

# How well does the Westminster system and the constitution work for Scotland?

## *Summary of a private roundtable*

### Introduction

This roundtable, co-hosted by the Royal Society of Edinburgh, the Bennett Institute for Public Policy at the University of Cambridge and the Institute for Government, brought together key experts from the third sector, academia and the civil service to discuss how well the Westminster system and the constitution work for Scotland. The discussion will inform the work of the **Institute for Government / Bennett Review of the UK Constitution**, which is exploring ideas about governance and constitutional reform in all parts of the UK.

### Background

Scotland faces many questions about its constitutional future. The Scottish government is committed to a second independence referendum but has been faced with continued resistance at Westminster. The legal authority of the Scottish parliament to legislate for an independence referendum has been rejected by the Supreme Court.

For now, Scotland remains part of the UK, yet unionists and nationalists alike have expressed frustration about how the current constitutional arrangements operate. The UK's central constitutional principle of parliamentary sovereignty means that there is little constitutional protection for devolution. The Scotland Act 2016 provided that the Scottish parliament and the Scottish government are a permanent part of the UK's constitutional arrangements and could only be abolished by a decision of the Scottish electorate in a referendum. But parliamentary sovereignty means that, in practice, this Act can be changed by a simple majority in the UK parliament, however unlikely that seems politically.

The UK's Conservative government has shown an increased willingness to push the boundaries of the norms and conventions that govern the devolution settlement. Reserved and devolved competencies are increasingly interdependent, and the boundaries between them are blurred. The UK's majoritarian voting system and divergent electoral outcomes in each part of the UK mean that in recent years the UK government has been primarily representative of voters in England.

The often-adversarial parliamentary arrangements in Westminster tend toward a binary dynamic of opposition versus government, with few meaningful mechanisms for representing distinct territorial interests across the UK within political debate and decision making.

This discussion sought to focus on these and other questions of governance and public policy. The following two questions were discussed:

- Is devolution adequately protected in the UK constitution?
- How should the interests of each part of the UK be represented in the UK parliament?

## Is devolution adequately protected in the UK constitution?

### *Parliamentary sovereignty leaves the devolution settlement weak*

Parliament is sovereign in the UK constitution and so the UK government has the power to override devolved legislatures. The only true threat that Scotland could wield against central government is the threat of exit from the union, but parliament and the UK government hold the power over whether a *de jure* referendum can be held. Participants observed that, partly due to this, Whitehall often appeared indifferent to Scotland and the other devolved nations.

### *Devolution does have political protections, but these have been weakened in recent years*

Participants noted that there were political protections for devolution, which had worked well in the past. There would be a high political price to pay in Westminster if the UK government sought to abolish devolution. The Scotland Act 2016 recognises the permanence of Scotland's parliament and government and requires a referendum to abolish this arrangement, but this legislation could be repealed by a simple majority. While parliamentary sovereignty does allow for devolution to be abolished, there is no political will for it to happen. Nonetheless, the most recent UK governments have been more willing to encroach on devolved areas than their predecessors.

Participants discussed the Sewel Convention, which states that the UK parliament will "not normally" legislate on devolved matters without the consent of the devolved legislature. Up to 2016, it functioned relatively well. While there were constant negotiations between the UK and Scottish governments, there was a collaborative approach.

However, after the EU referendum in 2016, the Sewel Convention had been undermined. Attendees agreed that political respect for the convention had decreased. The need to pass Brexit legislation led to the UK government passing laws without devolved consent, and this had continued even after the UK had exited the EU.

Legislative trends in the UK parliament had also had an impact, with the government taking more decision making powers and making more use of secondary legislation, which is not subject to the Sewel Convention.

### ***Legal protections also exist for devolution***

Several important Supreme Court cases in 2011 and 2012 (for example, AXA General Insurance v Lord Advocate, Imperial Tobacco v Lord Advocate, and H v Lord Advocate) recognised the significance of devolved legislation as effectively equivalent to UK primary legislation. The courts also took a generous approach to devolved competencies, and treated the devolution statutes as protected, conferring a degree of protection against parliamentary sovereignty.

But some participants argued that more recently there had been a judicial reassertion of constitutional orthodoxy, with judgments more likely to defer to the principle of parliamentary sovereignty.

### ***What can be done to better protect devolution?***

Participants agreed that parliamentary sovereignty was largely unassailable, and so any solution to perceived problems with the way devolution was working would likely need to be political. Even if there were constitutional amendments made, the Fixed-term Parliaments Act 2011 showed that constitutional changes could be undone by a UK government with a parliamentary majority.

Some suggested that a renewed commitment to the Sewel Convention from the UK government would make a difference to how devolution worked. Others suggested trying to build more mutual understanding between Scotland and the UK government at a lower level, through civil service secondments. Finally, attendees addressed the issue of public engagement and a need for more widespread engagement outside of groups of experts.

## **How should the interests of each part of the UK be represented in the UK parliament?**

### ***A territorial second chamber would be difficult to make work***

While many countries have a territorial aspect to their composition, the nature of the UK would make working out the distribution of such representation difficult. Wales and Scotland are far smaller than England, and panellists agreed that a model like the US Senate, where each nation was given equal representation, would not work. While a territorial second chamber could help amplify Scottish and Welsh voices in parliament, even if England were divided regionally in such a chamber, it would still be functionally larger than the other nations of the UK. The House of Commons is already a territorial chamber, but that house has passed legislation overriding the devolved administrations in the past.

### ***Lords reform needs careful consideration***

Panellists discussed a reformed second chamber and agreed that there needed to be careful consideration of what function it should perform. There were potential issues with appointment, direct election and indirect election, and none would immediately solve the problems with the second chamber, with a balance needed between democratic legitimacy and effective scrutiny.

A system like the Bundesrat, which is a second chamber composed of representatives of Germany's 16 federated states, would not work in the UK without a wider shift to a more federal constitutional arrangement.

### ***Commons reform could help devolved representation***

Some panellists noted that reforms in the House of Commons could help representation for the devolved nations. They argued that the current 'first past the post' (FPTP) electoral system did not encourage territorial representation. Regional caucuses were not workable due to the dominance of large parties in Westminster, which was partially a product of FPTP. Other attendees noted that an electoral system that produced more coalitions could help to foster more territorial brokerage across the UK.

### ***The representation of England is important for devolution in Scotland***

Panellists noted that the distrust of central government in Scotland and Wales was replicated in much of England as well. Devolution nationwide would benefit from England having its interests represented. One participant argued that English votes for English laws (EVEL) had helped to reinforce the distinction between the devolved and reserved spheres by demonstrating that English and UK-wide issues were separate.

The idea of an English parliament was discussed but participants agreed it seems unlikely to happen. It was noted that the UK parliament was the *de facto* English parliament, and that English representation could be addressed through the use of English standing committees, or a space for English MPs to collectively oppose a piece of legislation.



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