

BREXIT AND DEVOLUTION

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http://www.heraldscotland.com/opinion/15216171.No_convincing_constitutional_case_for_taking_back_powers_post_Brexit/

Two weeks ago, the UK Government set the Brexit process in motion by giving the EU notice of the intention to leave the EU. It also published a white paper on the 'Great Repeal Bill' which will repeal the European Communities Act 1972 and give effect to our departure from the EU in domestic law. These events raise two important questions about devolution. How will the Scottish Government and Parliament participate in the negotiations? And how will Brexit affect devolved powers?

There is no statutory obligation on the UK Government to allow Scottish participation in the negotiations. Nor does the Sewel convention require it. However, the Prime Minister has promised several times that the devolved institutions would be fully involved in discussions over Brexit. But all the indications so far are that Scottish influence on the Brexit process and its outcomes will be very limited.

According to the white paper, the main purpose of the Great Repeal Bill is to convert the existing *acquis communautaire* of EU law into domestic law to ensure the continuity and clarity of that law. Of course, the intention is that the UK Parliament will change some EU-derived laws over time, but in general the law in the UK will be the same the day after Brexit as the day before. One thing that will change is the powers of the Scottish Parliament.

The Bill will remove the current restriction that prevents the Scottish Parliament from legislating incompatibly with EU law, but there may be other changes too. Many policy areas in which EU law currently has an impact are also devolved matters under the Scotland Act 1998. Since devolution, it has been the responsibility of the Scottish Government and Scottish Parliament to ensure that Scots law is compatible with EU law in these areas. In some areas, notably fisheries and agriculture, the devolved bodies have little policy autonomy because of the constraints of EU law. After Brexit there would be real policy autonomy. However, the UK Government has refused to promise that all currently devolved areas would remain so after Brexit. The white paper states that, as powers are repatriated from the EU, it may be necessary to maintain common UK frameworks where necessary to protect the freedom of businesses to operate across the UK single market and to enable the UK to strike free trade deals with third countries. The guiding principle will be to ensure that Brexit creates no new barriers to living and doing business within the UK. That suggests that significant powers that are currently devolved will be transferred to the UK Parliament and Government.

To take power back to the centre would cut against the grain of the vow made before the 2014 referendum and the recommendations of the Smith Commission; these were for substantially more devolution, not less. There is no legal obstacle to such a transfer of power. The doctrine of the sovereignty of Parliament means that the UK Parliament can lawfully take back powers in this way at any time. There are, however, other constitutional restraints. Under the Sewel convention (a customary constitutional rule), legislation relating to devolved matters and legislation altering the competence of the Scottish Parliament requires its consent. But the

Scottish Parliament is unlikely to pass the necessary motion. This would leave the UK Government with the choice of backing down or forcing the legislation through without the consent of the Scottish Parliament. If it did try to force legislation through that might provoke a constitutional crisis, and it would not only be the SNP who would protest.

Although conventions are not, by definition, legally binding, the most important cannot be ignored without risk to the constitution. The Sewel convention is crucial to the post-devolution constitution. If it is not observed, there is no meaningful devolution. The UK Government would have to produce an exceptionally strong argument to justify overriding the will of the Scottish Parliament. It is not enough for it to argue that it is politically and economically expedient to move powers to the centre; it also needs to show that it is *constitutionally* appropriate. The single market rationale does not require the removal of all conceivable obstacles to commerce arising from differences between the nations of the UK. The UK Government will find it very hard to present a convincing constitutional – as opposed to economic – rationale for taking powers back to the centre. If it tries to do so on any substantial scale that may only increase the risk to the preservation of the Union which Brexit had already created.