

Constitutional Issues

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Outline of presentation

- 1 Devolution: the constitutional basics
- 2 Devolution: changes to devolved competence
- 3 Devolution: intergovernmental relations

1 Devolution: the constitutional basics

- There is no legal requirement to obtain the consent of devolved institutions to the Brexit deal.
- Nor does constitutional convention require such consent.
- There is no requirement in law or convention that the devolved governments participate in negotiations with the EU over Brexit.
- But, the Sewel convention may require consent to consequential legislation changing domestic law.

2 Devolution: changes to devolved competence

The European Union (Withdrawal) Bill:

- Removes the EU law limitation of competence from Scotland Act 1998
- Replaces it with new limitation based on ‘retained EU law’
- powers may be released from the ‘retained EU law’ restriction by Order in Council.

- Clause 11 of EUWB inserts new s. 29 (4A) to Scotland Act 1998:

“Subject to subsections (4B) and (4C), an Act of the Scottish Parliament cannot modify, or confer power by subordinate legislation to modify, retained EU law.”

- This will prevent SP or NAW changing laws required to comply with EU law e.g. farming subsidies.
- They will still have competence to change the law where they currently have that competence.

2 Changes to devolved competence - concerns

- Is this a power grab by Westminster? Is it the right way to proceed?
- The UK Government initially claimed that EUWB: “maintains the current scope of devolved decision making powers in areas currently governed by EU law.”

See The European Union (Withdrawal) Bill Explanatory Notes, para 11.

- Will UK Govt. and devolved governments reach agreement on this?
- UK Govt. says this is intended to be a transitional arrangement while decisions are taken on where common policy approaches are or are not needed;.

2 Devolution: changes to devolved competence

- Scottish and Welsh Governments accept that new co-ordination mechanisms may be needed but argue that this does not justify the allocation of all repatriated EU competences to UK level?
- They would prefer to construct common frameworks by agreement.
- The Bill's proposals undermine the 'reserved powers' model of devolution.
- The changes to competence engage the Sewel convention.
- Scottish and Welsh Governments have indicated they will not consent to EUWB unless amended to their satisfaction.
- UK Government published 'compromise' amendments to EUWB Clause 11 - debated in the House of Lords on 2/3/18 but then withdrawn for further consideration.

2 Devolution: changes to devolved competence

- If EUWB, Clause 11 forced through without consent of devolved assemblies this will worsen (already strained) inter-governmental relations.
- Scottish and Welsh Governments have published their own 'continuity' Bills.

3 Devolution: Inter-governmental relations

- Inter-governmental relations (IGR) are legally informal, i.e. largely unregulated by statute.
- Before the EU referendum, the input of the devolved governments to EU matters was governed by non-statutory MoUs and concordats e.g. the *Devolution: memorandum of understanding and supplementary agreement* (September 2012) and the *Concordat on Co-ordination of EU Policy Issues*:

<https://www.gov.uk/government/publications/devolution-memorandum-of-understanding-and-supplementary-agreement>

- Joint Ministerial Committee
- System of concordats

3 Devolution: Inter-governmental relations

- There is now a Joint Ministerial Committee on EU Negotiations (JMC(EN)) chaired by the Secretary of State for Exiting the EU
- members include ministers from each of the UK devolved administrations.
- JMC(EN) seeks to agree a UK approach to, and objectives for, negotiations, and to consider proposals put forward by the devolved administrations.
- The PM has emphasised that the interests of all parts of the UK will be taken into account and that the devolved administrations will be full involved.

<https://www.gov.uk/government/publications/devolution-memorandum-of-understanding-and-supplementary-agreement>

3 Devolution: Inter-governmental relations

- Scottish and Welsh Governments have indicated they are not happy with approach of UK Government to IGR in relation to Brexit – not genuine consultation and not genuinely co-operative.
- Suspension of devolution in Northern Ireland and UK Government's 'confidence' and supply' agreement with DUP acting as further impediment to co-operative IGR

- Brexit has exposed weaknesses in the territorial constitution
- The current IGR system is not fit for purpose.