

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.

The practical value of the legislative consent convention

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 2020.¹

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.

The legislative consent convention after Brexit

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

¹ <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>

¹⁵ <https://www.instituteforgovernment.org.uk/publications/four-nation-brexit>

¹⁶ <https://www.ft.com/content/ff1d0c72-4aa0-11e6-8d68-72e9211e86ab>

¹⁷ <https://bills.parliament.uk/publications/45053/documents/1341>

¹⁸ [https://hansard.parliament.uk/Commons/2020-01-22/debates/7D35E1A9-CB17-4503-A8AF-8E8E30169A95/EuropeanUnion\(WithdrawalAgreement\)Bill](https://hansard.parliament.uk/Commons/2020-01-22/debates/7D35E1A9-CB17-4503-A8AF-8E8E30169A95/EuropeanUnion(WithdrawalAgreement)Bill) at col.322

¹⁹ <https://www.centreonconstitutionalchange.ac.uk/news-and-opinion/brexit-eroding-sewel-convention>