Cynulliad Cenedlaethol Cymru
Y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol
Y newid yng nghyfansoddiad Cymru

National Assembly for Wales
Constitutional and Legislative Affairs Committee
Wales' changing constitution

CLA(5) WCC 02
Tystiolaeth gan Jo Hunt a Hedydd Phylip

Evidence from Jo Hunt and Hedydd Phylip

The current scope and application of the Sewel convention in the context of the process of leaving the EU:

1. As a consequence of the continuing sovereignty of Westminster Parliament, the legislative competence held by the National Assembly for Wales is, in effect, concurrent competence. As a matter of law, the National Assembly has no exclusive areas of competence that it alone holds.

2. The exercise of this concurrent, overlapping competence is subject to a self-limiting edict from the Westminster Parliament, that it will not normally legislate on devolved matters without the consent of the National Assembly. This is referred to as the Sewel Convention, which operates through the Legislative Consent procedure. In practice, the Westminster Parliament has operated as though there is a presumption in favour of the devolved institutions exercising their devolved powers – a 'devolution first' approach.

3. The current scope of the Sewel Convention can be determined by reference to a range of different legal and extra-legal sources, including Acts of Parliament (for Wales, GOWA 107(6)), in case law (especially the Supreme Court judgment in Miller 2017), in Standing Orders, the 2013 Memorandum of Understanding between the UK, Welsh, Scottish and Northern Irish governments, the Devolution Guidance Notes, and finally in the working practices of the parties involved.

4. Despite earlier uncertainty, there is now a strong basis to assert that the Sewel convention's scope engages both proposed Westminster legislation on matters which could be legislated on by the National Assembly for Wales as well as Westminster legislation which amends the scope of devolved legislative or executive competence. This broader definition is not excluded by the language used in the legislation (which refers to 'devolved matters'), and reflects the practice of the both the devolved legislatures and executives, and the UK government. This wider practice was observed by the Supreme Court in Miller: 'devolved legislatures have passed legislative consent motions not only when the UK Parliament has legislated on matters which fall within the legislative competence of a devolved legislature, but also when the UK Parliament has enacted provisions that directly alter the legislative competence of a devolved legislature or amend the executive competence of devolved administrations' (at para 137).

5. As McHarg (2018) demonstrates, the Sewel Convention/legislative consent procedure operates both facilitatively, as well as defensively. The facilitative dimension is reflected in Lady Hale's depiction of the convention in Miller: 'The convention was adopted as a means of establishing cooperative relationships between the UK Parliament and the devolved institutions' (at para 136). Elliot (2015) meanwhile has defined the Sewel Convention as having the purpose of ensuring respect for devolved autonomy.

6. The convention might be perceived as being particularly ill-equipped to meet the more defensive objective of protecting the sphere of devolved competence. However, it should be acknowledged that the concept of a sphere of autonomous competence is itself a political construct. There is no autonomous, exclusive field of de jure devolved legislative competence to protect. As a political convention, protecting a political construct of 'autonomous' legislative competence, it has proved remarkably robust. A hardening towards exclusive legal spheres of competence held by the different legislatures would demand a set of legal protections. Absent such a move, maintaining Sewel as a politically enforceable constitutional convention continues to appear appropriate.

7. The presumption against Westminster legislating on devolved matters without consent has generally operated effectively. However, the willingness of Westminster to afford the devolved legislatures their de facto autonomous spheres of activity may have been the product of a relatively settled form of multi-level governance that devolution developed within. The process of leaving the EU will dramatically increase the need for effective interaction between the different parliaments and governments of the UK, and destabilise the existing generally hands-off approach from Westminster and Whitehall given the need to replace the governance structures and policies previously provided by the EU.

8. In view of this, some additional elements to the Sewel Convention might be proposed which strengthen the position of the devolved legislatures, whilst reflecting the collaborative demands of sustaining the UK union. The convention might continue to provide that Westminster will not normally legislate for Wales in devolved matters, except with consent. 'Normal', in the post-exit context, would come to mean greater collaboration, joint-working and potentially, a coordinated legislative approach, between the four partner legislatures and governments. However, if the Westminster Parliament wishes to legislate for the UK as a whole, then it should be required to justify why a UK-wide approach is necessary, drawing on understandings of subsidiarity gained over the last 25+ years of EU activity. The need for a UK wide approach may be contested, and if the agreement of the affected legislatures cannot be gained, the dispute will come before a newly constituted UK-wide Council of Ministers, developed from the JMC, for determination.

9. The Intergovernmental Agreement reached between the Welsh and UK Governments in April 2018 unlocked the door to legislative consent being forthcoming from the Assembly for the EU (Withdrawal) Act 2018, and it also introduced a consent requirement into UK government's use of secondary instruments operating across devolved matters. In addition to the procedure to be followed in adopting 'freezing' regulations under section12 EUWA, sections 8 and 9 EUWA provide UK ministers with regulation-making powers to correct deficiencies and to introduce the Withdrawal Agreement. The procedure for s. 12 'consent decisions' (which may be overridden) is set out in the EUWA and in GOWA, though the consent requirements relating to s. 8 and 9 are not on the face of the legislation. Neither is the agreement (in the MoU, para. 8) that these powers will not be used to enact new policy in devolved areas but are primarily to be used for administrative efficiency. Further, none of these developments are reflected in the Devolution Guidance Note, which was updated to reflect the Wales Act changes of 2017, but before agreement was reached on the Withdrawal Act. For example, whilst there is reference in DGN Part 5 to Assembly consent normally being required for UK government secondary legislation which amends primary legislation within devolved competence (reflecting the 2013 change to SOs), it then states that 'there are however some exceptions to this general rule: for example, ….several Bills relating to EU exit would enable UK Ministers to makes SIs modifying Assembly legislation without the need for formal consent by the Assembly'. This does not reflect the position under the IGA, and clearly needs updating.

10. As Mullen and Hunt (2019) highlight in their report for the Scottish Parliament on the impact of Brexit legislation on devolved competence, the EU (Withdrawal) Act 2018 is not the only piece of actual and proposed Brexit related legislation which contains regulation-making powers for UK Ministers in devolved areas with the potential to restrict devolved policy options. Whilst commitments as to the use of these powers, and guarantees about the involvement of the devolved administrations in their exercise have been made by the UK government, this has tended not to be on the face of the legislation. A heavy emphasis has been placed on the role of intergovernmental agreements and memoranda of understanding accompanying the legislation to take these commitments forward. This soft form of policy instrument comes with concerns about its transparency, robustness and the strength of its guarantees. As there is expected to be an increase in the volume and significance of MoU as a tool of creating common frameworks, a more systematic approach is required in terms of the accessibility of these texts to ensure governments can be held accountable to the commitments made in them.

The implications of new levels of UK governance as a result of Brexit on the Welsh devolution settlement:

11. As noted above, the governance framework provided by EU membership will be dismantled as the UK leaves the EU. There has been general agreement that the new UK wide common frameworks will be required. Though it was expected that the sequencing of events would see adoption of freezing regulations under s. 12 EUWA 2018 and the subsequent determination of new frameworks- this has not been the way things have proceeded to date. Instead, frameworks are emerging through the ongoing process of readying the statute book for exit through s. 8 statutory instruments. The UK Government's Frameworks analysis update of 4 April 2019 notes that in 78 areas, non-legislative Frameworks will be 'common rules or ways of working will be needed' and that 'in some of these areas, consistent fixes to retained EU law (made using secondary legislation) will create a unified body of UK law alongside the non-legislative framework agreement'. It also notes that 'it is envisaged that the fixes to EU law, being put in place under the EU (Withdrawal) Act, may provide the basis for interim or longer-term framework arrangements, depending on the outcome of negotiations with the EU'. In practice, this means that the National Assembly for Wales may have already scrutinised EU Exit SIs, without being fully aware of their place within the broader Frameworks context.

12. The development of legislative and non-legislative common frameworks is being driven by a bottom-up approach through inter-governmental negotiations between government officials. The nature of such inter-governmental working makes the scrutiny of progress by the legislatures difficult

13. As the CLA Committee moves to consider the prospective scrutiny of Common Frameworks, it may feel it appropriate to obtain an explanatory memorandum from the Welsh Government, tabled at the same time as the Common Framework that contains the breadth of both primary and secondary legislation caught within the scope of the Framework. This would allow the Assembly to be fully aware of the practical implications of any Framework on the ability of the Assembly to amend legislation falling within it. Such an explanatory memorandum could, should the CLA Committee see fit, include an indication of any other Common Framework envisaged or operational in the same policy area, so that the Committee may have a fuller picture of where competence lies in relation to any given policy area.

14. It is likely that other UK legislatures will face similar challenges in the scrutiny of Common Frameworks, as such the importance and usefulness of fora such as the Interparliamentary Forum on Brexit is likely to increase, not least in its capacity as an information-sharing forum. With the increase in inter-governmental activity, there could also be scope for enhancing interparliamentary relations.

References:

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