Constitution, Europe, External Affairs and Culture Committee event at Strathclyde Law School (Mon 8 Jan 2024)

Critical reflections on *How Devolution is Changing Post-EU*

On Monday 8 January 2024 Strathclyde Law School hosted an event with the Constitution, Europe, External Affairs and Culture Committee of the Scottish Parliament (CEEAC) that centred on the committee's October 2023 report *How Devolution is Changing Post-EU* (here: How Devolution is Changing Post-EU (parliament.scot)). The event, conducted in accordance with the Chatham House Rule, encouraged a number of speakers to take the report recommendations as their starting point and to offer critical reflections that would form the basis of discussion in breakout sessions. Each of four breakout groups was chaired by a member of the committee. Participants were drawn from a wide range of professional backgrounds – politicians on a cross-party basis, Scottish Government and Scottish Parliament officials, public and private sector lawyers and academic public lawyers and political scientists In addition, PhD students from Strathclyde University, Glasgow University, Cambridge University and Queen's University Belfast were invited to participate and to provide feedback from break out rooms to all participants in plenary sessions.

The event began with a welcome from Strathclyde University's Principal, Sir Jim McDonald, who – citing the examples of Andy Burnham in Manchester and Andy Street in Birmingham - encouraged the committee to consider a further layer of devolution *from* Holyrood to cities; and, from Strathclyde Law School's Head of School, Professor Adelyn Wilson. There were six short substantive talks that related to different strands of the report: inter-governmental relations; devolution and the UK internal market; common frameworks; UK delegated law-making powers in devolved areas; the Sewel Convention; and, the operation of Statutory Instrument Protocol 2.

Is devolution changing post-EU?

(i) *Changing culture*

Participants noted that the report title – *How Devolution is Changing Post-EU* – begs the question: *is* devolution changing post-EU. As the report acknowledges, devolution was already becoming more complex before EU withdrawal. The devolution of, inter alia, taxation and social security powers given effect to by the Scotland Acts 2012 and 2016 established greater interdependence between the devolved and UK levels and so required more sophisticated mechanisms of inter-governmental and inter-parliamentary working (CEEAC report, p 1). However,whilst constitutional change in the pre-EU withdrawal era of devolution was characterised by consensus and by a shared understanding of 'the rules of the game', participants were in broad agreement with the committee's finding that 'significant differences [exist] between the UK Government and the devolved governments in how they view the extent of change to the operation of the devolution settlement outside of the EU' (p 2) and with evidence given to the committee that as a result of the EU

withdrawal process there has been a 'breakdown of trust' between the UK and devolved governments (CEEAC report, p 11).

For some participants, the challenge is to restore the pre-EU withdrawal condition of consensus (about the 'rules of the game') and cooperation (about their application to particular issues) between the devolved and UK governments. Those inclined to this view suggested that the clearest opportunity for such a reset was the prospect of a change of government at the next UK general election. They pointed to various recommendations made by the Brown Commission report (here: Commission-on-the-UKs-Future.pdf (labour.org.uk)) – including, inter alia, placing the Sewel Convention on a statutory footing and protecting it from amendment through a reformed second chamber constituted on a territorial basis; enhancing devolved powers; and, facilitating a renewed culture of co-operation - as evidence that a Labour-led UK government might take a more positive approach to the management of disagreements or divergence between devolved and UK governments (Brown Commission, pp 13-16). For others, however, and in particular for those drawing on comparative perspectives from outside of the UK, '[devolution's dependence], at a fundamental level, on understandings of trust between governments [across the UK]' (CEEAC report, p 11), and the relative health of that condition during the pre-EU withdrawal era of devolution, is a significant outlier. It was suggested that, outside of the UK, relationships between devolved/federal units tend to be conducted in a climate of mistrust, with the consequence that disputes are regularly escalated through intergovernmental channels and/or 'managed crisis' (e.g. played out through political campaigns or through the media) and/or legal challenges pursued through the courts. Proponents of this view raised four inter-related points that are worth further consideration:

- Is the current condition of mistrust in fact an inevitable regression to the mean when compared to governing arrangements and cultures in similarly structured countries;
- If so, is it a 'fools errand' artificially to manufacture trust, good will and cooperation where this runs against the grain of prevailing political conditions;
- If so, should our efforts instead turn to forms of constitutions (e.g. written constitutions, legally entrenched), rules (e.g. 'hard' law over 'soft' law such as conventions) and institutions (e.g. constitutional courts enabled to adjudicate on boundary disputes) that are robust in such conditions of political mistrust (as one participant asked: 'is the UK constitution worth the paper it is not written on if it relies upon trust rather than mitigates the breakdown of trust');
- Finally, a particular warning was made to any prospective Labour-led UK government: not to sideline the task of constitutional/institutional protections for devolution where Labour is able to restore more positive working practices (e.g. respect for the Sewel Convention as traditionally understood) but, as one participant put it, to 'fix the house while sun is shining' – to 'future proof' devolution against renewed devolution-scepticism from future UK governments.

On a general level, then, there was broad agreement that the pre-EU withdrawal conditions of consensus and co-operation have broken down. Where there was room for debate was whether these are conditions that can be restored (for example, by a post-UK general

election Labour 'reset') or whether the prevailing condition of mistrust is inevitable and that this should be the starting point of post-EU withdrawal constitutional reform across the UK.

(ii) *Changing practice*

As with the committee's observations about changing culture, there was broad agreement amongst participants about the key recommendations made by the committee albeit a level of debate about their deliverability and/or how they might operate in practice:

Recommendation: that there ought to be a 'new Memorandum of Understanding and supplementary agreements between the UK Government and the Devolved Governments' that 'specifically address how devolution works outside of the EU and [that are] based on a clear constitutional design' and that are 'accompanied by new Devolution Guidance notes and other operational guidance notes' (CEEAC report, p 16).

Although there was broad agreement by participants with view expressed by the committee's adviser, Michael Keating (CEEAC report, p 9), that – on paper at least – the significant structural changes made to IGR following the 2022 Review of intergovernmental relations (available here: Review of intergovernmental relations - GOV.UK (www.gov.uk)) offer 'an improvement on the previous system', it was felt that further consideration would be required about:

- The prospect of meaningful reform to the practice and culture of IGR in the absence of broader (pan-UK) thinking about more deep rooted constitutional reform;
- The 'shadow' of Parliamentary sovereignty that gives the UK government the upper hand in any dispute with devolved counterparts;
- Why (with only one reported exception) the new, 'improved', system of IGR has not been used despite various high profile disputes that might otherwise have engaged such processes (e.g. over Scottish and Welsh deposit return schemes; gender recognition reform in Scotland and the first use of section 35 of the Scotland Act 1998; legislative disputes about the need (or not) of the UK government to seek legislative consent for certain Bills; and, the wider-UK implications of the incorporation of the UNCRC in to Scots law);
- Political disincentives to highlight the achievement of pan-UK consensus or the success of IGR processes on account of political polarisation and competing constitutional visions for the UK from each of its constituent parts.

This need to situate IGR within a broader constitutional and political context was an important theme of the day's discussions. As regards the particular recommendation, any work towards a Memorandum of Understanding (and associated agreements), it was said, would require careful thinking about reporting requirements (it was suggested that regular reports would offer greater accountability and would engender a more responsive culture than would an annual report) and about how the success of IGR processes might best be measured both procedurally (e.g. less reliance on courts and greater use of formal IGR

processes) and substantively (e.g. the acceptance by all parties of, and the implementation of, decisions arising from dispute from resolution processes).

Recommendation: that a new MoU should include a supplementary agreement on common frameworks including clarity about the culture of shared governance, the purpose of common frameworks, the interaction of common frameworks with internal market access principles, the role of business and other stakeholders in the process, the place here of new IGR processes and the reporting mechanisms in relation to the operation of frameworks (CEEAC report, pp 21-22).

For some, neither of IGR, common frameworks, nor the UK internal market offer ideal models. Common frameworks, it was said, lack 'thick' principles and have instead become process orientated. The UK internal market contains 'thick' (market access) principles but has been legislated for on a non-consensual and asymmetrical basis. And, formal IGR mechanisms have largely been bypassed. Participants reflected on the chilling effect of UKIMA on devolved policy making but offered some signs of encouragement (the four-nation consultation on vaping) and offered some reflections on how UKIMA could be amended and improved, with a focus on enhanced parliamentary scrutiny of decisions made at intergovernmental level, formal (statutory?) notification systems that allow governments and legislatures to track developments within the UKIM to which they might wish to consider and respond and adjustments to the market access principles to soften the justifications for divergence and e.g. to introduce a de minimis principle into the operation of those principles.

There was some scepticism about common frameworks as the most effective way to manage divergence. Participants discussed the gap between the capacity for divergence and the capacity to do so in terms of resources, political capital and market access constraints. Questions were also raised about the inconsistency of framing between frameworks (and the challenges this presents to accessibility and understanding), about why so many policy areas sit outside of the common frameworks regime, about challenges for external and parliamentary accountability and about the difficulties of finalising frameworks (noting that, at the time of writing, 26 frameworks apply to Scotland with only one finalised, 22 provisionally agreed and operational, and three still to be published (see SPICe analysis here: Common frameworks – SPICe Intergovernmental Activity Hub (scottishparliamentinformationcentre.org)). It was suggested that close coordination and information sharing between legislatures is required in order to mitigate the accountability and transparency gap challenges created by (even co-operative) intergovernmental working.

Recommendation: that 'there is clearly a fundamental difference of viewpoint between the UK Government and all the devolved governments with regards to how the Sewel Convention has been operating since EU-exit' and that 'this level of disagreement on a fundamental constitutional matter is not sustainable particularly within the context of an increasing shared space at an intergovernmental level' (CEEAC report, p 26).

There was broad agreement amongst participants both that EU withdrawal-related legislation had put the Sewel Convention under strain and that this had significant negative

impacts on the legislative and scrutiny functions of the devolved legislatures. However, the theme of placing particular views expressed/recommendations made by the committee in a broader constitutional and political context continued and was expressed by participants in at least four different ways:

- That against the shadow of parliamentary sovereignty – both as a constitutional fundamental and as expressly provided for e.g. in section 28(7) of the Scotland Act 1998 – a legislative veto in the hands of the devolved legislatures is difficult to achieve. To place the Sewel Convention on a statutory footing, to legislate to make the rule justiciable, and/or to create a legislative veto could only meaningfully be achieved, as one participant put it, by 'interrogating the very principle of parliamentary sovereignty itself'.

  This was seen to be particularly important at both ends of the legislative process. At the *start* of the legislative process it is entirely in the gift of the UK government to interpret whether, in its view, a provision in UK legislation engages the Sewel Convention and therefore whether or not to seek consent. And, at the *end* of the legislative process the sovereignty of parliament will always give to the UK government/parliament the last word on whether or not to enact UK legislation in devolved areas. The Supreme Court has said that questions about devolved consent are not justiciable but for some participants these questions (is the convention engaged at all; who decides; what is the significance of disagreement about whether the convention is engaged or whether UK legislation should be enacted in devolved areas; how might disagreement be resolved) are ripe for resolution through the new IGR processes. Current practice, it was said, does not tell us enough about why Sewel is/is not thought to be engaged by the UK Government and therefore what can be learned – and what precedents might be established – where consent is not sought, or where consent is sought but where the consent decision ultimately is disregarded with the enactment of UK legislation.
- That although there is a shared concern by all of the devolved authorities about the application of the Sewel Convention, underneath this also lies particular concerns: in Scotland, the UK's increased willingness to legislate in devolved areas without devolved consent; in Wales (as well as this), the Welsh Government's continuing willingness to recommend legislative consent to UK legislation in devolved areas that ought properly to be legislated for by the Senedd; in Northern Ireland, the unwillingness of the Northern Ireland Executive even to share with the Northern Ireland Assembly when consent has been sought.
- That what is at stake where the Sewel Convention is weakened is not (only) particular to the devolved legislatures on their own terms, but presents a fundamental challenge to the legislative and scrutiny functions of the devolved legislatures *qua* legislatures. An important theme that emerged from this discussion, one that found broad agreement from participants, was therefore the need (relating to Sewel but also to IGR more broadly) for close interparliamentary working: for legislatures to pool resources, to share knowledge where devolved governments are minded to recommend consent to UK legislation (therefore cutting out devolved legislation,

devolved scrutiny, and effective input from local stakeholders) and to stress the constitutional principle of devolved autonomy that is at stake where the UK legislation is made in devolved areas in the absence of devolved consent. It was noted, however, that the fundamental problem here – the opaque nature of the intergovernmental space – is a deeper cultural issue that will take more than inter-parliamentary co-operation to resolve.

- That, whilst we increasingly see disputes about legislative consent played out in the public arena, intergovernmental disputes about, inter alia, legislative consent are not themselves a new post-EU phenomenon. For some participants it is therefore a good thing that disputes and negotiations that were previously conducted behind closed doors are now subject to publicity and scrutiny. Continuing a theme that even co-operative intergovernmental relations provide challenges of accountability and transparency, it was said that if a more co-operative relationship between the devolved and UK governments is achieved the existence of disagreements and the negotiations that are undertaken to resolve (or not) those disagreements should remain subject to publicity and scrutiny.

Whilst there was a general sense of pessimism about the prospect of fundamental constitutional reform (e.g. a written constitution, legal limits on the legislative competence of the UK Parliament, a legislative veto in the hands of the devolved legislatures), recourse to intergovernmental relations was offered as a practical means within existing constitutional reality to mitigate decisions by the UK Government to sidestep or disregard devolved consent, while close interparliamentary working was offered as a practical means within existing constitutional reality to mitigate the full implications of parliamentary sovereignty.

Recommendation: that, '[i]n the absence of an overarching intergovernmental agreement' which would 'govern the use of delegated powers to manage the post-EU regulatory environment' there should be 'supplementary agreement on the use of powers by UK Ministers in devolved areas' that includes a list of such powers, the criteria for their use, the process of engagement between UK and devolved ministers and officials, the place in all of this of new mechanisms of IGR, and 'a recognition of the fundamental constitutional principle that devolved Ministers are accountable to their respective legislatures for the use of powers within devolved competence,' and [that], '[t]he Scottish Parliament should have the opportunity to effectively scrutinise the exercise of all legislative powers within devolved competence' (CEEAC report, p 34).

Participants were in broad agreement with what one participant called the 'dog's breakfast' of post-EU legislative and executive powers in devolved areas. It was said that the increased willingness of the UK Parliament to legislate in devolved areas (often without the consent of the devolved legislatures), and the increased willingness of UK Ministers to take powers in devolved areas (with varied, if any, requirements to seek the consent of devolved counterparts), requires hard constitutional thinking about appropriate lines of accountability for the exercise of UK legislative and executive powers in devolved areas. For example, whether UK Ministers should be expected or required to give account to the Scottish

Parliament for the exercise of powers in devolved areas, or whether new IGR mechanisms would be an appropriate place for the resolution of disputes about the exercise of those powers.

Some participants drew attention to fundamental questions that have not been addressed by the report: competing visions about what EU withdrawal sought to achieve – withdrawal from the European Union but also a consolidation of Westminster and Whitehall as the political centre of the UK; and, competing visions about what devolution is and should be – about the appropriate space for devolved autonomy and the appropriate relationship between the devolved and UK legislatures and between the devolved and UK governments.

Another important theme that emerged during this discussion was the application of Sewel-like language to the exercise of UK delegated law-making powers in devolved areas: that UK ministers would 'not normally' exercise these powers without the consent of devolved counterparts. However, whilst this language might make sense in the context of primary legislation – the UK Parliament has residual and statutory authority to legislate in devolved areas and the convention protects the space for devolved autonomy from the arbitrary use of that power – for many participants the appropriation of that language in the context of delegated law-making powers in devolved areas is constitutionally inappropriate. It was said that, whilst there is a hierarchy of legislatures in the UK (as a function of parliamentary sovereignty) there is no equivalent hierarchy of governments. The Scotland Act 1998 is clear about the transfer of executive functions from UK to devolved ministers. There was some push back, then, against the appropriation of Sewel-like language – the idea that the UK Government has a residual authority to act in devolved areas that is regulated by convention or by a self-denying ordinance – and the implication that it carries about *executive* hierarchy in devolved areas.

For some participants, there was again a sense of pessimism about the prospect of the sort of fundamental constitutional change needed effectively to regulate the exercise of UK powers in devolved areas and to protect the sphere of devolved autonomy. The achievement of a legally binding and enforceable framework was thought to be unlikely. At the same time, there was some doubt about whether new supplementary agreements could provide a satisfactory solution given that the problem of legislative consent is in no small part a problem about the rigour and enforceability of such agreements.

Some participants wondered if the report might have said more about the exercise of delegated powers by the Scottish Government and about the scope of executive competence. Executive competence, it was said, does not map neatly on to legislative competence, adding a layer of complexity to matters not addressed by the report.

Recommendation: that the Scottish Government should publish guidance setting out 'the issues which officials consider when advising Ministers on consent/consultation in relation to the use of delegated powers by UK Ministers in devolved areas' (CEEAC report, p 35).

There was broad agreement with this recommendation - particularly so because approximately two thirds of EU withdrawal-related delegated legislation in devolved areas has been made by way of UK statutory instruments. For some participants, the existing

mechanism for the scrutiny of decisions by Scottish Ministers to consent to the exercise of UK delegated law-making powers in devolved areas, Statutory Instrument Protocol 2, demonstrates that political undertakings absent legally binding frameworks can have bite, albeit this is heavily contingent upon the nature of the consent/consultation requirement (if any) that attaches to the relevant UK power. Participants stressed the value of greater transparency about the existence, use and control of UK delegated law-making powers in devolved areas and, crucially, about decisions made by devolved ministers to consent to the exercise of those powers in devolved areas. Clarity in these areas, it was said, would encourage vital intra-parliamentary work (across the constitution and subject committees) and inter-parliamentary work (across the devolved and UK legislatures), would strengthen the position of individual legislatures against the devolved governments (e.g. where the legislature disagrees with a decision by a devolved government to consent to UK delegated law-making) and would strengthen the position of the devolved legislatures collectively against the opaque nature of intergovernmental working and against unwelcome or uninvited intrusions by the centre into the devolved sphere.

A note on complexity:

Too great a reliance on UK parliament primary legislation and UK government secondary legislation in devolved areas, it was argued, is problematic in at least two ways. First, it serves to increase the complexity of the devolution settlement. Second, it hollows out the role for the devolved legislatures to make and scrutinise law and to make those the legislative process accessible to Scottish stakeholders.

For some participants, increased complexity is a significant problem on its own terms, again for two reasons. First, because the successful navigation of complexity privileges those few who have sufficient access, knowledge and resources to do so. Second, because complexity breeds uncertainty. This was a particular concern of private sector lawyers in the room who stressed that clients report difficulty understanding the applicable rules, identifying the institutional source of those rules, following the lines of accountability for the exercise of those rules, and locating the proper site of lobbying in order that their interests can be heard in the making of those rules. If, for some, the current climate of political polarisation has had a chilling effect – discouraging stakeholders and the public at large from engagement with the issues arising from EU withdrawal - it was pointed out that the achievement of a consensus report by the committee was itself a sign that political differences could be overcome to achieve a focus constitutional and technical solutions that might begin to address these issues.

In this regard, the most common themes of agreement in the room were: that devolution is under strain as a consequence of the changing post-EU withdrawal landscape; that fundamental constitutional reform (a written constitution; legal entrenchment; legal limits on the power of the UK parliament; federalism of some flavour) within the UK is unlikely to be achieved in the short to medium term; that recourse to formal IGR mechanisms, giving them the chance to mature and to be normalised, would be welcome; that close inter- and intra-parliamentary work is needed to rebalance indigenous relationships between executive and legislature and to mitigate both the effects of parliamentary sovereignty and the

challenges created by (even co-operative) intergovernmental working; and, that a greater comparative focus might unlock potential solutions to the problems identified in the report.