CONSTITUTION, EUROPE, EXTERNAL AFFAIRS AND CULTURE COMMITTEE

13th Meeting, 2022, Session 6

19 May 2022

Legislative Consent after Brexit

1. The Committee agreed to hold a series of sessions on post-EU constitutional issues, including on the implementation of the Trade and Co-Operation Agreement, inter-governmental relations, retained EU law, and implementation of the Ireland/Northern Ireland Protocol. This meeting as the first of the series will focus on **Legislative Consent after Brexit**, and will consider the following key themes—

    - What is the constitutional purpose of the Sewel convention and what principles and values underpin its proper operation?
    - What is the meaning of 'consent' in the context of the Sewel convention?
    - What constitutes a 'not normal' context such that the UK Parliament need to obtain devolved consent?
    - To what extent has the behaviour of the Scottish Government and of the UK Government towards consent impacted the legislative and scrutiny functions of the Scottish Parliament?

2. The Committee will take evidence in a roundtable format from the following witnesses—

    - **Professor Nicola McEwen**, Professor of Territorial Politics, University of Edinburgh; Co-Director, Centre on Constitutional Change; Senior Research Fellow, UK in a Changing Europe
    - **Professor Stephen Tierney**, Professor of Constitutional Theory, University of Edinburgh
    - **Professor Aileen McHarg**, Professor of Public Law and Human Rights, Durham University
    - **Akash Paun**, Senior Fellow, Institute for Government
    - **Michael Clancy**, Director of Law Reform, The Law Society of Scotland (online)
    - **Professor Alan Page**, Emeritus Professor of Public Law, University of Dundee

3. The Committee's adviser, Dr Christopher McCorkindale, Senior Lecturer in Law, University of Strathclyde, will also attend the roundtable and has provided a briefing paper attached in **Annex A**.

4. Members can find a briefing paper from SPICe at **Annex B**, a written submission from Professor Aileen McHarg at **Annex C**, and a written submission from Institute for Government at **Annex D.**

CEEAC Committee Clerks
May 2022

ANNEX A

Legislative consent after Brexit

Territorial divergence in the UK: the Brexit problem

The United Kingdom's withdrawal from the European Union has posed a number of significant challenges to the effective functioning of the UK constitution. This was an inevitable and foreseen problem given, inter alia, the territorially divergent EU referendum results (that produced 'leave' majorities in England and Wales but 'remain' majorities in Scotland and Northern Ireland), territorially divergent government positions (very strong support for continued EU membership in Wales and Scotland, a mixed position in Northern Ireland and a pro-EU withdrawal UK Government), territorially divergent political consequences (most salient in Northern Ireland, of course, but a catalyst too for the revival of the Scottish independence debate so soon after the 2014 referendum) and territorially divergent views about the return of EU competences in devolved areas (by default to the devolved level or to the UK level) and about the level of constitutional realignment required to manage the internal dynamics of the post-EU withdrawal UK (whether expansive of devolved autonomy or centripetal in its implementation).

Territorial tension has been exposed and exacerbated by the relatively weak constitutional safeguards for devolved autonomy and the relatively weak mechanisms that have existed for shared governance as between the UK and the devolved institutions. Whereas the limits of devolved competence are statutory in nature, and boundary disputes are therefore subject to review by the courts, the safeguards for devolution against unwelcome intervention from the centre are *political* in nature, and boundary disputes are resolved between the parties themselves. What underpins this aspect of devolution is a political rule – the so-called Sewel convention[1] - that the UK Parliament will not *normally* legislate with regard to devolved matters without the legislative consent of the relevant devolved legislature(s), and by a politically grounded (as opposed to statutory) system of intergovernmental relations. In each case the balance of control and decision-making power has tilted heavily towards the centre.[2] However, despite the reliance that the UK constitution places on

[1] See, Institute for Government, 'Sewel Convention' (2020), available at https://www.instituteforgovernment.org.uk/explainers/sewel-convention.

[2] With regard to intergovernmental relations, a more structured, principled and – for the most part – more equal system of IGR seems to have emerged from the Cabinet Office and Department of Levelling Up's *Review of Intergovernmental Relations* (13 January 2022), available at https://www.gov.uk/government/publications/the-review-of-intergovernmental-relations. For commentary on the new arrangements see Nicola McEwan at https://ukandeu.ac.uk/intergovernmental-relations-review/ and Dan Wincott at https://ukandeu.ac.uk/machinery-and-culture-of-uk-igr/.

consent, the scope, meaning, operation and constitutional status of that principle remain uncertain. This paper seeks to make some sense of the causes and effects of that uncertainty.

What are the safeguards for devolution?

Section 28(7) of the Scotland Act 1998 (with analogue provisions in Northern Ireland and (now) in Wales) makes explicit that the transfer of devolved competence 'does not affect the power of the Parliament of the United Kingdom to make laws for Scotland'. This provision, which restates the principle of parliamentary sovereignty in legislative language, serves a two-fold constitutional purpose. On the one hand, it facilitates shared governance, including the making of UK legislation in devolved areas where that is invited or welcomed by the Scottish Government (motivated, for example, by a lack of legislative capacity, to avoid doubt about legislative competence or to ensure appropriate UK-wide territorial coverage). On the other hand, it provides a constitutional backstop that allows for the UK Parliament to legislate in devolved areas, where intervention is deemed to be necessary at the UK level (for example, where devolved institutions have collapsed, where there is a requirement to correct any breach by devolved institutions of the UK's international obligations or, as was argued during the passage of the Scotland Bill, if a devolved government was to pass a budget beyond its means).[3]

This legal rule – the residual power for the UK Parliament to legislate in devolved areas - is regulated by constitutional convention: the political rule, given expression by Lord Sewel during the passage of the Scotland Bill, that 'Westminster [will] not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament'.[4] The convention as articulated by Lord Sewel (and as replicated in section 2 of the Scotland Act 2016) refers to UK legislation applicable in devolved policy areas (what Alan Trench calls the 'policy arm' of the Sewel convention). However, Devolution Guidance Note 10 instructs UK officials that consent should also be sought for bills that would alter (by constraining or by expanding) the legislative competence of the Scottish Parliament or the executive competence of the Scottish Ministers[5] (what Trench calls the 'constitutional' arm of the Sewel convention).[6] Again, this political rule serves a two-fold

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[3] See, A McHarg, 'Constitutional Change and Territorial Consent: the *Miller* Case and the Sewel Convention' in M Elliott, J Williams and AL Young, *The UK Constitution After Miller: Brexit and Beyond* (Hart, 2018) Ch 7.
[4] On the evolution of the convention see McHarg (fn 3).
[5] Devolution Guidance Note 10, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/60985/post-devolution-primary-scotland.pdf. See also Rule 9B of the Standing Orders of the Scottish Parliament, which makes referend to both the policy and the constitutional arms of the convention, available at https://www.parliament.scot/about/how-parliament-works/parliament-rules-and-guidance/standing-orders/chapter-9b-consent-in-relation-to-uk-parliament-bills#topOfNav.
[6] Alan Trench, 'Legislative Consent and the Sewel Convention' (updated March 2017) *Devolution Matters blog*, available at https://devolutionmatters.wordpress.com/the-sewel-convention/.

constitutional purpose. On the one hand, it protects the autonomy of the devolved institutions from unwelcome legislative interference in areas of devolved competence, or from unwelcome alterations to devolved competence.[7] On the other hand, it facilitates shared governance by allowing, where welcomed and/or invited by the devolved institutions, for constructive and co-operative legislative intervention by the UK Parliament to be made in devolved policy areas or to facilitate agreed alterations to devolved competence.[8]

How does the Sewel convention operate in practice?

We can approach this question in two ways. First, what is the process that underpins the Sewel convention. Second, how has the Sewel convention been used between the centre and the devolved jurisdictions.

(i) Process

Although the terms of the Sewel convention, as set out by Lord Sewel and as reproduced in the 2016 Act, describe a process of *legislative* consent, this is in practice (and as described in DGN10) an *executive*-led process in which UK departments approach the relevant Scottish Ministers, who in turn indicate to the UK Government whether the consent of the Scottish Parliament has been given or has been withheld.[9] In order to ascertain the views of the Scottish Parliament, the Scottish Government must lay a legislative consent memorandum that explains the extent to which a bill relates to devolved matters or alters devolved legislative or executive competence, that sets out the aims and policy objectives of the bill and which contains a draft legislative consent motion or reasons why legislative consent is not being sought.[10]

As Alan Page has explained, though the Scottish Parliament 'was slow to adapt its procedures to Westminster legislation in devolved areas', the eventual adoption of formal procedures in this area was intended to ensure that 'the Parliament ha[d] the information it needed at a sufficiently early stage to enable it to carry out the task of scrutiny effectively'.[11] Early engagement between governments does not only enable informed and effective parliamentary scrutiny. At a prior stage, private discussions will normally take place between the UK Government and devolved governments

[7] M Elliott, 'The Scottish Parliament, the Sewel Convention and Repeal of the Human Rights Act: a Postscript' (28 Sept 2015) *Public Law for Everyone blog*, available at https://publiclawforeveryone.com/2015/09/28/the-scottish-parliament-the-sewel-convention-and-repeal-of-the-human-rights-act-a-postscript/.
[8] McHarg (fn 3).
[9] In practice, the consent decision is communicated by the Clerk to the Scottish Parliament in writing to the Clerks to the House of Commons and the House of Lords.
[10] Scottish Parliament Standing Orders r.9B.1.1.
[11] A Page, *Constitutional Law of Scotland* (W Green, 2015) 220-221.

before a bill is published in order to deal with potentially problematic provisions.[12] However, the efficiency of these private discussions comes at a cost: transparency about, and scrutiny of, the nature and content of any concessions or amendments made in order to clear the bill for a smooth passage through the consent procedures.

(ii) Use

Until recently, external and internal analysis of the legislative consent process has highlighted the frequency with which the legislative consent procedure has been used (against the expectation some held at the outset that recourse to UK legislation in devolved areas would be made only in 'exceptional and limited circumstances'),[13] as well as the relatively uncontroversial nature of its use.[14] By 2015, for example, before the demands of EU withdrawal changed the consent dynamics, the Sewel convention had been engaged more than 140 times in Scotland[15] but consent had been withheld only once, in in relation to the Welfare Reform Bill. On that occasion, aspects of the bill, as they related to devolved policies (such as free school meals) and services (such as social care), were amended by the UK Government to allow the Scottish Parliament to pass legislation[16] giving Scottish Ministers powers to make provisions consequent of the 2012 Act in those areas.

There were a number of factors that combined to explain the positive – co-operative – experience of Sewel in the pre-Brexit era. These included: the political alignment between Labour and Labour-led governments at UK and devolved levels in Scotland until 2007; the prevailing attitude within the SNP when it won power to be seen as a constructive and responsible party of government[17] (albeit, as experience of the Welfare Reform Bill demonstrated, one that ought also to be seen to be standing up for Scotland within the UK); the pre-introduction engagement between governments to anticipate and resolve potential problems at an early stage, and the willingness of the UK Government at that stage to give way if consent was not likely to be forthcoming; the practical advantages of the Scottish Government inviting or welcoming UK Government legislation in devolved areas; and, what is often described as the 'technical' nature of many bills that make sense to be handled at the UK level.[18]

In each case, however, these indicators of co-operation obscured potential constitutional fault lines: political alignment and the informal resolution of consent issues initially stunted the

[12] Institute for Government (fn 1).
[13] Scottish Parliament OR June 16, 1999, col 403 (Donald Dewar).
[14] See, for example, Institute for Government (fn 1), Page (fn 9) 219.
[15] Page (fn 9) 219.
[16] See the Welfare Reform (Further Provision) (Scotland) Act 2012.
[17] See, for example, C McCorkindale and J Hiebert, 'Vetting Bills in the Scottish Parliament for Legislative Competence' (2017) 21(3) *Edinburgh Law Review* 319 at 343.
[18] Institute for Government (fn 1).

maturation of formal processes; private pre-introduction meetings had a negative impact on transparency and scrutiny; and, the advantages of inviting or welcoming UK legislation in devolved areas, sometimes explained by issues of capacity or consistency or by the 'technical' nature of the legislation, occasionally spilled over into policy areas (such as gender recognition or civil partnerships) that ought to have been the domain of the Scottish Parliament.[19] Indeed, in Wales during this period disputes between the UK and Welsh Governments about whether or not UK legislation related to devolved matters and therefore whether legislative consent motions were necessary (and, where withheld, whether they ought to be acted upon) were already being fought in areas such as crime and policing, trade union law and housing and planning. In another instance, the refusal by the (then) National Assembly for Wales to consent to UK legislation on agricultural wages led to the passage of devolved legislation that became subject to a (for the UK Government, unsuccessful) Supreme Court reference by the Attorney General.[20]

In the pre-EU withdrawal era, then, the legislative consent process (at least as it applied in Scotland) was one that was relatively well understood to include both a policy and a constitutional arm; that was respected on both sides as a constitutional rule that protected devolved autonomy and facilitated shared governance; in which the decision to withhold consent was the exception rather than the rule, but where a decision to withhold consent generated a constructive response from the UK Government by creating space for amendment in response to concerns from the Scottish Parliament and/or devolved legislation in the relevant areas; and, (reflecting this) against which UK legislation in devolved areas would only be made where that legislation was necessary on the part of the UK Government or where it was invited or welcomed by the Scottish Government. This is what Nicola McEwan has referred to as the 'former glory' of the convention.[21]

What is the constitutional status of the Sewel convention?

Despite the relatively (but not wholly) uncontroversial use of the Sewel convention, there have been calls for it to be strengthened in both major reviews of the Scottish devolution settlement: the Calman Commission (2012) and the Smith Commission (2014). For the Calman Commission, while the convention had been largely successful in defending the devolved sphere from unwanted or

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[19] A Batey and A Page, 'Scotland's Other Parliament: Westminster Legislation About Devolved Matters in Scotland After Devolution' (2012) *Public Law* 501. Consistency was one of the reasons used to justify recourse to the LCM procedure in relation to both gender recognition (see Scottish Parliament, Official Report col 5658 (5 Feb 2004)) and civil partnerships (Official Report col 8925 (3 June 2004)). For sharp criticism of the use of the LCM procedure in the latter case, see P Cairney and M Keating, 'Sewel Motions in the Scottish Parliament' (2004) 47(1) *Scottish Affairs* 115.

[20] *Agricultural Sector (Wales) Bill – a Reference by the Attorney General for England and Wales* [2014] UKSC 43.

[21] N McEwen, 'Is Brexit Eroding the Sewel Convention?' (21 Jan 2020) *SPICe Spotlight blog*, available at https://spice-spotlight.scot/2020/01/21/is-brexit-eroding-the-sewel-convention/.

inadvertent UK legislation,[22] the frequency of its use[23] as well as the executive-driven nature of the process,[24] had caused some 'suspicion and even hostility'.[25] The Commission therefore proposed to strengthen the *political* status of the convention by entrenching it within the standing orders in both Houses of the UK Parliament (recommendation 4.2) and by improving mechanisms for inter-parliamentary dialogue where LCMs are concerned (recommendation 4.3). In 2014, the Smith Commission, convened in response to the narrower than expected Scottish independence referendum result, proposed to strengthen the *legal* status of the convention, by placing it 'on a statutory footing'.[26] This was reflected in the new section 28(8) of the Scotland Act 1998, inserted by section 2 of the Scotland Act 2016, which conditioned the continued legislative sovereignty of the UK Parliament (section 28(7)) with the 'recogni[tion] that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament'. As recently as the passage of the Scotland Act 2016, this is to say, and although not fully realised, the constitutional trajectory has favoured *strengthening* both the political and the legal status of the Sewel convention.

How has EU withdrawal changed the consent dynamics?

Given the territorial divergences described above it is unsurprising that the process of EU withdrawal would in turn engage the question of territorial consent. The first formal catalyst for this was the UK Supreme Court decision in *Miller v Secretary of State for Exiting the European Union*.[27] There, having held that it would require an Act of Parliament to authorise notification of the UK's intention to leave the EU in accordance with article 50 TFEU, the Court nevertheless rejected the argument that – by virtue of the convention's replication in statute – the Court could and should adjudicate on whether any Notification Bill would require devolved consent. Far from being placed 'on a statutory footing', as the Smith Commission had recommended, the Court took the view that section 28(8) amounted to no more than statutory *recognition* of the already existing political rule. The purpose of the provision, the Court said, was not to create legal rights and duties on the part of the devolved and UK Governments; rather, it was to 'entrench [Sewel] as a convention'[28] – one that has an

[22] Commission on Scottish Devolution, *Serving Scotland Better: Scotland and the United Kingdom in the 21st Century* (the Calman Commission) para 154.
[23] Ibid para 132.
[24] Ibid para 135.
[25] Ibid para 135.
[26] *Report of the Smith Commission for Further Devolution of Powers to the Scottish Parliament* (2014) 13.
[27] [2017] UKSC 5.
[28] *Miller* para 149.

'important role in facilitating harmonious relationships between the UK Parliament and the devolved legislatures'.[29]

On one reading, the impact of *Miller* on legislative consent was minimal – preserving but not diminishing the political convention (indeed, recognising its particular significance) whilst giving effect to the purpose of legislation that 'recognised' but did not *establish* a constitutional rule.[30] On another reading, however, *Miller* exposed some of the tensions that have characterised the EU withdrawal process and its aftermath. First, the Advocate General's argument for the UK Government, that only the policy arm (that the UK will normally seek consent to legislate in devolved areas) and not the constitutional arm (that the UK will normally seek consent to legislate to alter devolved competence) is covered by the convention (that the latter has occurred is a matter of practice and not duty) exposed fundamental disagreement between the UK and Scottish (and Welsh) Governments about the scope of the convention. This fundamental disagreement has in turn hardened some in the UK Government towards the view that the practice of seeking legislative consent – and, in particular, of seeking legislative consent with regard to the alteration of devolved competence – is a 'courtesy' but not itself a constitutional requirement.[31]

Second, it has been argued that, by weakening the political risks of ignoring or setting aside the convention, the judgment in *Miller* has emboldened the UK's approach to subsequent EU withdrawal-related legislation.[32] So, whilst it was recognised that legislative consent should be sought from the Scottish Parliament to the EU (Withdrawal) Bill, the EU (Withdrawal Agreement) Bill and to the Internal Market Bill – both because of overlaps with devolved competence (the policy arm) *and because of alterations made to devolved competence* (the constitutional arm) – in each case the legislation was enacted despite that consent being withheld. It is certainly arguable that – because of the time limited and the 'cliff-edged' nature of the negotiation period, and the requirement for domestic legislation to fulfil the UK's international obligations by giving domestic effect to the agreement – the EU (Withdrawal Agreement) Act passed the test of necessity as an exception to the requirement 'normally' to obtain consent. However, with regard both to the EU (Withdrawal) Act and the Internal Market Act the necessity of UK-wide legislation can be called into question. With regard to the former, the Supreme Court held in the *Continuity Bill reference* that the Scottish Parliament's parallel Continuity Bill, passed after the decision by the Scottish Parliament to refuse consent to the Bill for the EU (Withdrawal) Act *would* (save for a single provision) *have been*

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[29] *Miller* para 151.
[30] *Miller* para 148.
[31] Henry Hill, 'Another Cabinet Clash with Gove Over the Government's pro-Union Approach' (27 Jan 2022) *Conservative Home*, available at https://www.conservativehome.com/thecolumnists/2022/01/henry-hill-another-cabinet-clash-with-gove-over-the-governments-pro-union-approach.html.
[32] McHarg (fn 3) 20.

within devolved competence but for the post-reference enactment of the Withdrawal Act, the effect of which was to render ultra vires any provision in the Scottish Bill that modify any protected provisions of that act.[33]

With regard to the latter, it has been argued that the implementation of a UK internal market is neither a necessary nor an urgent consequence of EU withdrawal.[34] By seeking, but proceeding without obtaining, legislative consent, then, we see that not only is the *scope* of the Sewel convention under strain (whether it consists of the policy arm only or of both policy and constitutional arms), but so too is its substantive content. First, because the requirement '*normally*' to obtain legislative consent seems to be stripped of its normative content – requiring no special justification (such as necessity or abuse of power) unilaterally to be set aside. Second, because, with this, the requirement normally to *obtain* consent seems to be evolving into a requirement merely to *seek* consent (whether that consent is obtained or withheld). Indeed, this less onerous condition of consent has now found expression in statute. In the EU (Withdrawal) Act 2018 - where the UK Government is required to seek a 'consent decision' from the Scottish Parliament before proceeding with regulations to mark those areas of retained EU law that it wishes to protect from modification by the devolved legislatures pending the establishment of new common frameworks to regulate the UK internal market - a 'consent decision' expressly includes a decision by the Scottish Parliament to *refuse* consent.[35] In the Internal Market Act 2020, the Secretary of State must seek the consent of devolved counterparts before exercising powers to amend the scope of the non-discrimination principle, the listed 'legitimate aims' that might justify a departure from non-discrimination against incoming goods and exclusions to market access principles, and to make appointments to the Office for the Internal Market Panel.[36] However, the Secretary of State may proceed in each case where consent is not given within one month of the day that it was first sought. In each case, under the Withdrawal Act and under the Internal Market Act, the Secretary of State must give reasons where they proceed without consent. More recently, that trajectory – from a duty to seek consent to a duty (merely) to consult – has taken explicit form with the inclusion (by way of a late stage amendment)[37] of a so-called 'consult plus' requirement in the Professional Qualifications Bill 2021-22. According to this provision, UK ministers or the Lord Chancellor must *consult* with devolved counterparts before

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[33] *The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill – A Reference by the Attorney General and the Advocate General for Scotland* [2018] UKSC 64. Section 21 of Schedule 3, part 1 of the EU Withdrawal Act 2018 inserted that act into the list of statutes, contained in Schedule 4 of the Scotland Act 1998, that are protected from modification by the Scottish Parliament.

[34] M Dougan et al, 'UK Internal Market Bill, Devolution and the Union' (2020) esp Q9, available at https://ukandeu.ac.uk/wp-content/uploads/2020/10/UK-internal-Market-Bill-devolution-and-the-union.pdf.

[35] See, for example, European Union (Withdrawal) Act 2018 s 12 and Sch 3 Pt 1.

[36] Internal Market Act 2020 ss 6, 8, 10, 18, 21 and Sch 3.

[37] See Commons amendment 2, available at https://bills.parliament.uk/publications/45731/documents/1595.

making regulations that otherwise sit within the sphere of devolved competence. This includes a duty on the part of the relevant UK minister to publish a report on the process and outcome *of the consultation*, detailing whether and how the views of the devolved authorities have been taken into account (including where a decision is made to proceed despite objections raised by the devolved authorities).[38]

On the basis that the effective management of the UK internal market requires buy in across the constituent parts of the UK, the absence of any statutory consent requirement undermines the potential for devolved jurisdictions to agree *to* new constitutional arrangements even where they do not agree *with* them.

To re-cap, where the 'former glory' of Sewel was defined by a well-understood definition of the convention that included both policy and a constitutional arms, now we find disagreement about the scope of the convention at least with regard to the latter; where the relatively uncontroversial operation of the convention pointed to a co-operative spirit, the convention now manages more (and increasingly) confrontational relationships across the territorial constitution; where the expectation was that the convention would be respected and - unless invited, welcomed or necessary – where bills would be amended to address devolved concerns or to carve space for bespoke devolved legislation, now we see consent decisions set aside and in circumstances that arguably fall short of any 'necessity' test.

Members of the Scottish Parliament should therefore be wary of attempts to narrow the scope and weaken the content of the Sewel convention. They should push the UK Government (to recognise the constitutional arm as convention and not mere practice; to share draft legislation at an early stage with Scottish Government counterparts and with relevant scrutiny committees) and the UK Parliament (to assume a greater scrutiny role where UK legislation overlaps with devolved competence or seeks to alter devolved competence; to work closely with Scottish, Welsh and Northern Irish MPs, and with members of devolved legislatures, to identify and address areas of concern) to enhance the convention as an opportunity to defend devolved autonomy and to facilitate shared governance.[39]

What about the Scottish Government's role?

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[38] The 'consult plus' process falls short of the Scottish Parliament's call for a statutory *consent* mechanism to be inserted into the Bill (see the report on the relevant LCM by the Delegated Powers Committee, available at https://bills.parliament.uk/publications/45731/documents/1595 (at p 4).

[39] For recommendations for reform, see Institute for Government, 'Legislating by Consent: how to revive the Sewel convention' (17 Sept 2020), available at https://www.instituteforgovernment.org.uk/publications/sewel-convention.

As with concerns expressed in the early days of the devolution settlement - that the invitation for the UK Parliament to legislate in certain devolved areas, or the acquiescence to a UK-wide approach for practical reasons of expediency or capacity, had deprived the Scottish Parliament of its opportunity to exercise its legislative and scrutiny functions in important devolved areas - there is concern too that the sheer scale of the legislative response to EU withdrawal might create a similar pattern. For example, the Scottish Government has recommended that legislative consent be given to the Animal Welfare (Kept Animals) Bill for reasons of efficiency and capacity despite those covering a number of matters of 'significant public concern…that are within the legislative competence of the Scottish Parliament'.[40] The Scottish Parliament should be vigilant in its scrutiny of legislative consent motions to ensure that its own role is not hollowed out on account of overreliance by the Scottish Government on UK legislation in important areas of devolved competence (counterintuitively at a time when the convention is arguably being weakened and when relationships between governments are increasingly fraught).

What about delegated legislation?

Whilst (as noted above) the Sewel convention does not extend to *delegated* legislation made in devolved areas or that alters devolved competence, the Scottish Government and the Scottish Parliament – recognising that 'the UK Government will increasingly make use of…statutory powers to make instruments arising from the UK's withdrawal from the EU that would include provisions within the competence of the Scottish Parliament', and that 'UK Ministers will [be expected to] seek the consent of Scottish Ministers,' in the exercise of those powers, 'irrespective of whether there is a statutory obligation on UK Ministers to obtain such consent' – have agreed a protocol to ensure that the Scottish Parliament has the opportunity to give 'effective and proportionate' scrutiny where such consent is sought. The protocol explains the principle that 'Scottish Ministers will normally wish to give such consent where the policy objectives of the UK and Scottish Ministers are aligned and there are no good reasons for having separate Scottish subordinate legislation'.[41] References in the protocol to 'proportionate' scrutiny recognise that not all provisions require the same level of scrutiny. It continues by stating that 'in most cases' the Scottish Parliament 'will decide whether to approve the proposal by the Scottish Ministers to consent before Ministers consent to the UK

[40] See the relevant LCM (esp at para 29), available at https://www.parliament.scot/-/media/files/legislation/bills/lcms/animal-welfare-kept-animals-bill/splcms061.pdf.

[41] Protocol on Scrutiny by the Scottish Parliament of Consent by Scottish Ministers to UK Secondary Legislation in Devolved Areas Arising from EU Exit (V2) (1 June 2020) (SIP 2), available at https://www.parliament.scot/-/media/files/committees/statutory-instrument-protocol.pdf.

Government's request' (Type 1 approval) but that 'in technical cases' scrutiny will occur after the event (Type 2 approval).

This protocol, Statutory Instrument Protocol 2 (SIP 2), builds upon but expands the scope of its predecessor agreement. Where SIP 1 applied only in relation to regulation-making powers under the EW (Withdrawal) Act 2018, SIP 2 applies to a much broader range of EU withdrawal-related regulation-making powers (including to various provisions of the UK Internal Market Act 2020).[42] Despite the feeling that SIP 1 had worked well and provided a solid starting point for the successor protocol there are number of areas that might attract further scrutiny by the Scottish Parliament. First, it will be for the Scottish Government to determine whether scrutiny will come before agreement is reached with the UK Government or whether a provision is of a 'technical' nature such that scrutiny will occur only after the fact. Type 2 (retrospective) consent is limited, in Annex B to the protocol, to provisions that the Scottish Government deem, inter alia, to be 'clearly technical' in nature and that '[do] not involve a policy…decision made by UK or Scottish Ministers'. However, and as noted above, the boundary between technical and policy measures is contestable at the edges. Scrutiny by committees of type 2 should be alert to the possibility that, on occasion, there may be (perhaps unintended) policy impacts to decisions nevertheless deemed to be technical in nature. Second, anxious scrutiny should therefore be applied to the principle that consent to the exercise of UK powers will 'normally' be given where policy aims align and there are 'no good reasons' for having Scottish subordinate legislation. As is the case with regard to legislative consent, the legislative and scrutiny functions in devolved areas of the Scottish Parliament are constitutional goods in and of themselves and so care must be taken not to hollow out that the role by an overreliance on pragmatic consent. Third, and most significantly, the capacity for scrutiny by the Scottish Parliament under the protocol is itself dependent upon the strength of any consent mechanism in the relevant UK legislation. Where there is a statutory requirement on the part of UK ministers to obtain the consent of devolved counterparts (such is the case with regard to many of the powers inserted into retained EU law by use of the 'deficiency correcting' powers in the EU (Withdrawal) Act 2018),[43] the protocol has bite: the Scottish Government would not consent, and the UK Government therefore could not proceed, where the Scottish Parliament expresses disapproval. Where there is no statutory consent requirement but the protocol is nevertheless engaged because of the political commitment of the UK Government to seek consent, disapproval has no meaningful impact because the consent of the Scottish Government is not of UK Government action. Here, however, the Scottish Parliament would be made aware of the proposed instrument,

[42] SIP 2, Annexe A.
[43] See, for example, s3(2) of the Direct Payment to Farmers (Legislative Continuity) Act 2020.

which would not be the case in the absence of any such protocol or equivalent procedure (which is the case, for example, in Northern Ireland). Finally, where there is no statutory requirement or political commitment on the part of the UK Government to seek consent the protocol is redundant: there is no consent decision on the part of the Scottish Government upon which the Scottish Parliament's scrutiny function can bite.

So what?

Just as the UK's territorial constitution is itself in a state of flux, so too are the constitutional rules that bind that union. A constitutional order that places weight on the principle of territorial consent has struggled to adapt to the territorial divergence, and increasingly the territorial confrontations, generated by the process and implementation of EU withdrawal. This causes a three-fold concern. First, the weakening of the Sewel convention threatens to undermine devolved autonomy and the capacity for shared governance. Second, the changing nature of consent, both in convention and in statute, threatens to undermine the democratic input necessary if devolved nations are to agree *to*, even if not *with*, new constitutional trajectories. Third, and looking inwards, too ready a recourse to consent by the *Scottish* Government threatens to undermine the Scottish Parliament's legislative and scrutiny functions in devolved policy areas. Underpinning all of this: the rapid evolution and proliferation of consent mechanisms requires a return to first principles: to better understand what consent demands as a constitutional fundamental (as our advisor, Michael Keating, has said, we know it is something more than a courtesy and less than a veto, but not much more than that) and whether it is (and if so, how it can be made) fit to regulate the pressures of the post-EU withdrawal constitution.

ANNEX B

Constitution, Europe, External Affairs and Culture Committee

13th Meeting, 2022 (Session 6), Thursday 19th May 2022

Legislative Consent Roundtable

1.The meaning of consent

The Sewel Convention is the mechanism for obtaining the consent of the devolved legislature where the UK Parliament intends to pass primary legislation in a devolved area.

The Convention was named after Lord Sewel, Minister of State in the Scottish Office during the passage of the Scotland Bill in 1998. In the Lords Committee stage of the Scotland Bill he stated that the Government expected:

"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]"

The principle of legislative consent was developed almost entirely at governmental level. It took formal shape in the 2001 Memorandum of Understanding (MoU) between the UK Government and the devolved administrations (the then Scottish Executive, the Welsh Assembly Cabinet and the Northern Ireland Executive).

The Sewel Convention was put on a statutory footing by Section 2 of the Scotland Act 2016. This amended section 28 of the Scotland Act 1998, which contains the power for the Scottish Parliament to make laws and states that this does not affect the power of the UK Parliament to make laws for Scotland. It inserted a new Section 28(8) of the Scotland Act 1998, which states:

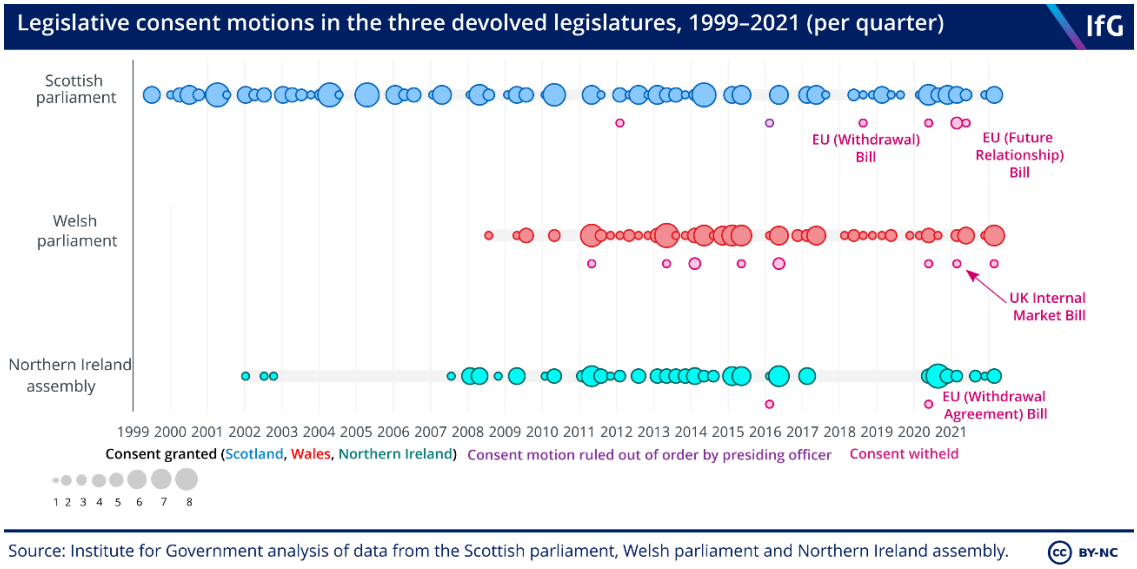
[1] 21 July 1998, Lords Hansard, vol 592, col 791

"(8) But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament."

In 2017, the UK Supreme Court considered the Sewel Convention in its deliberations on the Miller case[2]. The UK Supreme Court examined the effect of the Sewel Convention as set out in section 28(8) of the Scotland Act 1998. The Supreme Court ruled that the Sewel Convention was a political convention which could not be enforced legally through the courts. Therefore, the courts have no role in determining how the convention is to be applied to any particular Bill or circumstances.

As Dr McCorkindale highlights in his paper, the Convention was engaged more than 140 times before 2015, but the Scottish Parliament had only withheld consent once (in relation to the Welfare Reform Bill). The result of the Scottish Parliament withholding consent was change in the form of the Welfare Reform (Further Provision) (Scotland) Act 2012 which gave Scottish Ministers powers to make provision for devolved purposes in consequence of the Act.

Analysis from the Institute for Government shows LCMs up until 2021 and points at which consent has been refused.



The Institute for Government has stated that:

"Until 2016, the Sewel Convention largely operated with remarkably little controversy…Devolved engagement on UK legislation has usually begun at an early stage, private conversations have helped to address problems and, if necessary, the threat of withholding consent has allowed the devolved administrations to extract concessions…But this approach requires trust, compromise and good and open communication, all of which have been in increasingly short supply since the 2016 EU referendum."

[2] This case concerned whether the UK Government could trigger the process of the UK leaving the EU without an Act of Parliament, and without the consent of the devolved legislatures.

As such, the UK's exit from the EU can be seen as a point at which there was a break with the general trend of no refusals of consent.

In a letter to the UK Government in 2018, then Cabinet Secretary for the Constitution, Michael Russell stated in relation to the EU Withdrawal Act:

"The confidence of the Scottish Parliament in the Sewel Convention, and thus its authority to determine the devolved law of Scotland has understandably been undermined by these events."

The letter went on to set out three ways in which the Scottish Government felt the Convention could be improved:

- Strengthening processes for determining the applicability of the Sewel Convention to particular Westminster legislation.
- Commitment by the UK Government to respect the views of the Scottish Parliament when consent is required; in particular that it undermines the Convention if the UK Government can decide circumstances are "not normal" having initially sought consent.
- Robust procedures to protect the interest of the Scottish Parliament and enforce the convention; including strengthening the statutory protection in the Scotland Act 2016, and procedures for resolving disputes on the scope of reservations and the applicability of the Convention.

In January 2020 the Institute observed that *"following the fall-out from the EU Withdrawal Act, the devolved administrations are also testing the limits of the convention…Consent is only required for certain clauses of the Withdrawal Agreement Bill... But, fundamentally, the devolved administrations' objections relate to the Withdrawal Agreement itself."*

2.What constitutes a 'not normal' context

The incorporation of the Sewel Convention into statute by section 2 of the Scotland Act 2016 included the word "normally". The House of Commons Political and Constitutional Reform Committee expressed concerns during the passage of the Scotland Bill 2015-16 as to the ambiguity this word might cause, commenting that:

"The Scotland Office insists that, because the Convention has always been adhered to, "there has been no need to unpack the words 'not normally'". However, it is hard to see how any clear statutory prescription (as distinct from a parliamentary convention) could be made to rest on such an imprecise term. Retention of the word "normally" sits ill with the Government's stated intention to "formalise" the Convention.[3]"

[3] Political and Constitutional Reform Committee, Constitutional implications of the Government's draft Scotland clauses, 22 March 2015, HC 1022 2014-15

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The House of Commons Political and Constitutional Reform Committee suggested two ways in which the Bill could have provided greater clarity:

"One way to address this would be to elaborate the circumstances in which the UK Parliament would be allowed to legislate on a devolved matter without the consent of the Scottish Parliament. […] Alternatively […] the UK Government [might be required] to state why it sought to legislate on a matter covered by the Convention without the consent of the Scottish Parliament. A Minister could, for example, be required to make a statement to the UK Parliament regarding the consent of the Scottish Parliament to a Bill (along the lines of section 19 of the Human Rights Act 1998). Any government wishing to proceed with legislation without the consent of the Scottish Parliament would still be able to do so, but at a political cost.[4]"

Neither recommendation was reflected in the Scotland Act 2016.

In 2017 the Supreme Court, in the Miller case, stated that the inclusion of the word 'normally' was evidence that UK Parliament did not intend to create a legally enforceable rule, saying:

"We would have expected UK Parliament to have used other words if it were seeking to convert a convention into a legal rule justiciable by the courts."

Professor McEwen has argued that the Convention's *"limitations have been exposed by the Brexit process"* explaining that the Scotland Act 2016 "failed to put the process and substance of the convention into statute and failed to provide clarity about the presumably abnormal situations where the convention may not apply."

In its paper, 'After Brexit: the UK Internal Market Act and devolution', the Scottish Government stated that "the UK Government has chosen to override the Sewel Convention on a number of occasions since the Brexit vote" and that it had:

"sought to justify this on the grounds that the circumstances of EU exit were "not normal" and that, therefore, it could proceed with these pieces of legislation without consent. However, on each occasion the UK Government sought the consent of the Scottish Parliament, which indicates it was required for elements of each Bill. The exception to the Sewel Convention for circumstances that are "not normal" can have no meaning if it is only applied retrospectively once the Scottish Parliament has made its decision, and refused consent. This reasoning of the UK Government has therefore emptied the Convention of its force, and replaced a binding constitutional rule with a procedure that can be disregarded at UK Ministers' discretion."

The Scottish Government's paper further stated that *"while the circumstances of EU exit are undoubtedly unprecedented, overriding the Sewel Convention was not justified, especially in the case of the UK Internal Market Act which was not necessary to implement an international treaty or to progress the process of EU exit."*

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[4] Political and Constitutional Reform Committee, Constitutional implications of the Government's draft Scotland clauses, 22 March 2015, HC 1022 2014-15

3.The evolution of the Convention

The Scottish Parliament is currently seeing an upwards trend in LCMs. In session 4, 39 LCMs were published; in session 5, 52 LCMs were considered and to date in session 6, 18 LCMs have been published.

Chapter 9B of the Parliament's Standing Orders sets out the rules and procedures for seeking legislative consent in the Scottish Parliament under the Sewel Convention. Under Standing Orders, consent is only required for UK bills which make 'relevant provision', which means provision which applies to Scotland in any of the following ways:

• the provision is for any purpose within the legislative competence of the Scottish Parliament;
• the provision alters the legislative competence of the Scottish Parliament;
• the provision alters the executive competence of the Scottish Ministers (executive competence relates to the devolution of powers to Scottish Ministers, including some responsibilities in reserved matters.)

As explained earlier in this paper, prior to EU exit, the Scottish Parliament had only refused consent on one occasion in 2011 (in connection with the Welfare Reform Bill).

The European Union (Withdrawal) Act 2018 was passed by the UK Parliament despite the Scottish Parliament withholding consent. The European Union (Withdrawal Agreement) Act 2020 was passed by the UK Parliament without the consent of any of the devolved legislatures. This was the first time that the devolved legislatures had together refused consent for a UK Bill. Subsequent legislation, such as the European Union (Future Relationship) Act 2020, the UK Internal Market Act 2020, the Professional Qualifications Act 2022 and the Elections Act 2022 has also passed without the consent of the Scottish Parliament.

4.The autonomy of the Scottish Parliament

Legislative consent motions allow devolved parliaments to express their will when the UK Parliament seeks to legislate in an area of devolved competence. EU exit and the challenges presented by it have highlighted some of the tensions in the consent process.

In his paper Dr McCorkindale argues that MSPs should *"be wary of attempts to narrow the scope and weaken the content of the Sewel convention. They should push the UK Government (to recognise the constitutional arm as convention and not mere practice; to share draft legislation at an early stage with Scottish Government counterparts and with relevant scrutiny committees) and the UK Parliament (to assume a greater scrutiny role where UK legislation overlaps with devolved competence or seeks to alter devolved competence; to work closely with Scottish, Welsh and Northern Irish MPs, and with members of devolved legislatures, to*

identify and address areas of concern) to enhance the convention as an opportunity to defend devolved autonomy and to facilitate shared governance.[5]

Since the start of session 6, there have been 18 Bills that have been subject to LCMs. In at least 3 of the Bills[6] there was a disagreement between the Scottish and UK Governments over whether a provision required legislative consent or not (this being essentially a disagreement over whether the provision was reserved or devolved).

5.The impact of Sewel on the Scottish Parliament's legislative and scrutiny function

The CEEAC Committee has consistently highlighted the need for an overall approach to the scrutiny of the policy development process post EU exit which is proportionate and deliverable, but which takes account of the whole range of interconnected factors, including:

• The market access principles of the UK Internal Market Act 2020;

• Common Frameworks;

• The Ireland/Northern Ireland Protocol;

• The EU-UK Trade and Cooperation Agreement including binding decisions of the Partnership Council and the Specialised Committees;

• Other international obligations and international trade agreements.

Dr McCorkindale's paper states that:

"As with concerns expressed in the early days of the devolution settlement - that the invitation for the UK Parliament to legislate in certain devolved areas, or the acquiescence to a UK-wide approach for practical reasons of expediency or capacity, had deprived the Scottish Parliament of its opportunity to exercise its legislative and scrutiny functions in important devolved areas - there is concern too that the sheer scale of the legislative response to EU withdrawal might create a similar pattern."

There is no legislative consent mechanism for delegated (secondary) legislation made at the UK Parliament which is in devolved areas, the Sewel convention only ever applied to primary legislation (UK Parliament Bills). The UK's exit from the EU has significantly increased the frequency and significance of UK SIs made in devolved areas. This development needs to be seen in context. The history of UK Government powers in devolved areas is therefore set out in **Annexe A**.

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[5] For recommendations for reform, see Institute for Government, 'Legislating by Consent: how to revive the Sewel convention' (17 Sept 2020), available at https://www.instituteforgovernment.org.uk/publications/sewel-convention.

[6] Environment Bill; Health and Care Bill and Elections Bill (all now Acts)

In relation to secondary legislation, Statutory Instrument Protocol 2 provides the Scottish Parliament with a role in deciding whether it is content with the Scottish Ministers' proposal that particular regulations are made by UK Ministers rather than by Scottish Ministers themselves (or by both the Scottish Ministers and UK Ministers jointly).

There are, however, limitations to the scrutiny role that Protocol 2 can provide. First, it applies only to powers in policy areas that were formerly governed by the EU. This is because Protocol 2 was agreed at a time when the new powers that were being created were only in former EU areas. Increasingly, however, new powers for UK Government Ministers are now being conferred in devolved areas that were not formerly EU areas.

Second, the Protocol is only effective if the Scottish Government has a legal entitlement to withhold its consent for a UK SI to be made, that is, where a requirement for such consent is written into the power. Such a statutory consent requirement is not always provided. An example is the Professional Qualifications Act 2022 which contains a statutory requirement for consultation rather than consent. It contains what is being referred to as a "consult plus" provision, which is a statutory requirement that UK Ministers consult the Scottish Ministers before making legislation within devolved competence. It specifies a timetable and process for reporting on that consultation process.

In relation to delegated powers, 10 of the Bills for which LCMs have been lodged in session 6 so far conferred at least one delegated power on UK Ministers which is exercisable for Scotland within the Scottish Parliament's legislative competence. SI Protocol 2 is sure to give an effective role to the Scottish Parliament for only 1 of those 10 Bills.[7]

The reasons why the exercise of the powers in the remaining Bills will not necessarily be subject to effective scrutiny under the SI Protocol are principally:

- there is no statutory requirement for Scottish Ministers' consent (9 of the 10 Bills contain at least one power for which there is no statutory consent requirement) and/or
- they are not in a former EU area (this applies to powers in 7 of the Bills).

A significant number of powers for UK Ministers are being conferred in subject areas that were not formerly governed by the EU. Examples are seen in the Police, Crime, Sentencing and Courts Bill (now the Police, Crime, Sentencing and Courts Act 2022), the Health and Care Bill (now the Health and Care Act 2022) and the Elections Bill (now the Elections Act 2022). These will not be subject to the SI Protocol as the Protocol only covers policy areas that were formerly EU.

Sarah McKay
SPICe Research
11 May 2022

[7] The Animal Welfare (Kept Animals) Bill, because the powers are subject to a statutory consent requirement and are also in a former EU area.

ANNEX B

Note: Committee briefing papers are provided by SPICe for the use of Scottish Parliament committees and clerking staff. They provide focused information or respond to specific questions or areas of interest to committees and are not intended to offer comprehensive coverage of a subject area.

The Scottish Parliament, Edinburgh, EH99 1SP www.parliament.scot

Annexe A: The history of UK Government powers in devolved areas

Before devolution all delegated powers to make secondary legislation for Scotland belonged to the UK Government.

At devolution a distinction was made between those delegated powers which were exercisable within devolved competence and those which were not. With a few exceptions, the powers that were in devolved areas were removed from UK Ministers and transferred to the Scottish Ministers. This was achieved by a wholesale "general transfer of functions" under section 53 of the Scotland Act 1998. The exceptions to the wholesale transfer were specific and were contained in the Scotland Act 1998 or in subordinate legislation made under that Act.

These exceptions included a small category of "joint" powers, meaning powers which are exercisable jointly by Scottish and UK Ministers acting together. Examples of joint powers are the power to make changes to cross-border public authorities and powers in relation to rivers that form the Scotland-England border. Legislation made under "joint" powers usually needs to be laid in and approved by both the Scottish and UK Parliaments.

The exceptions also included a category of "concurrent" powers, meaning powers which are conferred on both Scottish Ministers and UK Ministers and are exercisable by either of them separately. They include, for example, concurrent powers to regulate sea fishing for conservation purposes.

The most notable exception at devolution was the power to implement EU law.[8] This was a concurrent power. Section 57(1) of the Scotland Act 1998 had the effect that, despite the general transfer of functions under section 53, both Scottish and UK Ministers could, separately, make subordinate legislation to implement EU law.

Before the UK left the EU, this power was regularly exercised by UK Ministers where Scottish and UK Ministers (and often other devolved administrations) were content for it to be done on that basis. This process was for implementing policy that had been agreed at EU level, and which had already passed through the EU's legislative processes.

Over the years following devolution, some further powers were conferred on the Scottish Ministers in reserved areas. A few powers were also created which are exercised by UK and Scottish Ministers concurrently or jointly, however the creation of such powers was very much the exception rather than the rule.

There was a significant step change during the preparations for EU exit. The European Union Withdrawal Act 2018 (EUWA) created a new body of domestic law known as retained EU law. The Act also provided delegated powers to the UK and devolved administrations to fix deficiencies in this "retained EU law". This power was given to the UK and devolved administrations and is exercisable by each separately or both jointly[9].

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[8] Being s.2(2) of the European Communities Act 1972 (now repealed): this was the main power to make secondary legislation for the purpose of implementing EU law in the UK.

[9] The deficiency-correcting power expires at the end of this year, on 31 December 2022.

EUWA also contains other new powers for UK and devolved administrations to make secondary legislation. There is no requirement written into EUWA for the UK Government to obtain the consent of the devolved administrations before exercising these powers in devolved areas. However, the then UK administration gave a political commitment that it would do so. The commitment was that the UK Government would not normally use the powers in EUWA to amend domestic legislation in areas of devolved competence without the agreement of the relevant devolved authority.[10]

In addition to the powers contained in EUWA itself, a huge number of new delegated powers to make secondary legislation within devolved competence were conferred on the UK Government and/or the Scottish Government through the EU Exit SIs (the "deficiencies" instruments) themselves. Often these were powers to make delegated legislation which were previously held by the European Commission and were transferred to the Scottish and/or UK Ministers.

These powers were conferred in a mixture of ways: some (a minority) were conferred on Scottish Ministers alone; some were conferred concurrently; some were conferred on UK Ministers alone. Some, but not all, of the powers that were conferred on UK Ministers are exercisable within devolved competence only with Scottish Ministers' consent.

New powers that are exercisable within devolved areas were also conferred on UK Ministers by other primary legislation which deals with EU withdrawal, for example the EU (Withdrawal Agreement) Act 2020. Similarly, further such powers have been conferred by primary legislation which deals with the new relationship between the UK and the EU, and other post-EU primary legislation, such as the EU (Future Relationship) Act 2020, the Agriculture Act 2020 and the Fisheries Act 2020.

The powers which are conferred on UK Ministers are powers to make secondary legislation (SIs) in the UK Parliament. The Scottish Parliament cannot scrutinise secondary legislation laid at the UK Parliament (unless the legislation is made under a special "joint procedure" and is scrutinised by both Parliaments, but this is very rare). The Scottish Parliament can, however, scrutinise the decision of Scottish Ministers to consent to the secondary legislation being made by UK Ministers in devolved areas.

The process for the Scottish Government obtaining the Scottish Parliament's approval was initially the statutory instrument protocol 1 agreed between the Scottish Government and the Scottish Parliament. Protocol 1 was agreed in December 2018.

[10] This statement was contained in the Delegated Powers Memorandum for EUWA, in paragraphs 145, 151, 170, 194, 237, 276 and 290 in relation to each of the relevant powers.

- Protocol 1 applied to proposals for UK secondary legislation made under the power in the European Union (Withdrawal) Act 2018to correct "deficiencies" in retained EU law.[11]

Under Protocol 1 it was the role of the Scottish Parliament to decide whether it was content with the Scottish Ministers' proposal that a particular change to retained EU law would be made by UK Ministers rather than by Scottish Ministers themselves (or by both the Scottish Ministers and UK Ministers jointly). If the Scottish Parliament was content, the Scottish Government gave its consent to the UK Government and the UK Government then laid the legislation in the UK Parliament. The UK Parliament was then responsible for considering the statutory instrument which set out the exact wording of the change being made to the law.

Protocol 1 was replaced by Protocol 2 at the start of 2021. Whereas Protocol 1 initially applied only to secondary legislation made under two powers in the European Union (Withdrawal) Act 2018, Protocol 2 is applicable to all proposals to make UK statutory instruments which include devolved matters and which are in former EU law areas.

[11] It would also have applied to proposals for UK SIs made under a power in EUWA to implement a withdrawal agreement before exit day, but this particular power was not ultimately used and was repealed by the European Union (Withdrawal Agreement) Act 2020. Like the deficiencies power, this power could have been exercised by UK Ministers and Scottish Ministers either separately or jointly (s. 9 and Sch. 2 para 12(1) EUWA for separate exercise; Sch. 2 para 12(2) for joint).

ANNEX C

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 July1998, 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.

<u>The Sewel Convention After Brexit</u>

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

ANNEX D

Legislative Consent after Brexit

Institute for Government briefing for the Scottish Parliament Constitution, Europe, External Affairs and Culture Committee

Summary

This note has been prepared by the Institute for Government to assist the Scottish Parliament Constitution, Europe, External Affairs and Culture Committee in its consideration of the issue of *Legislative Consent after Brexit*. It includes an overview of the history and purpose(s) of the legislative consent convention, under which Holyrood consent is sought for legislation passed at Westminster that affects devolved matters. We discuss the impact of Brexit and present a summary of recommendations designed to revive and strengthen the convention.

Introduction

Devolution transformed the governance of Scotland and the wider UK. It created the new legislature at Holyrood and transferred responsibility for major public services and a large proportion of public spending to ministers in Edinburgh. Devolution is also recognised in legislation as a permanent part of the UK constitution.[1]

Despite its radical effect on the constitution, devolution left intact the core principle of parliamentary sovereignty. This left the Scottish Parliament potentially vulnerable to changing political winds at Westminster, where MPs could, in principle, decide to unwind the 1999 reforms. However, from the outset Westminster committed to a self-denying ordinance: that it would "not normally" legislate on devolved matters without consent. This commitment became known as the legislative consent or Sewel convention, after Lord Sewel, who spelt it out on behalf of the government in the House of Lords in 1998 during the passage of the Scotland Act.[2]

Under this convention, the Scottish Parliament has the opportunity to grant or withhold consent to any UK bill that affects devolved matters or amends the powers of the Scottish Parliament or Scottish ministers. After 1999, the convention swiftly became a central pillar of the relationship between Westminster and Holyrood. As the UK and Scottish governments have been governed by different parties since 2007, the consent process had the potential to trigger regular clashes. But in practice disputes have been rare, and usually resolved by negotiation and compromise. The convention has served to create a protected sphere of political autonomy for Scotland, and to facilitate cooperation between Westminster and Holyrood.

However, the situation has changed since the aftermath of the EU referendum of 2016, both as a direct result of Brexit and due to changing attitudes towards devolution within the UK government. In 2020, as it became clear that the convention was coming under unprecedented strain, the Institute for Government published a detailed study of the convention, funded by the Joseph Rowntree Reform Trust, and entitled *Legislating by consent: how to revive the Sewel convention*.[3]

This briefing is based on the conclusions of that report, updated where appropriate.

The constitutional purpose of the legislative consent convention

The constitutional doctrine of parliamentary sovereignty means that there are no domestic legal constraints on the power of parliament to legislate on all matters for the whole UK. It cannot bind itself or its successors, nor carve out areas of exclusive competence for the devolved legislatures. In the traditional formulation, it can "make or unmake any law whatever".[4] The UK parliament can only be restrained politically – by conventions, intergovernmental agreements, and self-denying ordinances. Parliamentary sovereignty is also explicitly acknowledged in each of the devolution acts.[5]

This stands in contrast to federal states such as Canada, where the constitutional spheres of authority of the provincial legislatures are protected by a codified constitution and courts that can annul federal laws that stray into areas of exclusive competence of the provinces. If Canada's federal parliament wanted to legislate on one of the matters listed as a provincial competence, such as management of provincial hospitals,[6] it would have to seek a constitutional amendment. Constitutional amendments have a high threshold, requiring the support of the Senate, the House of Commons and two-thirds of the 13 provincial legislatures (representing at least half of the population of Canada).

In the United Kingdom, there are no special thresholds or protections for amendments by the UK parliament to the constitution. Even though the Scotland Act 2016 recognised devolution as "a permanent part of the United Kingdom's constitutional arrangements", which could be abolished only following a referendum,[7] changes to these statutes only require an ordinary Act of Parliament.

Federalism cannot exist without some form of constitution, or at least "basic law" which is beyond unilateral amendment by the central federal legislature. In a federal, rather than devolved, system, the constitutional powers of the constituent units are therefore protected beyond the unilateral competence of the central legislature.[8] The doctrine of parliamentary sovereignty as currently understood prevents a federal arrangement in the UK.

However, while devolution did not dispense with the formal legislative supremacy of the UK parliament, the devolution statutes of 1998 have been recognised by the High Court as being "constitutional statutes"[9] that carry a greater significance than ordinary domestic legislation. The Supreme Court has noted the "fundamental constitutional nature" of the Scotland Act,[10] while Lords Bingham and Hoffmann suggested that the Northern Ireland Act 1998 is "in effect a constitution".[11] Lord Steyn further observed that the devolution acts "point to a divided sovereignty" in the UK.[12]

The purpose of devolution, as another Supreme Court judgement had it, was "to create a system for the exercise of legislative power…that was coherent, stable and workable".[13] To deliver this coherence and stability, it was necessary from the outset to delineate a sphere of devolved law-making authority into which Westminster would encroach only by invitation, other than in exceptional circumstances.

Therefore, as Professor Gordon Anthony concludes, "The fundamental purpose of the Sewel Convention is to ensure that devolution works in a manner that respects the roles of the UK Parliament and the devolved legislatures."[14] What the convention does, in other words, is to protect the political autonomy of the devolved institutions within their spheres of competence, as far as is constitutionally possible.

<u>The practical value of the legislative consent convention</u>

The consent process provides a mechanism through which the UK parliament can legislate in devolved areas with the express consent of the Scottish Parliament (and the other devolved legislatures, where applicable). This delivers practical benefits for both UK and Scottish governments.

First, it provides a simple way to ensure that the law is consistent across the UK, in technical or other areas where there is no political disagreement about the desired objective and practical reasons to prefer a single UK-wide legal framework. This was the case for the Direct Payments to Farmers (Legislative Continuity) Act 2020, which created a framework to make direct support payments to farmers after they lost access to EU funding.

Second, UK-wide legislation, passed with consent, can be the best way to ensure consistent compliance with international obligations: one example is the Domestic Abuse Act 2021, which

ensured that courts across the UK are compliant with the Istanbul Convention on preventing domestic violence.

Third, the convention can play a useful role when there is uncertainty about what is and what is not devolved and/or a complicated intersection between reserved and devolved powers. In such areas, if there is agreement on the substantive policy questions, the consent process allows legislation to be enacted without needing to resolve the question of where competence lies, avoiding the risk of legal challenge (since Acts of the UK Parliament cannot be overturned in the courts).

Fourth, the consent process frees up space in the legislative timetable in Holyrood, since it provides an alternative route for Scottish ministers to make desired legislative changes without needing to pass their own bill. It also avoids unnecessary duplication of effort and lightens the burden on the devolved institutions. Moreover, where consent is given to UK legislation that relates to devolved matters, this does not remove the ability of the devolved bodies to pass their own legislation in the same area at a future point, unless the legislation makes changes to the devolution settlement itself.

Fifth, the convention can be used at pace to ensure a swift and coordinated approach to a crisis. The Coronavirus Act 2020, for instance, was mainly drafted in Whitehall in close consultation with the devolved governments, with some sections reportedly written by Scottish Government officials. The legislation modified the powers of devolved ministers and legislated in areas within devolved competence, so fell within the scope of the convention. Upon its introduction, the legislation was swiftly granted consent at Holyrood in March 2020.[58]

Sixth, as the last example indicates, the convention is often used to confer additional functions on the devolved institutions – most often by extending the executive competence of devolved ministers, but occasionally to amend the legislative competence of devolved legislatures (as in the Scotland Act 2016). The convention thus serves as a mechanism to strengthen and deepen devolution, with consent, as well as to make minor technical adjustments to the devolution settlements.

In sum, when it works well, the convention delivers clear benefits to all sides.

<u>The legislative consent convention after Brexit</u>

Following the 2016 EU referendum, many observers immediately recognised that Brexit would have an impact upon the devolution settlements and that the convention would be engaged for legislation giving effect to Brexit. As the Institute for Government concluded in October 2016: “Brexit cannot be treated as a simple matter of foreign relations. Leaving the EU will have a significant impact on the powers and budgets of the devolved bodies. This means the devolved parliaments will almost certainly seek to vote at some point on whether to give consent to the terms of Brexit.”[15]

At that time it remained conceivable that UK-wide agreement on the terms of Brexit could be reached, as Theresa May had promised she would seek upon becoming Prime Minister in July 2016.[16] But May’s aspiration proved unattainable, once her government ruled out a softer form of Brexit, as recommended by the Scottish Government, and the withdrawal process consequently unfolded amid a series of disputes between the UK and Scottish governments, which have cast doubt over the future of the convention.

Four Brexit-related bills were passed between 2018 and 2020 despite (a) the UK government explicitly accepting that the legislation fell within the scope of the convention, and (b) the Scottish Parliament voting to withhold consent and communicating this decision to the UK Parliament. Until 2018, this had never happened. More recently, the Elections Act 2022 was enacted despite the Scottish Parliament

[58] https://archive2021.parliament.scot/parliamentarybusiness/bills/114888.aspx

having passed a motion that resolved "not to consent to the UK Elections Bill".[17] These developments, in our view, have eroded trust between the administrations and undermined the sense that they have a shared understanding of the rules governing their relationship. It also exposed the limitations of the consent process as a guarantor of devolved autonomy.

The UK government initially argued that it was only in the exceptional circumstances of Brexit that it had chosen to legislate without devolved consent. But having crossed the Rubicon, it appears the UK Parliament is growing more willing to legislate without consent in devolved areas on a more frequent basis, not least because withdrawal from the EU has created additional areas of potential conflict on matters where EU law previously reigned supreme. In particular, the UK Internal Market Act has become the most contentious example of Westminster's willingness to intervene in devolved matters and amend devolved competence without consent.

The Institute for Government cautioned in our 2020 report that "if further legislation is passed by Westminster without devolved consent (on bills where Sewel clearly applies), this would further undermine trust between the governments and make it harder for them to work together in areas where EU law must be replaced by new UK-wide arrangements." We further warned the UK government that such a development would give credence to the argument that the autonomy of the devolved nations was at risk, and that this could destabilise the Union as a whole. We believe our analysis has been supported by subsequent developments.

The passage of this series of bills without consent opened up the possibility that the convention could collapse altogether, had the Scottish Parliament and Government taken the view that Westminster would do what it liked regardless of their consent, and so participation in the process was pointless. Conversely, the UK Government could have concluded that since it can get its own way irrespective of the outcome of any consent motions, it might as well dispense with the convention and avoid the need for negotiation and compromise.

Fortunately, that has not happened. The UK and Scottish governments have continued to work together on bills requiring consent. Whitehall departments have engaged with Scottish Government counterparts in the normal way to seek to resolve disputes, Scottish ministers have laid legislative consent memorandums, and the Scottish Parliament continues to debate and pass consent motions. In 2021, for instance, Holyrood gave its consent to eight bills.

As a result, one might conclude that the convention has functioned as it should – with legislation passed without consent only in exceptional circumstances – and that all has now returned to normal. As Stephen Barclay MP, then Brexit Secretary, stated after the passage of the EU Withdrawal Agreement Act 2020: "The refusal of legislative consent in no way affects the Sewel convention or the Government's dedication to it."[18] However, as we argued in 2020: "this interpretation underplays both the significance of what has transpired during the Brexit process, with regard to the Sewel Convention, and the potential for further disputes over the coming period."

It is understood within the devolved governments that Westminster has the *legal* ability to legislate without consent. However, the previous assumption that the UK and devolved institutions were playing by the same rulebook has been shattered. The consent process is based on trust. As Professor Nicola McEwen has put: "The paradox of the Sewel convention is that it only functioned as a principle and process that fostered a culture of cooperation so long as its limits were untested."[19] Now the limits *have* been tested, its ability to regulate UK-Scottish relations is cast into doubt.

Brexit has destabilised the convention not only because of the headline disagreement about the nature of the UK-EU relationship, but also because it has opened up new space for disagreement in the many important policy areas previously subject to EU law. These are areas where there is less certainty about the boundary between reserved and devolved power, precisely because the

boundary has not hitherto mattered, given the supremacy of EU regulations and directives. Brexit also opened up a possibility of consent disputes over international agreements, as was the case over the legislation that gave effect to the 'future relationship' agreement with the EU.

How to reform and revive the legislative consent convention

In light of the above analysis, the Institute for Government set out eight proposals for reform. A brief summary follows. The purpose of our proposed reforms is to:

- mitigate disputes between the UK and devolved governments,
- improve the transparency of the system,
- sharpen the accountability of UK ministers for decisions they take that relate to devolution,
- improve awareness of the consent process within Westminster, and
- strengthen the relationship between the UK and devolved parliaments.

First, the UK government should recognise that **consent should be sought in precisely the same way for legislation that amends the powers of the devolved bodies, as for legislation in already devolved areas**. Without this guarantee, the devolved governments fear that Westminster may unilaterally impose new constraints on devolution.

Second, **the UK and devolved governments should seek to reach agreement on the limited circumstances in which consent need not be sought for legislation in devolved areas**. These circumstances could include legislation to deal with crises and to ensure that the UK complies with international obligations.

Third, **Whitehall departments should share draft legislation with devolved counterparts an agreed minimum period before introduction into parliament**, so that devolved views can be taken into account and disputes can be resolved as far as possible at this stage. This duty to consult should be set out in a revised Memorandum of Understanding agreed by the four governments.

Fourth, **at the point of introduction of a bill, the lead minister should lay a "Devolution Statement" before Parliament** which sets out in detail whether and why consent is required, how the department has engaged with devolved counterparts during the pre-legislative process, whether consent is expected, and how the government plans to resolve any outstanding disagreements.

Fifth, **each Devolution Statement should be referred to a parliamentary committee**, which could also take evidence from the devolved bodies. **The committee would report on the consent issues relating to the bill, including on any unresolved disagreements**, to inform parliamentary debate during the legislative process. This role could be played by an existing select committee or a new Devolution Committee with a wider remit to scrutinise inter-governmental relations.

Sixth, in cases **where there is disagreement between the UK and devolved administrations over whether consent is required, the committee should be able to seek expert advice**, either from specialist advisers employed directly by the committee, or from an independent advisory panel established as a standing body to consider competence disputes on behalf of Parliament. **The advice would address the specific question of whether and why the Sewel Convention applies**.

Seventh, **if ministers wish to proceed with legislation in devolved areas without consent, they should make a statement to parliament justifying this decision**. Moreover, an additional stage of the legislative process should be created at which **each House of Parliament would debate and vote on a motion on the specific question of whether to proceed with the bill** despite the absence of consent.

Eighth, we suggest **there should be fuller public information provided by the UK parliament about the consent status of each bill**, to make clearer the connection between consent motions at the

devolved level and the legislative process at Westminster, and to further enhance awareness of the devolution issues at stake when legislation is passing through parliament.

Conclusion

We did not recommend that the convention be replaced by a judicially enforceable consent mechanism, in which, for instance, the devolved legislatures could veto the passage of Acts of Parliament or the courts could strike down legislation passed without devolved agreement.

Our approach was to take the current constitutional framework as a given, at least for the immediate future, and to set out proposals that could be implemented within this context. In our model, therefore, the sovereignty of parliament would be retained, meaning Westminster could still, in exceptional circumstances, pass laws without consent in devolved areas, or even to amend the devolution settlements. We recognise that our package of proposed reforms would therefore not give the Scottish Parliament binding protection against unilateral actions at Westminster that affect devolved matters. We nonetheless believe these reforms would mark an important improvement on the status quo.

That is not to say there is no argument for the UK moving towards something closer to a federal constitutional settlement, in which the powers and status of the Scottish Parliament and other devolved bodies would be entrenched. That is a bigger debate that we did not delve into. However, what is clear is that the more the UK government chooses to amend the terms of devolution or intervene in devolved policy areas without consent, the harder it is to claim that the consent convention can fulfil its purpose of protecting the political autonomy of the devolved institutions.

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[1] Scotland Act 2016, part 1(1); Wales Act 2017, part 1(1)
[2] HL Deb, 21 July 1998, col 791: https://bit.ly/3b6lPby
[3] Akash Paun & Kelly Shuttleworth (2020), *Legislating by consent: how to revive the Sewel convention*, Institute for Government, at: https://www.instituteforgovernment.org.uk/publications/sewel-convention/
[4] A.V Dicey 'The Law of the Constitution' (1885), pp 39-40
[5] See section 28(7) of the Scotland Act 1998 and section 107(6) of the Governance of Wales Act 2006
[6] https://cbmu.com/uploads/Constitution_Act_1867_sections_91_and_92.pdf
[7] Scotland - http://www.legislation.gov.uk/ukpga/2016/11/section/1/enacted, Wales http://www.legislation.gov.uk/ukpga/2006/32/part/A1
[8] https://publications.parliament.uk/pa/ld201516/ldselect/ldconst/59/59.pdf
[9] Thoburn v Sunderland City Council [2002] EWHC 195, LJ Laws
[10] [2012] UKSC 24, [2013] 1 AC 413 [30]
[11] Robinson v Secretary of State for Northern Ireland and Others, [200] UKHL 32, para 11
[12] R (Jackson) v Attorney-General [2005] UKHL 56, para 102
[13] Imperial Tobacco Limited (Appellant) v The Lord Advocate (Respondent) (Scotland) [2012] UKSC 61, para 14
[14] 'Devolution, Brexit, and the Sewel Convention', Professor Gordon Anthony, the Constitution Society (2018) https://www.consoc.org.uk/wp-content/uploads/2018/04/Gordon-Anthony-Devolution-Brexit-and-the-Sewel-Convention-1.pdf
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[19] https://www.centreonconstitutionalchange.ac.uk/news-and-opinion/brexit-eroding-sewel-convention