

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

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Tystiolaeth gan Grŵp Cynrychiolaeth
Llafur Cymru

Evidence from Welsh Labour
Representation Group

This response is on behalf of the Welsh Labour Representation Group (WLRG), a fringe and research group made up of Welsh Labour members looking at constitutional matters for Wales. Some of the questions in this response have been answered grouped together in order to give proper context to the answer.

Regarding how “normally” should be interpreted in section 107(6) of the Government of Wales Act 2006, who should interpret it and how disputes should be resolved; questioning the power of UK Ministers under section 109A of the Government of Wales Act 2006 (as introduced by section 12 of the EU Withdrawal Act 2018) to temporarily ‘freeze’ areas of devolved competence

With regards to the word ‘normally’. Whilst the UK Parliament, would not *normally* legislate, that does not mean that it *will not*, nor does it mean that it *cannot*. Some may now argue that Sewel being placed on a statutory footing recognises how serious the UK Parliament is about respecting the rule. However, despite the codification of the convention it remains *prima facie* a convention, a non-justiciable rule because of that word *normally*. Both Section 2 of the Wales Act 2017 and Section 2 of the Scotland Act 2016 reflect a good step forward in many ways in terms of Westminster starting to respect the autonomy of devolved institutions, but they do not go far enough. There have been 340 Sewel motions voted on since 1999: 173 in Scotland, 79 in Northern Ireland and 88 in Wales. Whilst the intergovernmental mechanisms between UK and devolved administrations ensures most changes are made with the express consent of the devolved legislatures, there are circumstances in which consent has been withheld. Most recently in the case of the Scottish Parliament’s refusal to consent to The EU Withdrawal Bill now Act, while the National Assembly has refused to give consent seven times and Northern Ireland once.

Something must change to ensure that devolved legislatures are not overruled or have legislation imposed upon them from London, but what is the solution? It could be argued it is time to propose a new justiciable rule, stronger than a convention, that would ensure that the UK Parliament *cannot* legislate in an area that is within the devolved competence of the Scottish Parliament, National Assembly for Wales or Northern Ireland Assembly. For the moment we shall call this Sewell +. Additionally, if UK-wide action were required, a joint ministerial committee should meet to formulate the legislation co-operatively with individual Bills introduced in each national legislature. This same joint ministerial committee

could act as an initial arbiter of the definition of the term 'normally' with the Supreme Court of the United Kingdom acting as a final decision maker. With the creation of said committee it should be considered unacceptable for Westminster to legislate for any of the devolved legislatures or for UK Government Ministers to freeze legislative competence.

This suggestion has some issues, excusing for a moment that legislation focusing on constitutional tinkering is probably quite low down on the UK Government's priority list.

Primarily that of parliamentary sovereignty. The doctrine of parliamentary sovereignty is such that even if the UK Parliament passed legislation removing their right to legislate for the devolved administrations in devolved areas, they could not bind a successor Parliament. Therefore, a subsequent Parliament could just legislate to remove this protection, or in fact just legislate in the devolved area ignoring the protection completely. Some may argue that parliamentary sovereignty is a fallacy. That just because Parliament votes to nationalise all the cafes in Paris does not make it so. However, there is a clear distinction to be made between the UK Government of the day's potential penchant for Parisian Coffee Houses and institutions created by the UK Parliament itself. With the UK's constitution as it is Parliament could simply legislate away any protection, it could even legislate to abolish the devolved legislatures. It is submitted that this must not be allowed to occur. So, something even more drastic would be required to ensure Sewel + 's place in the UK constitution.

Never again should Wales ever be under threat of not having a Parliament of its own.

We require a Constitutional Convention.

Only a Constitutional Convention that fundamentally alters the location of power in the UK could ever deliver a set of circumstances in which Sewel + could be deliverable, where power rests equally in the hands of all the UK's constituent nations. If the UK Government is not willing to engage in a convention of this kind, then the Welsh Government should do so, inviting Scottish and Northern Irish (Once re-established) Governments to take part.

Unlike the EU, the UK does not provide a structure of Sovereignty that would allow for a unilateral withdrawal from its union. The important distinction here revolves around Section 30 of the Scotland Act 1998 and Article 50 of The Treaty of the European Union. Section 30 provides for The Scottish Parliament to get a temporary extension of power with which they can pass a referendum Act. This was the legal basis for the referendum in 2014 and would be the likely basis of any future "Indy Ref". Compare this with Article 50, which provides that 'Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.' The difference here is staggering.

It is a difference of relationships and of power dynamics. In one union you are treated as an equal, a valued constituent part of a greater whole, responsible

enough to make your own decisions. In the other, you are treated as if a child, not capable of taking control of your own destiny, maybe only getting your way when the parent has grown tired of your arguments.

The development and use of intergovernmental agreements between the UK and Welsh Governments that are emerging as a consequence of Brexit-related legislation

Whilst it is the subject of some academic wrangling if indeed the EU is a *true* confederation and fair question can be raised of attempting to emulate a system which you voted to leave only a few years prior, **if the UK is to have any hope of surviving it must embrace the confederal nature of the EU and make each constituent unit equal**. It must ensure that power derives from the periphery to the centre and not the other way around. This should not only apply to the Nations, but to the regions of England as well.

The union must ensure each constituent element is in charge of making the majority of its decisions and that includes the decision to secede from the union if that element chooses to do so, in accordance with their own constitutional requirements. The UK would not accept being told what to do by France or Germany so why should it expect the same of its own constituent elements?

Scotland and Northern Ireland voted strongly to remain, and Wales and England to leave. If we learn lessons from the EU, which in many situations affords its member states a veto, each constituent element of the UK would have a veto on the decisions of the UK as an international entity. Exit from the EU could have been stopped for the UK by respecting the decision of the constituent entities in this case Scotland and Northern Ireland. Such a model was recommended by Nicola Sturgeon prior to the Brexit vote. This system could apply not only to the decision to leave the EU but to day to day governance. If one region or nation wants to govern itself in a particular way it should have the right to do so and not have to rely on Westminster for permission.

This confederal structure is not unique to the EU. Countries such as Belgium and Australia use variations of this practice in order to ensure that each constituent element has an equal say and if the Union is to survive then it will take a change such as this to make that happen.

Earlier versions of these submissions can be found in the below articles.

<https://www.iwa.wales/click/2019/01/is-it-time-to-reform-the-sewel-convention/>

<https://www.iwa.wales/click/2018/12/our-place-in-two-unions/>