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House of Lords Constitution Committee inquiry into the Future Governance of the United Kingdom

Consent in the UK Devolution Settlement

Union by Consent

There is a widespread acceptance that the United Kingdom should be seen as a union of nations, based on consent. This can be traced this back to the foundation of Great Britain and then the UK through Acts of Union in 1707 and 1800, rather than assimilation as had earlier happened in the case of Wales. Since the advent of democracy, it is seen as a union of peoples. The implications of this, however, are far from clear or agreed.

Unusually among modern states, the concept of union by consent extends even to allowing the right of the constituent nations, ultimately, to secede. Prime Ministers Margaret Thatcher, John Major and Theresa May have all stated that the nations of the UK cannot be held against their will and David Cameron permitted a referendum on Scottish independence in the Edinburgh Agreement of 2012. In the 1980s, the Labour Party signed up to the Claim of Right asserting the sovereignty of the Scottish people, although that has been subject to various interpretations.

The idea that Northern Ireland could leave the UK was implied in the Ireland Act of 1949, which promised that it would not be taken out of the UK without the agreement of its own Parliament. In 1973, provision was made for a border poll on unification with the Republic of Ireland and a similar arrangement is part of the Good Friday Agreement of 1998. This meant that Irish nationalists accepted that unity could happen only with the consent of the North, not by decision of the whole Irish nation. More recently, nationalists have suggested that unification could in practice require the consent of at least part of the historically unionist community.

While there is a clear provision for Northern Ireland leaving the UK and unifying with the rest of Ireland, there is no agreement on how the other nations might secede. So, while consent is accepted as the basis for union, there is no agreed provision on how it might be withdrawn, as we see in the current debate about a possible second Scottish independence referendum. Ciaran Martin has argued that a continued refusal on the part of the UK Government to grant such a referendum could represent a breach of the understanding that the UK is a voluntary union.[1]

The politically-accepted right to secession, moreover, co-exists with the constitutional principle of parliamentary sovereignty and supremacy. The

[1] https://www.bsg.ox.ac.uk/sites/default/files/2021-04/Scotland_Referendum_final.pdf

devolution statutes confirm that Parliament remains supreme so that secession would require its consent.

Devolution by Consent

The devolution settlements for Scotland, Wales and Northern Ireland at the end of the twentieth century were subject to referendums to secure consent and legitimacy on the basis of simple majority. So a narrow win was sufficient in Wales. Although the simple majority rule in Northern Ireland was also formally sufficient, the fact that a (small) majority was obtained in the unionist community as well as a large majority in the nationalist community was important in securing legitimacy. Consent from both communities is an underlying principle of the settlement.

Further devolution moves in Scotland and Northern Ireland have not required consent by referendum. In Wales, there was a further devolution referendum in 2011 but a requirement for yet another one to proceed with tax devolution was dropped.

Consent mechanisms

There are two interpretations of the devolution settlement. One is based on the traditional doctrine of parliamentary sovereignty and suggests that Westminster has merely lent powers to the three devolved territories, which can be reclaimed at any time. The other is that devolution represents a substantial constitutional change and requires a modification of our understandings of parliamentary sovereignty and supremacy. The former view has been generally sustained by the courts, including the Supreme Court. The latter has been expressed by many academic commentators as well as by some judges in writings, lectures and *obiter dicta*. In this view, the United Kingdom, while not formally a federation, is evolving in a federal direction.

Faced with this dilemma, the UK has developed a series of consent mechanisms, whereby Westminster continues to assert the right to act in all fields but seeks the agreement of devolved legislatures when it reaches into matters of their competence. There is no agreed doctrine about the meaning of consent or withholding consent and the various mechanisms are all rather different.

The first is the Sewel or Legislative Consent Convention. In the parliamentary debates on the Scotland Act, the minister Lord Sewel declared that the Government 'would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament.'

The principle was then extended to Wales and Northern Ireland. It was also extended to legislation altering the powers of the devolved legislatures, including statutory instruments devolving powers as provided for in the devolution Acts. Otherwise statutory instruments were not initially subject to consent provisions, although there could be consultation. There was no definition of what 'normally' meant or what the consequences of refusal of consent would be.

In the Scotland Act (2016) and the Wales Act (2017), statutory recognition was given to the Sewel Convention but without changing the wording. It thus remained a convention rather than a binding rule and Westminster remained free to interpret it as it chose. Indeed, it might be argued that including the Convention statute may actually have weakened it, since statutes can be over-ridden by Westminster any time. As a convention, embodying the broad principle of consent, it might have joined other conventions that are recognised to be an important part of the UKs' uncodified constitution.

Invited to rule on whether it applied to Parliament's triggering of Article 50 in order to withdraw from the European Union, the Supreme Court stated that the convention was a 'political' matter. While it is true that the Convention is not binding in law, the ruling was widely criticised for failing to note its role in sustaining the principle of consent in the devolved constitution.

Another consent mechanism was introduced in the European Union Withdrawal Act of 2017, concerning the allocation of powers repatriated from the EU. The Act stipulated that the UK Government could use a statutory instrument to reserve some of the otherwise devolved powers coming back but that this would be subject to a consent mechanism. This time the effect of the mechanism was spelt out in full. If the devolved legislature consents, the instrument is valid; if it refuses consent, it is valid; and if it takes no decision, it is valid.

Under pressure, the UK Government also introduced a consent mechanism into the UK Internal Market Act (2020) concerning statutory instruments changing the list of items that are exempt from the market access principles. It provides that, if consent is not given within a month, the measures will go ahead anyway.

Northern Ireland

The principle of consent is central to the Northern Ireland settlement but not always defined or legally entrenched. Two measures are legally specified.[2] First is the assurance that Northern Ireland will remain part of the United Kingdom as long as its people so wish. The second is the extensive provision for legislation to be agreed by a cross-community majority.

The Northern Ireland Protocol in the EU Withdrawal Agreement Act is also subject to a consent mechanism, which will be triggered after four years. A simple majority is required to give or refuse consent. If consent is refused, the Protocol will cease to apply after two years. This differs from other consent mechanisms, where refusal of consent has no legal consequences. Another vote can be taken after four years, unless the first one is passed by qualified cross-party majority, in which case the gap is eight years. While it was unionists who insisted on the Northern Ireland Assembly having the ability to end the Protocol, they were critical of the simple majority mechanism, arguing that it violates the principle of cross-community consent.

What is Consent?

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2 https://blogs.lse.ac.uk/europpblog/2019/01/11/breached-or-protected-the-principle-of-consent-in-northern-ireland-and-the-uk-governments-brexit-proposals/

The idea of consent is thus an important feature of the UK constitutional settlement, but it has never been defined rigorously. On the one hand is the general principle that the constituent parts of the union are there by consent and that, potentially, that consent might be withdrawn. Alongside this is the idea that Northern Ireland should be governed with the consent of its two communities (although large numbers of people now identify as neither nationalist nor unionist). On the other hand is a series of specific mechanisms, adopted *ad hoc* to fit particular circumstances, sometimes responding to pressure from devolved governments. There has been no effort to define the principle of consent itself and how it fits into the constitution in either its conventional or written forms. The Supreme Court, in its ruling in the Miller case, refused to enter the debate. Some forms of consent appear to be strongly embedded, such as the provisions of the Northern Ireland Protocol. Others appear to be no more than a promise of consultation, such as the provisions of the UK Internal Market Act.

This issue is so important for intergovernmental relations and constitutional understanding that it would be worthwhile to have a broad definition of the principle and how it forms part of our constitutional understanding. It would also be useful to translate this into a standard procedure, to be applied in future cases.

Whether this takes the form of a set of rules binding on Westminster as well as the devolved legislatures is part of a broader debate about federalizing the constitution. At least, however, it should be considered more fully as part of the conventions underpinning much of UK constitutional practice.

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