Constitution, Europe, External Affairs and Culture Committee

How is devolution changing post EU **inquiry – adviser's briefing**

The Committee has asked for consideration to be given to how some of the challenges around consent in the post-Brexit era may be addressed.

In its report *The Impact of Brexit on Devolution* the Committee identified the following challenges with consent at present:

- Sewel Convention is under strain;
- The increase in the number of powers taken by UK Ministers to act in devolved areas and the significance of those powers.
- The need for a wider debate on consent across the UK.

This paper considers three matters common to the consent challenges above:

1. The proliferation of consent mechanisms without a shared understanding of their meaning and the appropriateness use.
2. The ad hoc and inconsistent application of consent mechanisms and the effect of this on the balance of powers between executive and legislature, both at the UK and devolved level.
3. The effect of the uncodified constitution in understanding what may be deemed to be 'constitutional' and 'unconstitutional' action.

The final section of the paper sets out some thoughts on what might be done to address the challenge of consent in the operation of devolution at present. In doing so, it explores areas which the Committee may wish to discuss with witnesses during its inquiry on devolution.

Devolution in Scotland and the question(s) of devolved consent

Why is 'consent' an important feature of the devolution settlement?

In 1973, the Kilbrandon Commission reported its conclusions on 'the present functions of the present legislature and government in relation to the several countries, nations and regions of the United Kingdom' and whether in 'the interests of…prosperity and good government…changes are desirable in those functions or otherwise in present constitutional and economic relationships'. A majority report concluded that devolution was the preferred way to 'counter over-centralisation…to…strengthen democracy [and to respond to] national feeling in Scotland and Wales'.[1] Other options were considered. Continuity was not an option precisely because the problem identified by the Commission was the overconcentration, and the unrepresentative and unresponsive nature, of executive and legislative power at the centre.[2] Independence (the transfer of sovereignty to the nations over all matters) was rejected on the basis that political will was lacking. Federalism (a division of sovereignty between the nations and the centre) was also rejected on the basis of England's dominant position in terms of 'political importance and wealth' as well as the need for wider constitutional reforms – 'a written constitution, a special procedure for changing it and a constitutional court to interpret it' – that were unlikely to find general acceptance.[3] Devolution, on the other hand, in which significant powers are exercised at the sub-state level, but where full sovereignty is retained at the centre, seemed capable of delivering more representative and responsive government in Scotland and Wales without the kind of radical change necessary at the centre (the loss or division of sovereignty) that, for lack of political will, might undermine reform from the very beginning.

When devolution was delivered by the New Labour government in 1998 that conscious link between (1) a 'new settlement' whereby 'decision making was brought closer to the people [of Scotland, Wales and Northern Ireland]'[4] and, nevertheless, (2) the continuation of the sovereignty of the Crown-in-Parliament was evident in a number of ways:

- By the method of reform via the enactment of ordinary statutes (the Scotland Act 1998, the Government of Wales Act 1998 and the Northern Ireland Act 1998) rather than by any special constitutional mechanism;
- By express provision in section 28(7) of the Scotland Act 1998 and by section 5(6) of the Northern Ireland Act 1998;[5]
- By implication in light of the nature of parliamentary sovereignty itself (see, for example, the claim by the Secretary of State for Wales, Ron Davies, during the

[1] Kilbrandon Commission, *Report of the Royal Commission on the Constitution 1969-1973* (1973) at para 1102.
[2] A Page, *Constitutional Law of Scotland* (2015) 22.
[3] Kilbrandon Commission at para 497.
[4] T Blair, 'Devolution, Brexit and the Future of the Union' (interview at the Institute for Government, London, 24 April 2019) available at tony-blair_0.pdf (instituteforgovernment.org.uk).
[5] And, with the delivery of primary law-making powers to Wales, now in sections 97(5) (Assembly Measures) and 107(5) (Acts of the Senedd) of the Government of Wales Act 2006.

passage of the Government of Wales Bill, that any express provision would be 'meaningless' as 'Parliament is supreme, and any statutory assurance to that effect can be set aside by any future Parliament);[6]

- And, in its treatment as a subordinate legislature by the courts in early devolution cases (see, for example, Lord Rodger's view in *Whaley v Lord Watson* that '[the Scottish Parliament] - however important its role - has been created by statute and derives its powers from statute …. like any other statutory body, [it] must work within the scope of those powers').[7]

An important justification for devolution, then, has been to achieve greater executive and legislative autonomy in the devolved jurisdictions. However, to the extent that the relevant *law* has anything to say about the boundaries between the devolved legislatures and the UK Parliament it is (subject to two exceptions, set out below) to affirm the continued and unbroken sovereignty of the latter including, by express provision and by constitutional implication, its unlimited power to legislate in devolved areas.

This legal rule – the residual power for the UK Parliament to legislate in devolved areas - is regulated by a political rule: the constitutional convention, articulated 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'.[8] This was not Lord Sewel's innovation. Rather, it referred to the custom of non-interference developed during the period of devolution in Northern Ireland between 1921 and 1972 that was qualified only by UK legislation in Northern Ireland with the consent of the Parliament of Northern Ireland or by UK legislation without the consent of the Parliament of Northern Ireland – in the context of political violence - by necessity as an action of last resort.[9] The presumption against interference was a strong one. Reflecting on the that experience of devolution in Northern Ireland, the majority report of the Kilbrandon Commission noted that, to accord with its vision for devolution in the UK, 'frequent recourse to [legislation without devolved consent or to the vetoing of devolved legislation] would be bound to undermine regional autonomy and the smooth working relationship between central and regional authorities which would be essential to good government'.[10]

Whilst the convention as Lord Sewel described it refers to UK legislation in devolved policy areas (the 'policy' arm of the convention) Devolution Guidance Note 10 instructs UK officials that consent should also be sought for bills that would alter (by retracting or

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[6] HC Deb 8 December 1997, vol 302, col 685 (Ron Davies).

[7] *Whaley v Lord Watson* 2000 SC 340 at page 348G

[8] On the evolution of the Sewel Convention see A McHarg, 'Constitutional Change and Territorial Consent: The Miller Case and the Sewel Convention' in M Elliott, J Williams and AL Young (eds), *The UK Constitution After Miller: Brexit and Beyond* (2016) Ch 12.

[9] On the experience of legislative consent in Northern Ireland during the period 1921-72, and linking that experience to the convention as applied today, see A Evans, 'A Tale as Old as (Devolved) Time? Sewel, Stormont and the Legislative Consent Convention' (2020) 91(1) The Political Quarterly 165.

[10] Kilbrandon Commission at paras 763-768.

expanding) devolved competence.[11] This rule serves a two-fold constitutional purpose. On the one hand, it protects the autonomy of the devolved authorities from unwelcome legislative or constitutional interference from the centre. On the other hand, it facilitates shared governance by allowing for UK legislation, where welcomed or invited by the devolved authorities, to implement agreed policy developments in devolved areas or to make agreed alterations to devolved competence.[12]

The Scotland Act 2016 (with analogue provisions in the Wales Act 2017) did make some statutory provision for devolved autonomy, albeit these are constitutionally limited safeguards:

- Section 1 asserted the permanence of the Scottish Parliament and Scottish Government subject to the proviso that their abolition could be achieved only following a decision of the people of Scotland voting in a referendum. However, according to the orthodox reading of parliamentary sovereignty (as stated by Ron Davies, above) this safeguard could simply be set aside by ordinary legislation passed by a future parliament.
- Section 2 'recognised' the existing constitutional convention that the UK Parliament will not normally legislate in devolved areas without the consent of the Scottish Parliament. However, in *R (Miller) v Secretary of State for Exiting the European Union* the Supreme Court said that this provision merely recognised the already existing political rule and that the Sewel Convention would continue to operate in the political arena. Contrary to the Smith Commission report[13] the provision did not place the convention on a statutory footing and so, where they occur, disputes about the proper application of the rule could not be subject to judicial review.[14]

What is the problem?

In its 2022 report, *The Impact of Brexit on Devolution*, this committee identified a number of developments that engaged the issue of consent:

- The Committee agreed that the Sewel Convention is under strain as a result of several instances of Brexit-related UK legislation effective in devolved areas and/or amending the scope of devolved powers that has been enacted despite the devolved legislatures withholding consent, including occasions where legislative override was not necessary as a matter of last resort (and certainly not to the exceptionally high threshold of justification that applied Northern Ireland

[11] Devolution Guidance Note 10 available at Post-Devolution Primary Legislation affecting Scotland (publishing.service.gov.uk).
[12] On the use of Sewel in Scotland pre-Brexit see A Page and A Batey, 'Scotland's other Parliament: Westminster legislation about devolved matters in Scotland since devolution' (2002) Public Law 501.
[13] *Report of the Smith Commission for further devolution of powers to the Scottish Parliament* (2014) at para 22 (available at [ARCHIVED CONTENT] (nationalarchives.gov.uk)).
[14] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 at paras 147-151.

until 1972), or where there has been disagreement between the UK Government and the devolved authorities about whether the convention is engaged at all [para 119];[15]

- The Committee noted a step change in the number, extent and scope of executive powers taken by the UK Government to act in devolved areas, with an ad hoc and inconsistent approach to the consent mechanisms that attach to those powers - in some cases, UK Ministers are prohibited from legislating in devolved areas (e.g. sections 36, 38 and 38 of the Fisheries Act 2020), in others UK Ministers must seek (but not necessarily obtain) consent from devolved counterparts before exercising powers in devolved areas (e.g. sections 6, 8, 10, 18, 21 and Sch 3(2)(3) of the UK Internal Market Act 2020), in others UK Ministers must (merely) consult with devolved counterparts before exercising powers in devolved areas (e.g. section 17 of the Professional Qualifications Act 2022) in and others there is no statutory requirement to seek consent from, nor to consult, devolved counterparts before exercising powers in devolved areas (e.g. section 50 [making provision for direct UK Government spending in devolved areas] of the United Kingdom Internal Market Act 2020, section 8 of the European Union (Withdrawal) Act 2018 – albeit in the case of the latter a political commitment to seek consent was made and honoured in practice) [paras 176-179].
- The Committee recognised the cross-UK rather than jurisdiction-specific nature of these problems and called for a wider public debate about 'where power lies within the devolution settlement following the UK's departure from the EU' [para 119].

There are at least three issues that the committee might usefully address in order to (begin to) resolve these problems.

First, there has been a proliferation in the UK constitution of consent mechanisms with no consensus on when consent mechanisms are appropriate, by whom consent is sought, of whom consent is sought, and what consent means with regard to those mechanisms. Consider the following (non-exhaustive) list of examples:

Primary (UK) legislation

- The policy arm of the Sewel Convention (which attaches to UK legislation in devolved policy areas) applies across the devolution settlements in Scotland, Wales and Northern Ireland. However, there has increasingly been disagreement about the scope of reserved matters and whether (and if so, to what extent) UK Parliament legislation engages the convention at all.[16]

[15] Constitution, Europe, External Affairs and Culture Committee (Scottish Parliament), *The Impact of Brexit on Devolution* (22 September 2022) available at The Impact of Brexit on Devolution | Scottish Parliament.

[16] For example, see the Environment Bill (regarding forest risk commodities at para 28: splcms062.pdf (parliament.scot)), the Health and Care Bill (regarding the prohibition of paid-for

- The constitutional arm of the Sewel Convention (which attaches to UK legislation that amends devolved competence) applies only to Scotland and Wales.[17] However, there has been disagreement between the UK Government and the devolved authorities about whether consent has been sought in such circumstances as a courtesy in the interests of good governance or because the requirement to seek consent falls within the scope of the constitutional rule.

Primary (devolved) legislation

- In Wales and Northern Ireland, the devolved authorities must obtain consent from the relevant Secretary of State in order to legislate on certain matters.

Executive (devolved) consent

- As noted above, the ad hoc and inconsistent development of UK Ministers taking powers to act in devolved areas has been accompanied by ad hoc and inconsistent consent mechanisms, from requirements to seek consent (but where Ministers may nevertheless act where consent is not given by a specified deadline or even where the consent decision by the relevant devolved authority is 'no'),[18] to requirements merely to consult with devolved counterparts, to powers to act in devolved areas with no consent or consultation requirements at all. There seems to be no guiding constitutional principle as to when it is appropriate for UK Ministers to take such powers and as to the consent mechanisms (if any) that should attach to the exercise of those powers.

Popular consent

- In Northern Ireland, the principle of consent – that 'it is for the people of the island of Ireland alone, by agreement between the two parts respectively and without external impediment, to exercise their right of self-determination on the basis of consent, freely and concurrently given, North and South, to bring about a united Ireland, if that is their wish, to bring about a united Ireland, if that is their wish, accepting that this right must be achieved and exercised with and subject to the agreement and consent of a majority of the people of Northern Ireland' - is a key tenet of the Good Friday Agreement, reflected in the border poll provisions of the Northern Ireland Act 1998. as well as cross-community consent requirements relating, inter alia, to certain 'key' decisions (such as budget allocations) and to the continuation or not of the Northern Ireland Protocol. However, as the Committee's adviser Professor Katy Hayward has said, shifting

advertising of less healthy food online at para 45: Supplementary legislative consent memorandum (parliament.scot)), the Elections Bill (regarding information to be included in electronic campaign material at para 52: splcms068.pdf (parliament.scot)), the Social Security (Additional Payments) Bill (regarding payments to people to meet their short term needs to avoid risk of harm to their wellbeing at para 7: Legislative Consent Memorandum (parliament.scot)), the Levelling-up and Regeneration Bill (regarding planning data at paras 13-15: splcms0623.pdf (parliament.scot)).

[17] *McCord's (Raymond) Application* [2016] NIQB 85 at paras 119-122.

[18] European Union (Withdrawal) Act 2018 s 12.

political dynamics post-Brexit in Northern Ireland mean that what was once thought a safeguard of the union – the requirement for (a majority unionist) Northern Ireland to consent to unification – might instead be signpost to unification if that majority dissipates.[19]

- Section 1 of both the Scotland Act 1998 and the Government of Wales Act 2006 provide that devolution may only be abolished with the consent of the people of Scotland or Wales as expressed in a referendum.

Sometimes, in other words, consent must be obtained and sometimes it must be sought. Sometimes consultation is enough. Sometimes consent requirements are imposed on the UK authorities and sometimes on the devolved. Sometimes consent must be sought of legislatures, sometimes of ministers and sometimes of the people. Sometimes consent is a decision and sometimes it is merely a view. Sometimes consent is a creature of statute and sometimes it is a creature of convention. Sometimes it sits awkwardly between. Sometimes consent requirements protect devolved autonomy and sometimes they inhibit it. Sometimes consent means something close to a veto and sometimes it appears to be little more than a courtesy. Sometimes there is no consent requirement at all. What *is* certain about consent is that it plays a significant part in the regulation of devolution in the UK. However, with such a proliferation of use, and with rapidly changing political dynamics affecting even its more established uses, it is little wonder that there seems be no shared understanding of what consent means and what it requires both at a fundamental level and in the day to day functioning of the constitution.

Second, the ad hoc and inconsistent application of consent mechanisms, with limited, if any, mechanisms of enforcement tilt the balance of power towards the centre. For example, there have been, until recently, relatively weak mechanisms of intergovernmental relations and dispute resolution in the UK, in which the UK Government has been described as 'judge, jury and executioner'.[20] And, in the context of legislative consent, because the power of initiative lies with the UK Government, with no mechanism for dispute resolution or judicial oversight, it has been in the UK Government's gift to interpret the scope of reserved matters and the meaning of 'not normally' so as to exclude the requirement to seek consent or to justify legislation in devolved areas where devolved consent has been withheld.

Third, the (it is often said) flexible nature of the UK's uncodified constitution means that constitutional actors might talk past one another at a more fundamental level about the boundary between constitutional and unconstitutional action. On one view, the evolution of consent mechanisms described here might present no change at all. Proponents of this view might argue that the UK Parliament has always held the power to

[19] K Hayward and D Phinnemore, 'Breached or protected? The 'principle' of consent in Northern Ireland and the UK Government's Brexit proposals' (11 Jan 2019) LSE Blog available at Breached or protected? The 'principle' of consent in Northern Ireland and the UK government's Brexit proposals | EUROPP (lse.ac.uk).

[20] See evidence to CEEAC by Prof McEwen and Dr Anderson in *The Impact of Brexit on Devolution* at paras 112-113.

legislate in devolved areas and that legislation to create powers for UK Ministers in devolved areas, or legislation made directly in devolved areas even where consent is withheld, is merely a manifestation of that power.[21] On another view, the increasing presence of UK executive powers in devolved areas, or the departure from legislative consent as traditionally understood, might properly be described as 'unconstitutional' behaviour that should be rolled back to fit within existing constitutional norms and architecture.[22] Finally, it might be argued that our existing norms and architecture are no longer fit for purpose. Proponents of this view might argue that political reality has changed – that UK executive powers in devolved areas or greater willingness by the UK Government to legislate in devolved areas where consent is withheld are now *features* of an evolving settlement - and that we need new constitutional norms and new constitutional architecture capable of regulating the exercise of those powers.

To gather these problems, it is clear that, post-Brexit, even greater reliance is being placed on consent as a means of constitutional regulation. However, the lack of a shared understanding about the meaning and proper operation of established consent mechanisms (e.g. the operation of Sewel) is being exposed by the rapidly changing constitutional landscape. At the same time, consent mechanisms have been applied inconsistently to the regulation of new executive powers in devolved areas. What is at stake here is the scope of devolved autonomy and the constitutional legitimacy of, and accountability for, the exercise of power in the devolved sphere.

What might be done?

There are a range of reform proposals from placing the Sewel Convention on a statutory footing and making it subject to judicial review, to making amendments to the UK legislative process, to new political commitments to respect devolved autonomy, to the founding of a new constitutional settlement, to joint governmental/parliamentary work to agree on principles and conditions to govern the exercise of powers and the consent mechanisms that attach to them. Proposals come from governments and legislatures, political parties, think tanks and academics. These proposals can be categorised as follows:

Primary legislation in devolved areas

Statutory amendment and a justiciable rule

For some, reform should be aimed at removing the ambiguities inherent in section 28(8) of the Scotland Act 1998. They recommend either that the phrases 'it is recognised that' and 'not normally' are removed so as to create an unambiguous statutory rule[23] or that negotiations between the centre and the devolved authorities should clarify the conditions (the 'not normal' circumstances) that would properly authorise UK legislation in devolved

[21] Quoted by CEEAC in *The Impact of Brexit on Devolution* at para 176.
[22] I Jennings, *The Law and the Constitution* (1955) 158.
[23] See, for example, Labour Party, *A New Britain: Renewing our Democracy and Rebuilding our Economy* (2022) (also referred to as the Brown Commission) 102-104, available at Commission-on-the-UKs-Future.pdf (labour.org.uk).

areas where consent has been withheld.[24] It has also been recommended that ambiguity about the *scope* of the rule - does it apply *as a rule* only the policy arm of the convention (i.e. to UK legislation in devolved policy area) or does it apply *as a rule* (and not only as mere practice or courtesy) also the constitutional arm of the convention (i.e. to UK legislation that amends the scope of devolved powers) – should be clarified. This could be done by way of legislative amendment to tighten the language used in section 28(8) or by way of a public statement by both the centre and the devolved authorities about the constitutional importance of the rule and its application as a rule to the constitutional arm of the convention.[25]

For some, this legislative tightening of the rule and the statutory language that gives expression to it would have the additional effect of making the rule justiciable (i.e. making disputes about its application subject to the jurisdiction of – and resolution by – the courts). It was the ambiguities above ('it is recognised that'; 'not normally') that persuaded the Supreme Court in the *Miller* case that the rule was a political rather than a legal one.[26] Such a move would align with the commitment made by the Smith Commission and is worthy of careful consideration in light of the Brown Commission's recommendation to a potential Labour Government to do just that.[27] In light of the prevailing doctrine of parliamentary sovereignty this is no panacea. On the one hand, any amendment in this direction will itself be vulnerable to further amendment by a future parliament. On the other hand, the constitutional pressure placed on the courts to strike down – or to take measures short of strike down such as to disapply or to declare 'unconstitutional' - provisions of a UK statute in disputes between the centre and the devolved authorities might draw the judiciary into political controversy at a time when the Supreme Court is sensitive to claims that the judiciary has overreached its proper constitutional role.[28]

Reform to parliamentary procedures

For some, the political nature and consequences of the Sewel Convention mean that boundary disputes are better resolved by legislatures and not by the courts.[29] Their focus is on reform to the role of parliament(s) to ensure better scrutiny of decisions by the UK

[24] See, for example, A Paun and K Shuttleworth (for the Institute for Government), *Legislating by Consent: How to Revive the Sewel Convention* (2020), esp 27, available at https://www.instituteforgovernment.org.uk/sites/default/files/publications/legislating-by-consent-sewel-convention.pdf; Welsh Government, *Reforming Our Union: Shared Governance in the UK* (2019) esp 7-9, available at Reforming our Union: Shared Governance in the UK; Prof Aileen McHarg in evidence to this Committee, see papers available here 3381 (parliament.scot) at annex C.

[25] Paun & Shuttleworth and McHarg ibid.

[26] *Miller* judgment (n 14) at 148.

[27] Brown Commission (n 23). See also M Hexter, 'Is it time to reform the Sewel Convention?' (24 Jan 2019) IWA blog, available at Is it time to reform the Sewel convention? - Institute of Welsh Affairs (iwa.wales).

[28] See C Gearty, 'In the Shallow End'(2022) 44(2) London Review of Books, available at Conor Gearty · In the Shallow End · LRB 27 January 2022.

[29] See, for example, House of Lords Constitution Committee, *Respect and Cooperation: Building a Stronger Union for the 21st Century* (10th report of 2012-22) esp paras 125-142, available at Respect and Co-operation: Building a Stronger Union for the 21st century (parliament.uk).

Government to proceed with legislation in devolved areas where consent has been withheld or where there is a dispute as to whether the convention is engaged at all. Proposals in this direction include:

- *Ministerial statements* (similar to those made by devolved ministers upon the introduction of every Bill into the devolved legislatures or by UK Ministers under section 19 of the Human Rights Act upon the introduction of every Bill into the UK Parliament) could be made upon the introduction of every Bill into the UK Parliament detailing the devolution implications of a Bill and, if legislative consent is required, detailing levels of engagement with the devolved authorities to manage that process and resolve any disagreement at an early stage.[30] This would serve to inform the UK Parliament about the devolution implications of its legislation and also to focus UK Government's minds in the pre-introduction stage to resolve issues with devolved counterparts as early as possible (including to avoid strong censure where committees are engaged).
- *Enhanced role for committees* in the scrutiny of legislative consent issues. Any requirement for a ministerial statement, for example, could trigger scrutiny by a committee of the UK Parliament at which devolved authorities would have the opportunity to give reasons for any decision to withhold consent and UK Ministers would have the opportunity to give reasons for any decision to proceed with legislation without devolved consent. Any such committee would have the benefit of special advisers and the ability to call for expert evidence when considering and reporting on the constitutional implications of any decision to proceed without devolved consent or where there is disagreement about whether consent is required in the first place.[31]
- An *additional legislative stage* could give both Houses an opportunity to consider whether to proceed with a Bill to which devolved consent has been withheld. This stage would begin with a ministerial statement to both Houses setting out the reasons for proceeding without devolved consent, would provide an opportunity for the devolved authorities to set out their position(s), and would empower committees empowered to report on the implications of proceeding without consent.[32]
- *House of Lords scrutiny* could be made more robust where legislation engages the Sewel Convention. This would include all Bills being introduced into the Lords with a devolution memorandum outlining the Bill's devolution implications and the nature and extent of any related engagement with devolved authorities, or an explanation why in the view of the UK Government devolved consent is not required. The Procedure and Privileges Committee could tag the lack of devolved consent against each stage of the Bill's consideration in the Lords. The Lords could advise on the constitutional implications of proceeding without devolved consent.[33]

[30] See, for example, Paun & Shuttleworth (n 24); Welsh Government (n 24).
[31] Paun & Shuttleworth (n 24).
[32] Welsh Government (n 24).
[33] HL Constitution Committee (n 29).

- *Opportunities for early engagement between legislatures* – noting the lack of opportunities for pre-legislative inter-parliamentary engagement at present – could be developed in order to identify, manage and resolve boundary disputes as they arise.[34]
- *Parliamentary endorsement* could be given to any negotiations between the centre and the devolved authorities about the significance and scope of Sewel or about the conditions whereby UK legislation might proceed without devolved consent. This should be done concurrently by the UK and devolved legislatures.[35]

Reform to (inter-)governmental practice

As well as the statutory and parliamentary recommendations above it has also been suggested that better (inter-)governmental practices could resolve some of the tensions that currently inhibit the proper operation of the convention. Some of these have already featured above. For one, the requirement for a devolution statement to be made by ministers would require pre-legislative internal scrutiny by UK Government lawyers and could be informed by pre-legislative engagement with devolved counterparts in order to identify, manage and resolve as many issues as possible before legislation is introduced.[36] This would no doubt help to ease tensions but taking place in the intergovernmental sphere and prior to introduction might come at the cost of transparency and accountability.[37] For another, the recommendation that the centre and the devolved authorities (engaging government, parliament and official levels) agree to reaffirm the importance and scope of the convention and to agree to the conditions according to which legislation might proceed without devolved consent (perhaps with affirmation by the respective legislatures) would require direct and not-entirely-straightforward inter-governmental dialogue. This would not be a straightforward exercise - asking one party (the centre) to cede the power of initiative and interpretation and attempting to identify a category (the 'not normal') that almost by definition evades substantive if not procedural definition.

Other recommendations at this level include the UK Government amending the Cabinet Manual and the Guide to Making Legislation in order to embed the Sewel Convention there,[38] UK Government routinely sharing draft legislation at an early stage with meaningful opportunities to hear and respond to views from devolved counterparts[39] and making use of new opportunities for alternative means of dispute resolution to the courts. It has been suggested that new inter-governmental relations machinery – which promotes 'collaboration', seeks to resolve or manage 'disagreement' and that commits to clear and agreed processes that might be invoked by any UK administration – might be a fruitful arena for the resolution of such disputes. The untested nature of the new IGR scheme affords

[34] HL Constitution Committee (n 29).
[35] Paun & Shuttleworth (n 24) and McHarg (n 24).
[36] Paun & Shuttleworth (n 24).
[37] See for example the account of pre-legislative exchanges between Scottish Government and UK Government lawyers given in C McCorkindale and J Hiebert, 'Vetting Bills in the Scottish Parliament for Legislative Competence' (2017) 21(3) Edinburgh Law Review 319.
[38] HL Constitution Committee (n 29).
[39] Paun & Shuttleworth (n 24).

room for the devolved authorities to work with the centre to consider what an agreed process might look like, including what a political enforcement mechanism might look like. As Prof McEwan told this committee, the advantage of building on the new IGR scheme is that 'the UK Government [can no longer] deny the existence of a dispute [as] now any administration can escalate a disagreement to a formal dispute'.[40]

Constitutional entrenchment

Some of these recommendations take a more fundamental turn – acknowledging the difficulty of entrenching constitutional change in a constitutional context still dominated by the sovereignty of the crown-in-parliament. Prof Keating challenges these assumptions in his paper. Nevertheless, for some any modification of statutory language, judicial guardianship of consent or parliamentary/intergovernmental reform will be insufficient without more fundamental reform in the direction of entrenchment – whether this is new institutional means of entrenchment, such as a constitutional safeguard in a revised second chamber (Brown Commission) or an entirely new written constitution on more explicitly federal grounds (Welsh Government), perhaps emerging from a new constitutional convention of the people of the UK (Hexter).

Secondary legislation in devolved areas

As regards the ad hoc and inconsistent nature of consent mechanisms as they apply to the exercise of executive powers in devolved areas, a number of useful options present themselves. It would be a useful exercise to collate the various powers taken by UK Ministers to act in devolved areas, to identify whether (and if so, what) consent mechanisms attach to the exercise of those powers and to identify whether (and if so, how) those powers are being used and whether (and if so, to what effect) any relevant consent mechanisms have been triggered in their exercise. It has also been recommended that, *if* we accept the principle that such powers are justifiable, engagement between UK and devolved governments, legislatures and officials should lead to agreement on the constitutional principles and processes that might guide consistency in their allocation and application. If such powers are justifiable it is likely that there should be a high threshold of justification so as to avoid normalising their use and hollowing from within the reserved powers model of devolution.[41] This might require consultation by UK Ministers with devolved counterparts about potentially problematic Bill at an early stage and by a prescribed deadline. It might also mean reaching agreement on whether the consent mechanisms attached to their exercise should require UK Ministers to obtain or merely to seek consent, from devolved executive counterparts only or also from their legislatures, with mechanisms to update Parliament on the extent to which there has been engagement with devolved counterparts and about the nature of that engagement.[42]

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[40] *The Impact of Brexit on Devolution* at para 112; HL Constitution Committee (n 29).
[41] McHarg (n 24).
[42] Hansard Society, Proposals for a New System for Delegated Legislation (2023) 36-37, available at hansard-society-delegated-legislation-review-working-paper-2023.02.06.pdf (ctfassets.net); McHarg (n 24).

Here, the tension between competing constitutional visions is most clear. One reading of these new executive powers might be that they are unconstitutional – that they run contrary to the devolution settlement, where the hierarchy of legislatures by virtue of parliamentary sovereignty is not matched by a hierarchy of governments – and therefore that the powers should be repealed or discontinued and the status quo ante restored. This would have the advantage of clarifying lines of accountability and legitimacy for the exercise of powers in devolved areas. Another reading might be that – for better or for worse – these powers, which have not been limited to post-Brexit legislation but have been applied into other devolved policy areas, are now part of the devolution settlement and therefore require new constitutional thinking to match that new political reality. This might mean, for example, mechanisms to call UK Ministers and their departments directly to account to the devolved legislatures for the powers that they exercise in devolved areas. Or, it might mean new IGR mechanisms to allow for the meaningful resolution of disputes where the exercise of those powers undermines policy decisions taken, or policy priorities set, in devolved areas by democratically elected and democratically accountable devolved institutions.

To illustrate the issue, consider the proposed use by the UK Government of its spending powers (to which no consent or consultation mechanism is attached) under the UK Internal Market Act 2020 (UK legislation for which devolved consent was withheld) to build an M4 relief road in Wales in the face of the Welsh Government's decision (squarely within devolved competence) not to do so.[43] Putting to one side hurdles such as planning permission that would stand between any proposed expenditure and the delivery of the new road, this invites questions of democratic legitimacy (e.g. the democratic mandate of the Welsh Government to make such decisions for Wales against that of the UK Government, exacerbated by the absence of devolved consent) and democratic accountability (e.g. accountability for the expenditure of public money in devolved areas as well as for the impact on the environment and related emissions targets) that arguably are not captured by existing constitutional norms and architecture. It would be useful to consider (1) whether this poses a constitutional problem at all and (2) if so, what the appropriate constitutional responses might be.

All of this is to say that there are layers of analysis required in order to tackle the 'problem' of consent. There are fundamental questions that must be addressed about whether the problem exists at all and if so about whether the proper solution requires push back in defence of existing constitutional norms and architecture, or whether the proper solution is to accept changing political reality and to reform our constitutional norms and architecture accordingly. The turn to practical solutions, if solutions are necessary – from judicializing Sewel, to new parliamentary and governmental working, to more robust inter-governmental machinery and inter-parliamentary relationships – might depend upon our answer to those

[43] For details of the proposed use of these powers in relation to Wales see the BBC News report here: M4 relief road: UK ministers 'could bypass Welsh Government' - BBC News and analysis by Prof Daniel Wincott here: The M4 and the Internal Market Bill - Thinking Wales - Meddwl Cymru - Cardiff University.

fundamental questions. Notably, all of these solutions require engagement across the devolution settlement and meaningful change must begin there.

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