that it is so wide ranging. If Sewel were violated in relation to a public emergency and in a very narrow area, a lot of people would sit back and say that that was fine. If Sewel were to be used to completely rewrite the Scotland Acts, however, one would imagine that the violation of that would be seen as equivalent to violating the convention of royal assent to legislation. The problem is that it is such a wide-ranging convention, so it depends what the subject matter is.

The UNCRC case is a very interesting point and the Supreme Court was unusually inflammatory and critical of that legislation, suggesting that at least one section took no account of the limits of legislative competence as a matter of policy. I do not want to get into whether that is the case or not, but that is inflammatory language from the Supreme Court.

I will say—and I think that this is what I was talking about earlier—that we are now in the realm of so many shared powers that the issue is one of intergovernmental and interparliamentary relations. Possibly, both sides should review whether they are stepping into reserved or devolved competence, perhaps inadvertently, perhaps consciously. I think that there is a debate to be had in both directions about violations of legal competence or convention respectively.

Donald Cameron: That is a very interesting point. Here in Scotland, the argument is often about whether something is reserved or devolved. We had a legislative consent motion in the chamber on the Nationality and Borders Bill, where the UK Government's position was that consent was not required because the bill did not touch on devolved areas. The Scottish Government's position was that, in practice, it did. There was an argument about it and we voted on it. Often, as you said, at issue is not just the application of the convention, but an argument about where the limits sit.

10:15

Professor Page: On the status of a convention or the question of what a convention is, it is more than just a statement of practice. It is a rule. In this

context, I think of it in terms of degrees of bindingness. If we go back to the Scotland Act 2016, which wrote Sewel into the devolution settlement, you could have said—or at least I thought at the time—that this was setting the seal on a federal or quasi-federal relationship between Scotland and the United Kingdom, in which it would be inconceivable that the UK Parliament would legislate without the consent of the Scottish Parliament. Michael Clancy captured that perfectly earlier, when he described the Treasury's summary of the position in Northern Ireland. That is unthinkable; we simply would not do that. I am not sure, given what was actually happening in Northern Ireland, that that was a particularly admirable position for the UK Government to adopt—it is nothing to do with us, they can get on with it and do what they like—with the consequences that we saw.

You could have said that Sewel was on the point of crystallising and becoming a hard, binding rule at that point. What has happened since is that it has become fluid. It is as though there has been an earthquake and the ground has suddenly become molten, which is why we are sitting here asking how binding it is now. I would say that it certainly has not lost all of its force but is has lost some of its force.

Professor McHarg: Dr Allan's question was excellent. Please come along to my tutorials.

On how you would determine its place in the hierarchy of conventions, I think that there are three dimensions to look at in terms of the importance of a convention. The first one is age. Sewel is obviously not the oldest of conventions but, as we heard from Michael Clancy, it has a prehistory that makes it older than you might think. Age in itself, however, does not protect against controversy. The convention that the Queen always grants royal assent became contested during the Brexit process, extraordinarily. I would have said that that was absolutely beyond doubt but it was questioned by people who had an interest in questioning it.

Clarity is the second dimension and Sewel is, of course, relatively clear as conventions go because it is written down. It is in the Scotland Act 1998 and in the Government of Wales Act 2006; it is amplified in devolution guidance notes and so on. That makes it clearer than some conventions and perhaps not as clear as others.

The third important dimension, and the one that is problematic for Sewel, is the political and institutional context in which it operates. The other area in which conventions are very important is the existence and accountability of the UK Government, the idea that the UK Government is drawn from and accountable to the Westminster Parliament. There are all sorts of problems about the operation of that in practice but it is a convention that is not seriously contested, I think partly because it operates in a context in which there is reciprocity or a mutual interest in seeing that convention operate effectively. Both Government and Opposition have a mutual interest, because they might switch places, in seeing that that convention operates properly.

The Sewel convention is not like that because you are talking about a relationship between the UK institutions and the devolved institutions in which there is not that reciprocity. They do not switch places, so when contests arise they are on opposite sides of a dispute, rather than in a position where greater consensus over its meaning and operation might be achieved. I think that that is important for Sewel.

I have two points to make on the UNCRC reference. The issue with the way in which the Supreme Court has used section 28(7) of the 1998 act is not about its reassertion that parliamentary sovereignty still exists—we all knew that. It is the content that the Supreme Court has given to parliamentary sovereignty in its incarnation in section 28(7) and it has given it a very extended meaning, such that mere pressure on the UK Parliament is now understood as compromising sovereignty, which is wholly unorthodox. A V Dicey would have made a strong distinction between political constraints and legal constraints on the UK Parliament's legislative competence—and political constraints did not count. That is how I have taught parliamentary sovereignty for decades.

The other point to make about the UNCRC reference is that it has a very direct implication for what this Parliament does in relation to the granting of legislative consent. It told us that, when you are legislating for things like the UNCRC bill and you want to create framework legislation that captures everything within the devolved sphere, you cannot attach that to UK legislation. If you want things like the UNCRC or other international treaties to attach to lawmaking in the devolved sphere, that will have to be lawmaking from this Parliament or from the Scottish ministers.

Dr McCorkindale: I want to come in quickly on what Donald Cameron said. Things basically operate fine, but there are exceptional cases, and we may be overstating or being drawn disproportionately to those. There have been some interesting developments. Committees of the Welsh Parliament the Northern Ireland Assembly have been considering the issue that we are discussing today, and, among those heated debates, they have highlighted that, when things become too efficient and too effective, it is too easy just to consent, and the legislators' function is cut out.

The Welsh Parliament has been looking at issues such as the Animal Welfare (Kept Animals) Bill and saying that, although, for all sorts of reasons, it might be convenient for the UK Parliament to legislate in that area, the bill concerns matters of great public interest that the Welsh Parliament should be scrutinising and debating. The Northern Ireland Assembly is greatly concerned about UK Parliament legislating in devolved areas and ministers not notifying the Assembly at all that the legislation has passed, so the Assembly is operating blind.

There is an extent to which we can overclaim for the efficiency of the process and we have to be vigilant when things are happening efficiently because we might be missing where there are important areas of policy that need to be given a second look—or a first look—by this Parliament.

Michael Clancy: Professor McHarg gave us very interesting analysis about age and clarity and so on. Of course the Sewel convention is not that old, although if one reaches back into legislation connected to the empire, and even to Crown dependencies such as the Channel Islands, you find it cropping up in various guises along the way. But I think that clarity is one of the key points, and that is where the use of normality comes in—we will come to that later. There certainly was considerable debate about whether the convention as enunciated by Lord Sewel was clear enough to be put into a statute with the continued reference to normality.

Stephen Tierney made an interesting point about the Canadian example. That, too, was referenced in Miller. There is an interesting quote from a Canadian Supreme Court judgment. It looks at the

"very nature of a convention as political in inception".

I think that that is the starting point that we have to remember: that constitutional conventions are political tools for smoothing the way in organising the constitution and making life a bit easier for everyone.

The judgment continues, saying that a convention depends on

"a consistent course of political recognition".

That is another condition: that it is recognised by those who are operating it in the political arena.

The judgment also says that, although a convention might have developed over a considerable period of time, its very nature

"is inconsistent with legal enforcement."

That is another leg to what a convention is all about: it is not capable of being taken to court and forced upon one of the parties; it is meant to be some kind of organic, proto-legal, political issue that does not easily sit with being enforced by the courts. I think that those are the things that one would think about.

I would be hesitant about creating in my own mind a hierarchy of conventions. I think that that would lead to far too many internal squabbles and we would end up saying, "My convention is better, older, faster, stronger than yours" and so on. However, it is important that we look on the concept of constitutional conventions as being a necessary one. When we start to try to bring them into law, it creates some of the difficulties that we see with the Sewel convention but there are other conventions that have been brought into law. Most recently the convention regarding prorogation that was abandoned with the Fixed-term Parliaments Act 2011 has been revived, as it were, by the Dissolution and Calling of Parliament Act 2022, and yet it is a different creature because it is no longer a constitutional convention; it is now a legal statement in an act of Parliament.

Akash Paun: There has already been useful discussion of what a convention is, how we define one and so on. In answer to the original question on that point, my approach is to go back to Ivor Jenning's classic definition of a constitutional convention. He set out the three tests of a convention: there must be a clear purpose for it; is must be based on established precedents; and the relevant actors must feel themselves to be bound by the convention. In the case of Sewel—again going back to the pre-Brexit and the post-Brexit context—I argue that it was very well established as a strong convention. I do not know exactly where one would place it in a hierarchy—that is difficult to do—but it meets all of those three tests.

We have talked quite a bit about the purpose of the Sewel convention. For me, we needed the consent convention in order to, as the Supreme Court put it in the Imperial Tobacco Ltd v The Lord Advocate (Scotland) case,

"create a system for the exercise of legislative power by the Scottish Parliament that was coherent, stable and workable."

That was not a point made in reference to Sewel but a point made by the Supreme Court about how devolution was intended to work, but I think that Sewel was a core pillar of that.

On precedent and practice, Michael Clancy has talked quite a lot about even the pre-1999 precedents going way back into the history of relations with Stormont and dominion Parliaments and, even after 1999, I think that it had been used a couple of hundred times by the point of Brexit.

On the question of whether actors see themselves as bound by it, I think that, pre-Brexit, the Government absolutely did, to a large extent. The key question is, what is the situation now? I

think that there are countervailing dynamics in the views on that question in Whitehall and Westminster.

10:30

I think that there are some people, including ministers, who are trying to limit the breaches to the convention as much as possible to things that are seen as inevitable and necessary consequences of Brexit, but that seems to be getting broadened into legislation that is by no means an absolute necessity to make Brexit work. There is also very much a shift in political strategy coming from the top, and there is a much more expansive view of what the role of the UK Government should be in terms of action and visibility in the devolved nations. We can see that in particular through the United Kingdom Internal Market Act 2020, the financial assistance powers established through that and the way that ministers are now starting to get involved in what were hitherto seen as devolved areas.

Alasdair Allan: I am interested in that point about there being a sense of movement away from things that may have been needed to cope with an urgent Brexit situation. Professor, McEwen, in your written evidence, you mentioned about a similar point. You talked about how, initially, the "not normal" reasoning was used around the Brexit deal because it was an urgent emerging situation, but you drew a contrast between that and things such as the United Kingdom Internal Market Act 2020, the Professional Qualifications Act 2022, the Subsidy Control Act 2022. Do you have a view on whether there is a contrast to be made between urgent emerging situations and pieces of legislation that do not meet that requirement, in your view, when it comes to using the phrase, "not normal"?

Professor McEwen: I think that Professor McHarg made the same point in her evidence. My answer is yes, but, even then, it is difficult for me to conceive of a situation where there is clarity on what is not normal or what is exceptional and unique and urgent without even prior consent about that. You could imagine that Covid might have been the perfect example of a situation in which normal practice was set aside but the procedures still functioned. There was consent for UK-wide legislation, but that was with agreement.

For me, the problem arises when someone decides, after they sought consent, that something is so abnormal or so exceptional that they do not need to require consent. It seems to me that you almost need agreement between the Governments prior to that process that something is such an unusual or exceptional circumstance that they can set aside their normal practice or convention. It is difficult to see in the current environment how you get to that point.

The Convener: I am conscious of time. I will suspend for five minutes for a comfort break. When we come back I will bring in Ms Boyack and Mr McMillan.

10:33

Meeting suspended.

10:40

On resuming—

The Convener: Welcome back, everyone. I invite questions or comments from Ms Boyack and Mr McMillan, after which we will open up the discussion again.

Sarah Boyack (Lothian) (Lab): I want to formally thank the witnesses for all the submissions that we received in advance of the meeting—it is useful to get different perspectives, even when you are saying similar things. It is still good to go through the high-level issues that you have raised and the detail.

The issue that I want to follow up is: what do we do about this? Even from the previous hour, you will have detected a difference in emphasis and thoughts among committee members. To go back to the points that Professor McHarg made about the age of the convention, the issue of clarity, what we mean by normality, and the whole issue of political consent and context, there is an issue about lessons learned from 1999 to 2022, and with the 2016 legislation, and what we think now as a Parliament.

I am interested in the two sets of potential solutions and changes from Professor McHarg and the Institute for Government. There is an issue about accountability, which was clearly not designed in by Sewel. At the UK level, ministers can initiate a piece of legislation and not be accountable at that level—there is no structure for that. There is also an issue about how we hold the Scottish Government to account on secondary legislation and how the UK Government is held to account on secondary legislation. However, at a higher level, with primary legislation, there is no accountability.

The Institute for Government and Professor McHarg have made some good and clear recommendations. Will you give us a quick summary at a high level and mention some practical changes?

Stuart McMillan (Greenock and Inverclyde) (SNP): My questions are mostly for Michael Clancy. Way back, I was a member of the Devolution (Further Powers) Committee, and

some of this discussion has taken me back to 2015 and 2016, when that committee discussed the Sewel convention at great length. I know that the Law Society proposed amendments to the Scotland Bill that would have removed the word "normally" from section 28(8) in the 1998 act. If the amendments as proposed by the Law Society had been accepted, does Mr Clancy think that we would be having this discussion in the committee today? Also, would the relationship between the two Parliaments and two Governments be on a better footing?

The Convener: I will go to Mr Clancy first to answer that specific question. I will then bring in Professor McHarg and Mr Paun. Perhaps Professor Tierney could then reflect on his statements about other federal arrangements. What other places get this right and who might have solved some of the questions that we are asking about?

10:45

Michael Clancy: I thank Mr McMillan for asking such an interesting question, and for giving me zero time to prepare for it. However, that is another matter.

One reason why the Law Society sometimes promotes amendments is to ensure that the minister of the day can give an interpretation of an ambiguous provision in a bill, which will satisfy the requirements of the case of Pepper v Hart and will mean that the parliamentary record can be referred to, should the matter ever come into litigation. Partially, that was the impetus behind our proposing amendments to the 2015 bill. Of course, the Government had a majority in Parliament and was able to achieve its intentions in getting the bill on to the statute book.

There was a considerable debate in the House of Lords, particularly on the question of what "not normally" meant. Lord Lang of Monkton referred to it as "special circumstances". Lord Cormack said that the provision should refer to

"times of war or national emergency".

Lord McCluskey, in his best tradition of pointing out things with that twinkle in his eye, said:

"Normally, 'normally' means 'usually'—but 'norm' means a standard and the main definition in some dictionaries is of conforming to a standard."

It was clear, however, that the Government was having none of it. The Advocate General was very gracious in saying that he did not accept Lord McCluskey's proposition, and that

"It would be for the court to say that Parliament decides whether it is normal to legislate for Scotland in a devolved matter."

He went on:

"'Normally' means just that—no more, no less. It is not for the courts to say, 'We don't think the situation was abnormal'. That is a political decision."—[*Official Report*, *House of Lords*, 8 December 2015; Vol 767, c 1494, 1495, 1504-5.]

Of course, that is the nub of dealing with the word "normally". It is the creation of a political nexus in the convention about what is determined to be normal or not.

If we removed the word "normally" from section 28(8) of the Scotland Act 1998, Westminster would not legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament. That would be quite an absolute provision. I will not comment on its political implications, because that is not my role—I am not a politician—but the important thing is that it could be problematic to have an absolute protection for the Scottish Parliament to prevent the UK Parliament from legislating under any circumstance.

We have talked about some of those issues today. We have talked about Brexit as an exceptional set of circumstances that, in legislative terms, were certainly not normal. It was possibly the biggest and most intensive reorganisation of legislative competence that the UK has seen, involving legislative and policy arrangements and many bills on many issues.

We have also touched on Covid as a not-normal situation. We know that, for the Coronavirus Act 2020, the four Governments were in deep conversation prior to the bill being introduced in the UK Parliament, and it went through very speedily without any issues being raised about consent to the matter being legitimate or not.

I do not know whether that answers Mr McMillan's question, but you can see where I am leading. It is quite important to have in the legislation something that takes account of exceptional circumstances, or not-normal situations.

Professor McHarg: I will pick up briefly on what Michael Clancy said before I come on to my specific recommendations, because the issues are linked.

Michael is right that what "not normally" means is clearly non-justiciable and is determined in the political sphere, but that does not mean that it has to remain completely vague and undefined. Michael referred to the dissolution principles that are attached to the Dissolution and Calling of Parliament Act 2022. That is a political mechanism with a statutory underpinning, but it tries to concretise conventions that previously existed. Therefore, it is possible through non-statutory and non-legally binding mechanisms to try to clarify what we mean. The ministerial code and the

Scottish ministerial code are further examples of that kind of mechanism.

In fact, the first of the four recommendations for reform that I made was that there should be an agreed statement from the UK and devolved Governments, first, as to the bindingness of the Sewel convention and what they understand it to mean. Also, to the extent possible, and not in excessive detail, that statement would give some indication as to, or unpacking of, when it might be justifiable constitutionally to make an exception. I would think that both Parliaments would want to be involved in scrutinising and endorsing that.

The second recommendation, which is important but difficult to achieve, is a mechanism for settling disputes about when the convention is engaged. We have two sets of problems. The first is about whether devolved consent is required at all. Does a bill, or do provisions in it, relate to a devolved matter in some sense? Then, once you have decided that it does, there is the second question of whether, if we cannot achieve consent, we can proceed anyway.

We do not have a mechanism for resolving disputes about whether the convention is engaged at all. That is what the Lord Advocate was asking the Supreme Court to do in the first Miller case. As Stephen Tierney said, the Supreme Court just said, "No, we're not going to get involved in that," but it could have got involved if it had wanted to. In the particular context of that case, it is understandable that it did not, but I think that it is regrettable, because it is very hard to replicate an independent and impartial authoritative mechanism for resolving such disputes.

Probably the best thing that we can hope for—this gets to my third recommendation—is improving the procedures in the UK Parliament. It is important to note that, although those procedures are still rather deficient, they have improved somewhat recently. At the final third reading stage of a bill, usually in the House of Lords, there is an express statement about legislative consent, so there is at least an acknowledgement that the UK Parliament is going to proceed without consent. Personally, I have usually found those statements to be empty. There is an expression of regret that consent has not been achieved, but there is no real articulation of why it is necessary to proceed without consent. That is better, but it is not ideal. On the UK Parliament bill pages, there are now links to the various legislative consent memorandums and motions, which is another improvement, although a very slight one.

The House of Lords Constitution Committee has made some recent recommendations—Stephen Tierney can probably say more about them—on how to improve scrutiny in the UK Parliament. There is a suggested role for the Constitution Committee itself. That would be a way of forcing a justification and having an in-depth look at questions or disputes about consent. It would not be a perfect mechanism, but at least it would be a process by which a body of practice, commentary and criticism could be developed.

The last of my recommendations is on doing something about secondary legislation on a consistent and mandatory basis. Again, that is very difficult, because we know that, in both the Scottish Parliament and the UK Parliament, when we try to regulate secondary legislative processes, they operate on an opt-in basis. It is difficult to mandate that a particular approach should be taken across the board. That is where conventions can be useful because, if you cannot mandate in a legally binding sense, you could at least try to create an expectation of how things should work. I would therefore like agreed statements about the operation of devolved consent to be extended to secondary legislation.

Akash Paun: I will pick up on Sarah Boyack's question about what can be done. First, I agree with her characterisation that the core problem in how the system operates in Westminster is the lack of accountability for decisions that are taken by UK ministers about whether to proceed without consent in certain circumstances and for a failure to engage properly with the Scottish Government and the other devolved Administrations during the process of developing the legislation, as sometimes happens.

I also agree about the problem that Professor McHarg referred to of whether consent is even required for a given piece of legislation. On that front, the UK Government can often just unilaterally determine—based on its internal legal assessment, one assumes—whether consent should even be sought.

Those are the underlying problems. The situation is exacerbated by the fact that, as we have just heard, legislative consent is not visible in any meaningful way in the procedures and proceedings of the UK Parliament, with small exceptions—there has been some improvement.

Those are absolutely the problems to which we were trying to suggest solutions in our written submission. The proposals are summarised in the paper, which you will have seen. I will not go through them all in detail, because there are quite a few, but I will give the gist.

There should be much more transparency about what the UK Government has done to engage with the devolved Administrations and to resolve or avoid disputes earlier in the process. In situations where ministers want the UK Parliament to pass legislation without consent, there should be much

more transparency about that. The UK Parliament should take a decision explicitly that consent is required and that, even though consent has not been received for certain reasons, the bill should be passed anyway. That should not happen without people noticing, which I think has happened on some occasions.

I will not read through all of the recommendations, but I will point out a couple of specific things that we are keen to see—I am pleased that the House of Lords Constitution Committee has come to similar conclusions. One key thing is that, at the point of introducing a bill, the UK minister and the department responsible for the bill should lay something like a devolution statement, as we call it, that sets out in detail whether and why consent is required, what engagement has taken place and whether there are outstanding areas of disagreement. That should be a core part of the process.

11:00

We would then like to see proper select committee scrutiny of the devolution implications of each bill. The House of Lords Constitution Committee would probably play that role in the Lords, and there are different options for doing that in the Commons. Then, ideally, there would be reports back to the Parliament earlier in the process rather than at that final third reading stage, so that Parliament can proceed in full knowledge of whether consent has been given. Potentially, there should be a dedicated extra stage of the legislative process at which that would happen. I know that the Welsh Government has proposed that, too.

Those are the core aspects of what we propose.

Professor Tierney: I want to say something briefly on the point that Aileen McHarg expressed so well. I should declare that I serve as legal adviser to the House of Lords Constitution Committee, but I speak in a personal capacity. It seems to me that, in the passage of primary legislation, there is a lot that can be done to build in more stages for consent through the process. LCMs are taken very early in the life of a UK bill, and there should be opportunities later on to amend legislation, as we saw in the Scotland Acts; I think that that is possible.

One problem is that there is so much fast tracking now with UK legislation. That is a problem that we are facing in the Constitution Committee, where we are trying to deal with bills that are going through so quickly—and it is not just the coronavirus legislation; it is a lot of stuff.

As far as secondary legislation goes, I think that the European Union (Withdrawal) Act 2018 is a model of good practice—it is not best practice, but it is good practice. As you know, the initial plan had been to take all the powers back from Brussels and slowly disperse them. There was a rebellion against that and the principle now is that delegated legislation in devolved areas requires an attempt to get consent and definite consultation all the way through the process.

In the end, there is a final step that the UK can take. What the Constitution Committee is now doing bill after bill after bill is recommending that the 2018 act model is followed in every single bill where there is any attempt to reduce or step into devolved competence by way of secondary legislation. That is entirely doable and those wins are being achieved; they are not high profile, but they are being achieved.

Could I say something about the issue of normality, which you asked about? It seems to me that attempts to define abnormality often come down to things such as public emergency or national security. I do not think that that is where the action is now. I think that the abnormality that we are talking about is Brexit. It is filling the single market gap that has been left in the UK. What the UK is attempting to do through all these bills—not simply the European Union (Withdrawal) Bill but all the bills that have come since, including the Procurement Bill—and everything else that is going on at the moment is fill in an internal market for the UK in its various different ways.

It seems to me that that is essentially an issue of intergovernmental relations, and it raises questions about whether Sewel is still fit for purpose. Other federal systems would say that these are areas where there are necessity measures going on and there are general welfare interests—in the US, there is the commerce clause—and they have allowed the centre great licence to legislate for an internal market. The Sewel convention does not allow that. Arguably, that is a good thing but, in so far as there are federal solutions to that problem, they all—ironically—tend to be far more centralising than the current system in my view.

One other thing about the convention is that it stops dead at saying that the UK Parliament will not normally legislate without consent, but what about the possible question of unreasonable withholding of consent? I just put that out there as something that has to be discussed. In other federal systems, they would say that legislation on an internal market will tread into devolved or federal areas and that that is an inevitable consequence of overspill. We do not have an allowance for that. We do not even have a pre-emption, so it is possible for the Scottish Parliament to come back later and relegislate in the same area unless that legislation overtly takes away the competence of the Scottish Parliament.

Also, what happens when one devolved assembly consents and another does not, as we saw in the European Union (Withdrawal) Act 2018? Arguably, that is just the way it goes and the Scottish Parliament still has a right to refuse consent, but it does raise a question of how Sewel begins to come under strain when there is not a united devolved voice in relation to UK legislation.

I would be careful in arguing for legislative solutions to replace Sewel, because one might find that, when we look at international precedents and examples, they tend to be far more centralising in nature than the system that we have.

Maurice Golden (North East Scotland) (Con): It strikes me that Brexit, Covid and Ukraine could be categorised as not being normal events and that, therefore, legislation as a result of those not-normal events that involves devolved competences would be in the not-normal space. Nonetheless, as Professor McEwen pointed out, some legislation could be as a result of those not-normal events but encompass other parts that are not required as a result of those events. In addition, if there is a series of not-normal events, does there come a point where that becomes normal? I hope not, but that is potentially the case.

We have heard some excellent ideas about dispute avoidance. Governments, wherever they are in the world, are often quite late in introducing legislation for a variety of reasons, but I am interested in exploring how we can put in a system that allows for dispute resolution almost outwith the political sphere. We have heard a lot about devolved Administrations and the UK Government being involved in dispute resolution, but it strikes me that that often involves a political space, and that is never a good place to resolve disputes. Is there perhaps a role for a new body that encompasses parliamentarians and is interparliamentary rather than just intergovernmental as a potential mechanism for resolving disputes?

The Convener: I will bring in Ms Boyack, before I open it to the floor.

Sarah Boyack: That is helpful, because Maurice Golden has just triggered the point that I was very keen to get a response on. I thought that point 6 in the Institution for Government's recommendations, about dispute resolution, was interesting. Maurice Golden has suggested an interparliamentary body as one way of holding Governments to account and you have suggested an independent advisory panel established as a standing body to consider the competence issues that arise in disputes. I would be keen to get your view, and maybe also Michael Clancy's, about different ways in which you could do that; what are the pros and cons?

The Convener: I am very interested in this area as well. Obviously, the interparliamentary forum has started up again and those links are there. The scrutiny of decision making is a concern across all devolved Parliaments at the moment and is a concern for the House of Lords, whose Constitution Committee has raised these issues. I am interested in how we go forward with that. As Maurice Golden said, a formal interparliamentary forum is an informal grouping of the Parliaments. As we move forward, are we in danger of not formalising some of those things as a way of future-proofing for dispute resolution in other areas. I am also interested in how the Parliaments can possibly scrutinise common frameworks.

I want to bring in Mr Clancy and then open up those points for the wider group.

Michael Clancy: The intergovernmental relations annual report talks about some aspects of consent to the legislative consent motions, but it does not deal with anything in relation to subordinate legislation. If the committee is going to make recommendations, we should be looking at the intergovernmental relations matter, which we acknowledge has taken a long time to get to where it is.

The interparliamentary aspect is extremely interesting. I recollect that Lord McFall, before he became Lord Speaker, was very energetically trying to get the Parliaments in the UK together to talk about matters of genuine importance for each of them. That was in the throes of the Brexit legislative maelstrom.

The best way to proceed is to have this interparliamentary forum, which is informal, and get to the point where we can have some more formalised arrangement. Of course, that mirrors what is going on in terms of the interparliamentary partnership, which you dealt with as item 1 on the agenda this morning, convener. If it is good enough for the trade and co-operation agreement, it should be good enough for us. If we can use the model of the partnership as a springboard for being more energetic about bringing Parliaments and legislatures together in the UK, that would be an unalloyed good. I better stop there, because you only have a few moments left.

Akash Paun: Dispute avoidance and resolution are a crucial area to try to improve in various ways. One point to clarify is that, as others have said, there are two different types of potential disputes. One is a question of whether a bill falls within the scope of the Sewel convention—where there is disagreement about the boundary between reserved and devolved matters. We know that, on quite a number of occasions, the UK Government has asserted that a bill does not require consent so the whole issue of going through the consent process does not arise from

its perspective. Obviously, there are also disputes about proceeding without consent where it is accepted that Sewel is invoked.

On the former type of dispute, that is ultimately a legal question, but it is not one that the courts can settle; a UK bill cannot be referred to the Supreme Court, because we have parliamentary sovereignty and so on. There are professors of law around the table who can explain this better than I can, but what we were suggesting in the sixth point in our submission is that, if there were to be a more formal process of scrutiny of the devolution and consent issues relating to legislation by the House of Lords committee on the Lords side, and perhaps a new devolution committee on the Commons side, perhaps where this issue arose we could either set up a new advisory panel or have capacity to commission independent advice on the question of different assessments of where the boundary lies. That is what we are suggesting in our submission.

On the other type of dispute, where the UK Government wants to proceed without consent having accepted that the bill is within scope of Sewel, I think that the revised dispute resolution process in the intergovernmental relations review is one way in which that can be addressed. There is scope for independent mediation, for example. I do not think that those new processes have been tested, but that is one place that you could try to resolve such issues.

We do not have any formalised systems of interparliamentary relations, but if committees in Westminster take this stuff more seriously during the passage of legislation, one thing that I would encourage them to do—it is in our report—is to engage with the relevant committees in the devolved legislatures, take evidence, be it oral or written or whatever, and ensure that those devolved views are fed in at the right point of the legislative process.

11:15

Professor McEwen: On the thing about Brexit not being normal, there is a useful distinction to be drawn. When there is domestic legislation that implements what was already agreed to internationally, there is more justification to proceed on the basis that that is not normal. However, although in many ways Brexit is not normal, when it comes to reshaping the United Kingdom as a result of that major constitutional change, doing so without consent is a bit more problematic if you are looking for a longer-term sustainable situation.

There have been interesting suggestions on interparliamentary opportunities, because a lot of what we are talking about is deficiencies in the process at the Westminster end. That is not for this Parliament to determine; the UK Parliament will have to think about that.

In more recent legislation, procedures that talk about consent in a different and less meaningful way than Sewel have appeared; however, some procedures have been set out that could perhaps be useful and apply to a Sewel context. I am thinking of the Professional Qualifications Act 2022 in which there is a responsibility, an obligation and a duty to report on consultation. There is nothing like that when Sewel applies, but that might be useful to understand more about what went on in the intergovernmental space and what is the nature of the justification for proceeding without consent.

On what this Parliament can do vis-à-vis the Scottish Government, it would be useful to know a little bit more about what happened at the pre-legislative end, because, if there were more pre-legislative engagement, some of the difficulties that emerge could be headed off.

The IGR review offers opportunities to the devolved Governments to use the new machinery through which they have much more opportunity now, as rotating chairs and in setting the agenda, to get issues on to the table and to use the new dispute resolution function, if necessary, if there is a dispute, which would help to get impartial expertise on some of the issues. Where the idea of a review failed completely was in transparency issues and in a role for Parliament. However, that does not mean that the Parliament has to accept that. Using interparliamentary channels will be much more effective if you work collaboratively to ensure that the issue of where Parliament comes in makes it on to the agenda and, in particular, on to the agenda of the middle-tier interministerial standing group, which is looking at Sewel and issues surrounding it.

The Convener: It is interesting that, if the PPA decides to go down the route of subgroups, those would likely be around policy areas and, although subject committees of this Parliament and the other devolved Parliaments would obviously have no role in that, the expertise would be there for devolved areas. We absolutely need to be working on that.

Professor McHarg: I want to pick up on dispute resolution. In other systems, there are precedents for parliamentary committees having a formal role in deciding on the constitutionality of legislation, so that would be one route to go down.

I was reminded that, in the UK context, there are precedents for seeking judicial advice on parliamentary matters. I do not know what the system is now, but there used to be a mechanism for the House of Lords Committee for Privileges

and Conduct to seek advisory rulings from the judicial committee of the House of Lords—the most senior court—on matters that engaged its privileges. There were a couple of important decisions, for instance, about the status of the Scottish and Irish acts of union as they pertain to the status of Scottish and Irish peers.

Even in our own systems, we have mechanisms for seeking advice—not binding rulings but highly authoritative advice—on legal questions that, for reasons of parliamentary privilege in the House of Lords case or parliamentary sovereignty in our case, cannot be subject to binding judicial resolution. I said earlier that it is difficult to resolve this problem, but, on further reflection, there are precedents that we might want to think about.

Professor Page: Following on from that, I return to our starting point, which was secondary legislation. I want to stress the need for much greater consistency in the framing or procedural requirements governing the exercise of ministerial powers to legislate in devolved areas. What we have at the moment is a confusing mess. There is no great surprise about that, but it needs to be sorted out.

Are we talking about exclusive or concurrent powers? Are we talking about powers that are subject to consultation or not, as a matter of law or not? Are we talking about powers that are subject to consent or not, as a matter of law or not? Instead of having a pick-and-mix, choose-what-you-want approach in relation to whatever piece of legislation is being promoted, there needs to be an agreed model—the Sewel equivalent—in relation to subordinate law-making powers in the devolved areas.

I was intrigued by what Stephen Tierney said, if I understood him correctly, about the European Union (Withdrawal) Act 2018 being regarded as a gold standard and there now being an insistence that that be replicated for other bills. Is that correct?

Professor Tierney: I did not say that it was a gold standard; I said that it was a big improvement and that it set a model for how to attempt to arrive at consent in relation to the making of secondary powers.

Professor Page: Is it being used?

Professor Tierney: Yes, if the UK Government makes secondary legislation in devolved areas, the consent and consultation process is there; it is the standard approach. Having said that, it is about consultation; in the end, the UK can go ahead even if consent is not there. That is always the backstop in the withdrawal act.

Professor Page: Once this has been resolved, there is a need to go back into that area and clean the legislation up in order to have an agreed way forward in relation to future enactments.

The Convener: I am very conscious of time; we only have a few minutes left. No one else is desperate to come in.

Mr Clancy wants to come in. Sorry—I missed that.

Michael Clancy: It is true that there is no provision for consent for subordinate legislation, but subordinate legislation has to be in accordance with the vires of its parent act. We have to focus our attention at the point at which the parent act is being enacted to ensure that the powers that are loaned by Parliament to ministers are proper and can be exercised in a way that satisfies everyone. It is that one step back from dealing with subordinate legislation.

The Convener: We have exhausted our time, if not our questions and interest in this area. I echo Ms Boyack's comments and thank everyone for their submissions to the committee, which were extremely helpful, and I thank Dr McCorkindale for his continued support in our evidence sessions. As I said, we are holding a series of round tables in this area, and I am sure that the committee will report on it in the near future. I thank everyone for their attendance.

Meeting closed at 11:24.

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