

COMMENT

Brexit Roundup: Uncertain Future for Scotland and Devolution

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The consequences of Brexit will be innumerable, though undoubtedly one of its most significant legacies will be the reshaping of the constitution of the UK. Although not often thought of as such, the European Union has over time become one of the constitutive pillars of the unwritten UK constitution. From the primacy of EU law (nominally enabled by the UK parliament) and the EU *acquis* integrated into the UK's legal systems, to the role of EU policy making in UK political culture and the inclusion of the EU in devolution, four and a half decades of EU membership have seen the Union become a core component of political and legal life.

Leaving the EU will evidently change all of these dynamics profoundly. In particular, it will have substantial ramifications for the UK's internal constitutional arrangements. Scotland's devolved settlement, along with those of Wales and Northern Ireland, will seemingly inevitably be recast in a post-Brexit light. Two principal issues have arisen in this context in the nearly two years since the EU referendum. One is the role of current and future EU law which relates to areas devolved to the Scottish parliament. The other is the nature of the parliament's powers and responsibilities after Brexit.

The Scottish parliament does not have competence on foreign affairs or relations with the European Union. However, a number of devolved remits do have a notable EU law dimension – including environment, law and order, agriculture and fisheries. The parliament transposes relevant EU law into devolved Scots law and has a cardinal obligation in the [Scotland Act 1998](#) not to legislate contrary to EU law. Accordingly, EU membership has its own significant, if indirect, impact on Scotland's laws and politics.

Debate on the role of EU law and the Scottish parliament's powers has crystallised around the [EU Withdrawal bill](#), which will create the new legal category of 'retained EU law'. The key question for devolved institutions has been how powers latterly under EU competence and in devolved

areas should transfer to them after Brexit. Disagreement between the UK government and devolved governments (for Scotland and Wales – Northern Ireland continuing not to have an executive) over whether certain powers should be centralised in London first before eventually being redistributed in some measure, or whether they should return directly to the devolved legislatures, has led to protracted negotiations which have yet to yield a definitive conclusion – though a compromise could well be reached in the near future.

As a consequence of the impasse, the Scottish and Welsh governments introduced EU ‘continuity’ bills to mirror the withdrawal bill in devolved law, both of which were passed by their respective legislatures. The [Scottish continuity bill](#) incorporates relevant EU law into devolved Scots law and explicitly retains domestic legislation related to EU membership. It also preserves the general principles of EU law, the [EU Charter of Fundamental Rights](#) and EU law rights in devolved areas, and creates the additional category of ‘retained (devolved) EU law’. This incorporation is complemented by ministerial powers to amend this legislation to correct deficiencies resulting from EU withdrawal and to update it in line with new developments in EU law for a limited period.

The continuity bill was passed by a degree of cross-party support, with the SNP, Labour, Greens and Liberal Democrats (except one) all voting for the measure. The Conservatives and one Lib Dem voted against. Combined with the Welsh assembly’s backing of its own similar bill, this response to the lack of agreement with the UK government cannot simply be dismissed as an independence-driven tactic. Among the pro-union parties in the Scottish parliament, the Conservatives opted for outright, principled opposition to the bill – while Labour and the Liberal Democrats focused criticism on specific aspects, such as the rushed nature of the debate and the controversial amending powers given to ministers by the bill, though nevertheless ultimately supported it.

The [legislative competence](#) of the Scottish parliament to pass the bill at this time was also called into question, with the Presiding Officer judging that the parliament did not have competence, while the Scottish government and the Lord Advocate concluded that it did. The central question in both analyses was whether the parliament has the power to legislate now for future changes to how EU law operates in devolved law after Brexit, in the anticipation that its EU law obligations will end upon EU withdrawal, before that is actually the case. It was unprecedented in the history of the reconvened parliament that the Scottish government should introduce a bill without certification from the Presiding Officer, and indeed that such a bill should be voted through – such are the extraordinary circumstances which Brexit has generated.

With the bill having been passed on 21 March, the option for a legal referral by UK law officers on competence opened in the period before royal assent. Recent reports [suggest](#) that the UK government is prepared to exercise the option to refer the bill to the Supreme Court for a ruling. If the continuity bill is found to be partially or wholly *ultra vires*, such a development would move the situation even further into uncharted constitutional territory. In parallel, negotiations are continuing to achieve agreement on the EU Withdrawal bill, so that the Scottish government recommends that the parliament give its legislative consent. An agreed outcome remains the stated preference of all sides, and the continuity bill contains provisions for its own repeal, should a solution be found.

At its heart, the bill is a means of political pressure in the current Brexit and powers debate – one in which the devolved institutions have a limited role. Although legislative consent for the EU Withdrawal bill is being sought by the UK government, it is not legally required, according to the Supreme Court’s ruling in the *Miller* case. Accordingly, although the Scottish and Welsh

legislatures have a relatively restricted, consultative role in the internal UK legislative process to implement Brexit, the continuity bills have effectively raised the political stakes.

The apparent price for a resolution is a satisfactory understanding on arrangements for the around 24 post-Brexit policy areas with devolved relevance which remain subject to dispute. These discussions have focused on the means by which 'common UK frameworks' in areas like agriculture and fisheries will operate – and whether the devolved governments will have an active role in agreeing them or will simply be consulted on them. Despite the clear differences, the political reality points in the direction of an eventual deal.

The UK government is consumed by all aspects of Brexit – particularly the ongoing negotiations and the shape of future relations with the EU – and the chance to resolve this devolution dispute could prove attractive. For Edinburgh and Cardiff, the worst possible outcome would be an EU Withdrawal act which did not adequately address their concerns on devolution and for the continuity bills to be partially or wholly invalidated by the Supreme Court. Moreover, all of the other political and legal complexities around Brexit mean a deal in which all sides can claim victory would likely be welcomed.

It seems then that the preferred scenario for the UK and Scottish governments is that a consensus is reached and the continuity bill is repealed. However, even if agreement is found, Brexit will undoubtedly have wider consequences for devolution. The asymmetry of devolution across the nations and regions, piecemeal nature of constitutional reform and absence of a clearly codified constitution collectively contribute to a higher degree of uncertainty around the powers and place of the devolved institutions than might otherwise be the case. A more federal structure or written constitution for the UK would give greater confidence, in this time of profound change, that the rights of the devolved nations will be maintained.

Broadly speaking, devolution and European integration were both considered to be one-way tracks – respectively, powers would flow from the centre outwards and states would progressively integrate. Brexit will end the EU track (in the UK) and, as a consequence, threaten the devolution track. Establishing the political principle, even if relatively subtly, that devolution can in fact reverse could undermine confidence in the governance structures of the UK. With all the fissures which Brexit is exposing, it seems markedly less likely that the UK's constitutional arrangements and intergovernmental relations can simply continue as they did before Brexit.