Scottish Parliament, Culture, Europe and External Affairs Committee

Constitutional options for Scotland

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Summary
The United Kingdom lacks a codified constitution but it does have a constitution. Reform has been hindered by the doctrine of parliamentary sovereignty. Rightly interpreted, this does not prevent the adoption of binding rules of government. There are differing views of the purpose of constitutions and different views of what the UK constitution is and should be. This must be taken into account in any proposals for reform but does not preclude agreement on practical rules. Current issues include strengthening the Sewel Convention; other mechanisms for devolved bodies to consent to laws and other measures in devolved fields; intergovernmental mechanisms; and joint policy making. Suggestions have been made for reform in these areas, which do not require wholesale reformulation of the constitution but could safeguard the interests of the devolved territories.

The UK Constitution

It is well known that the United Kingdom lacks a written, codified constitution. Instead, it relies on conventions, ordinary laws and political understandings and compromises.

The overarching principle is the sovereignty and supremacy of the Monarch-in-Parliament. This has constrained efforts at constitutional reform, including entrenching the powers of the devolved legislatures and governments.

The principle of parliamentary sovereignty and supremacy does not mean that the Westminster Parliament and UK Government always lay down the law and always prevail. There is extensive devolution to Scotland, Wales and Northern Ireland and there has been no general over-riding of devolved bodies. It does, however, cast a 'shadow of hierarchy' over what would otherwise be a system of coordinate governments each with their own spheres of action, since everyone knows that Westminster can always have the last word.

Repeated attempts to strengthen constitutional rules in the United Kingdom have come up against the doctrine of parliamentary sovereignty. This is a peculiarly British self-imposed constraint, which need not prevent change, should that be needed and agreed. There have been constitutional milestones in the history of the United Kingdom. Former colonies have been given independence, as has Ireland. In the case of the Old Dominions and Ireland, this was a gradual process of change and interpretation rather than a radical break, but nobody thinks it could be undone. Universal suffrage and the doctrine that governments are responsible to Parliament (specifically the House of Commons) also came in gradually but are irreversible. Conventions play a role as rules and practices, which may be inviolable, Understandings of the constitution have change under the influence of devolution, human rights law and, while the UK was a member of the European Union, EU law, although much of this is still contested.

Much of the debate in the UK has failed to distinguish between sovereignty, as a property of our system of government as a whole, and supremacy, which is about the relationships of the various institutions. Just as the powers of the House of Lords have been curtailed, so the relationships among the UK and devolved could be changed. Indeed, they have been changed but there is still uncertainty about how these new relationships can be safeguarded.

What are Constitutions for?

Two distinct conceptions of the purpose of constitutions have been confused in the UK debate.

a) Some constitutions are based upon fundamental unity and express a shared national vision and purpose and values.

b) Others exist to make government possible in the absence of consensus on foundations and the direction of travel.

In recent years, unionists have often emphasised the need to strengthen common values and a shared sense of purpose for the union. These two elements are not actually the same thing. Across the United Kingdom (and Ireland) civic, social and economic values are quite similar and, if anything, converging.

On the other hand, there are fundamental differences on the appropriate framework for these values and their constitutional implications. For unionists it is the United Kingdom and for nationalists it is the constituent parts. For many citizens, they are important at all levels. Hence the arguments come down to issues of sovereignty, authority and constitutional foundations.

It is the lack of consensus on this issue, not on social and economic values that makes the UK constitution one of the second type. There may be consensus on *ethos* (values) but not on *telos* (the purpose of the union or of devolution).

The lack of consensus on the foundations of the constitution, however, does not make cooperation, respect and shared action impossible. Northern Ireland is an extreme example of the lack of consensus on foundations and direction but institutions have been designed to work in their absence.

The lack of consensus in Scotland should not be exaggerated. It currently appears to be polarised between supporters of independence and of union. Yet recent research shows that many 'unionists' defend devolution while many 'Scottish sovereigntists' accept shared institutions with the rest of the UK.[1]

We do not have to dig down to the foundations in order to get institutions that work. These deeper questions can be put into abeyance without people having to surrender their long-term ambitions.

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[1] David McCrone and Michael Keating, ', 'Exploring Sovereignty in Scotland', *The Political Quarterly* 2023.
https://onlinelibrary.wiley.com/doi/full/10.1111/1467-923X.13214

Constitutions rely on shared rules yet even the most codified ones also rely on 'silences' or abeyances, by which contested issues can be put aside in the interests of practical action.[2]

Sovereignty and Sewel

One of the contested issues in the UK constitution is Scottish devolution. Three interpretations are:

a) It provides for a Parliament subordinate to Westminster, which can change its existence or, in theory, abolish it unilaterally as long as Westminster sovereignty is acknowledged. The Scotland Act explicitly asserts that it can legislate in devolved matters.
b) The doctrine of absolute sovereignty is alien to Scotland and that the Parliament is the product of an exercise of self-determination by the people of Scotland.
c) Scottish devolution represents a constitutional change rather than the mere 'lending' of power to Scotland and this must be respected.

The UK parties have, at various times, deployed all these arguments.

The compromise solution to the overlapping legislative powers of the Scottish and Westminster Parliaments is the Sewel Convention, under which Westminster will not 'normally' legislate in devolved matters without the consent of the Scottish Parliament. It is now understood that there are three manifestations of Sewel. This was then extended to laws changing the competences of the devolved legislatures themselves.

Sewel has been interpreted in two ways:

a) As a convenient procedure whereby governments can provide for common, agreed, policies;
b) As a device to protect the devolved legislatures against encroachment on their competences.

Sewel worked quite smoothly for the first twenty years of devolution, mainly serving purpose (a) above. It was engaged some many times before 2018 but consent was refused only once and then there was a compromise. Since 2018 it has been engaged about six times and in each case refusal of consent was over-ridden. It is now severely damaged as an instrument to protect the devolved bodies because of:

a) The Supreme Court judgement in the first Miller case, which characterised it as merely 'political'.
b) The willingness of Westminster to proceed without legislative consent;
c) The impact of Brexit and Brexit-related legislation.

There have been repeated efforts to strengthen the Sewel Convention. The problem is that, as long as Westminster is sovereign and supreme, it can repeal any measure to strengthen it. The

[2] Michael Foley, *The Silence of Constitutions. Gaps, 'abeyances' and political temperament in the maintenance of government*, London: Routledge Revivals (2012).

fate of the Fixed Term Parliaments Act shows how constitutional provisions can be changed like any other law.

In the Scotland Act (2016) it was put into statutory form. This did not alter its status as a convention rather than a binding rule. The same applies to the provision that the Scottish Parliament cannot be abolished without a referendum in Scotland.

The word 'normally' remains and the UK Government is the sole judge on what this means in practice.

If Sewel is to remain a convention (in the absence of a justiciable written constitution), however, it may still be strengthened.

In the first Miller case, the Supreme Court characterised the Sewel Convention as a political device, not judicially enforceable:

> The Sewel Convention has an important role in facilitating harmonious relationships between the UK Parliament and the devolved legislatures. But the policing of its scope and the manner of its operation does not lie within the constitutional remit of the judiciary., which is to protect the rule of law.

This has not been its view of all conventions. In fact in the 'Prorogation' (Miller 2) case the Supreme Court [3]stated that:

> Although the United Kingdom does not have a single document entitled "The Constitution", it nevertheless possesses a Constitution, established over the course of our history by common law, statutes, conventions and practice.

It also noted, in relation to the disputed prorogation decision, that:

> It is not suggested in these appeals that Her Majesty was other than obliged by constitutional convention to accept that advice.

It seems, then, that some conventions are more binding than others, with the Sewel Convention not being binding.

Discussion has therefore centred on how to make Sewel more, if not totally, binding.

There have been various suggestions.

a) The word 'normally' be removed from the wording in the Scotland Act;
b) The conditions under which Westminster can over-ride refusal of consent could be specified clearly, rather it being invoked *ad hoc*;
c) There could be a body to consider the justification for over-ride and issue a report. Although this could only be non-binding, it would force governments to provide a justification.

[3] JUDGMENT R (on the application of Miller) (Appellant) v The Prime Minister (Respondent) Cherry and others (Respondents) v Advocate General for Scotland (Appellant) (Scotland) [2019] UKSC 41 https://www.supremecourt.uk/cases/docs/uksc-2019-0192-judgment.pdf

d) There could be a requirement for affirmative support in both Houses of Parliament. The non-elected status of the House of Lords could prove an obstacle to this but it features in some proposals for an elected second chamber.

In these ways, an understanding could develop by which the Sewel Convention becomes one of those conventions that are regarded as binding except, perhaps, in extreme circumstances.

Other consent mechanisms

Sewel is not the only consent mechanism regulating the action of the UK Government in Scotland. It does not normally apply to secondary legislation (statutory instruments) except those to transfer more powers to the Scottish Parliament. In practice, however, consent mechanisms of various forms have been inserted into legislation in recent years. These are of varying strengths. Recently, it has sometimes been reduced to a requirement to consult. This matter is discussed in the paper by Christopher McCorkindale.

Delegated Powers

Both UK and Scottish Ministers have powers to issue statutory instruments (SIs). Historically, these have largely been confined to their respective competences. UK Ministers did make SIs in devolved areas but these were usually to give effect to EU rules and with the agreement of Scottish Ministers. In recent years, use of such SIs has increased, partly but not only, in measures giving effect to Brexit. The Retained EU Law Bill provides nine new powers for UK Ministers, of which six are also conferred on Scottish Ministers. The powers can be used either by UK or Scottish Ministers (or by both acting together) and there is no consent provision.

This matter raises concerns both about the respective powers of Scottish and UK Ministers and the relationship of Ministers to both the Scottish and the UK Parliament. There is particular concern about the growth of 'Henry VIII powers' (to modify primary legislation by statutory instrument) in both Parliaments.

The question of the powers of UK Ministers to make statutory instruments in devolved areas could be restricted, subject to clear rules and/ or subject to consent by devolved Ministers.

IGR mechanisms

The system of intergovernmental relations has been overhauled following the Dunlop report. The old system of Joint Ministerial Committees was replaced by the Prime Minister and Head of Devolved Governments Council (IGR) and the Interministerial Standing Committee (IMSC), meeting in different formats depending on the topic. There is a distinct Finance Interministerial Standing Committee (F: ISC). Below that are Interministerial Groups. With the exception of the JMC (Europe) the old system had mostly atrophied. The new Council and Committees have a regular schedule: IMGs every other month; the IMSC and F:ISC quarterly; and the IGR annually. There is an IGR Secretariat, as recommended by many critics of the old system. Any government can raise an issue in dispute and the idea is that disagreements should be resolved at the lowest level possible, with provisions for escalation if necessary.

This formalisation of the process is widely regarded as an improvement on the previous system. One persistent criticism was the Whitehall departments often forgot about the devolved administrations, that the latter were not informed about issues in time and that information sharing could be less than adequate.

The new system gets closer to the Welsh Government's idea of a Council of the United Kingdom[4] although that was advocated as part of an explicit shared sovereignty. It might be compared to the Spanish system of sectoral conferences but there is one key difference. In Spain, decisions can be reached by qualified majority vote where the Spanish government has the same number of votes as all the autonomous communities together and is thus not able to impose its view unilaterally. In the UK system the assumption is that decisions will be agreed by consensus but there is nothing to bind the UK Government to accept the views of the devolved administrations.

According to research by the Welsh Senedd[5] in the first year of operation, the new arrangements have been used unevenly. There have been six meetings on environment, food and rural affairs, and three each on business and industry, education and net zero, energy and climate change. With the exception of education, these are the areas where we would expect most interaction, especially in the wake of Brexit. There were two meetings on trade and one each on the UK-EU Trade and Cooperation Agreement (CTA), elections and registration and housing and communities. We would expect for activity around the CTA as it approaches the time for the first quinquennial review in 2025 or if the EU claims regression in standards on the part of the UK. There have been no meetings on covenant veterans; culture; health and social care; welfare; higher education; home affairs; justice; sports; tourism; science and research; and transport. The Interministerial Standing Committee and the Finance Standing Committee each met twice in the first year.

Joint Policy Making

The UK devolution system was largely based on the idea that each level would have its own responsibilities, with legislative and administrative competences in specific fields. All three devolved legislatures now operate on the 'reserved powers' model in which only the reserved powers are specified. In practice, devolved and reserved powers overlap and interact with each other. There may be a need, or desire, to work together on common problems. There is no bar to doing that but nor is there any standard mechanism or set of principles for such joint work. Instead there are ad hoc arrangements.

The UK Internal Market Act gives UK Ministers wide powers to spend in devolved matters. City Deals were an early example of UK Ministers spending on joint projects, albeit initially confining their spending the reserved aspects. The Shared Prosperity Fund is allocated directly in Scotland by the UK Government. Free Ports have been introduced in Scotland at the initiative of the UK Government, but with the details negotiated with the Scottish Government. The model of competitive bids for funding has been extended to Scotland, with

[4] (https://www.gov.wales/sites/default/files/publications/2019-10/reforming-our-union-shared-governance-in-the-uk.pdf),
[5] One year on: is the new UK intergovernmental agreement working?

https://research.senedd.wales/research-articles/one-year-on-is-the-new-uk-intergovernmental-agreement-working/

the result that local governments and others have expended substantial resources in bids that failed to yield results, as in the latest round of Shared Prosperity Fund allocations.

Common Frameworks for dealing with repatriated EU competences provide a distinct model for joint working, extending sometimes beyond former EU matters. There is no common format and Frameworks variously provide for agreed measures of divergence and joint policy making.[6]

All this adds to the lack of clarity in intergovernmental relations and difficulties in accountability. There is a risk of wasteful duplication and incoherence when the UK Government is running its own programmes and investments in devolved fields. Consideration might be given to the principles and design of joint programmes between levels of government, so as to ensure coherence and respect the rights and powers of each level.

There could also be a requirement for consent or a joint framework where UK ministers wish to spend in devolved areas.

Germany has a system for Joint Tasks between the Federal Government and the Länder. One such is the Joint Federal Government/Länder Task for the Improvement of Regional Economic Structures (GRW). Another is the Joint Task for the Improvement of Agricultural Structures and Coastal Protection.

The original Scottish devolution settlement followed the 'concurrent' powers model in which each level of government would largely make and implement policies in its own field, while recognising that there might be overlaps. If there is to be a move towards a more 'cooperative' model in which the two levels make policy jointly, this needs to be recognised more systematically. There are risks in such a model as it could lead to Westminster predominance, given the imbalance of capacity and resources. It could also result less transparency and accountability as policy-making is done within intergovernmental networks, often managed by officials.

On the other hand, a recognised set of mechanisms for joint policy making could serve to restrain unilateral UK action in devolved matters and help to focus resources rather than duplicating effort.

[6] Constitution, Europe, External Affairs and Culture Committee th June 2022 15th Meeting, 2022 (Session 6), Thursday 9 Intergovernmental Relations Panel /https://www.parliament.scot/-/media/files/committees/constitution-europe-external-affairs-and-culture-committee/joint-briefing-from-spice-and-professor-michael-keating-the-committees-aviser.pdf