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# BREXIT AND DEVOLUTION: LAWS AND LAND GRABS?

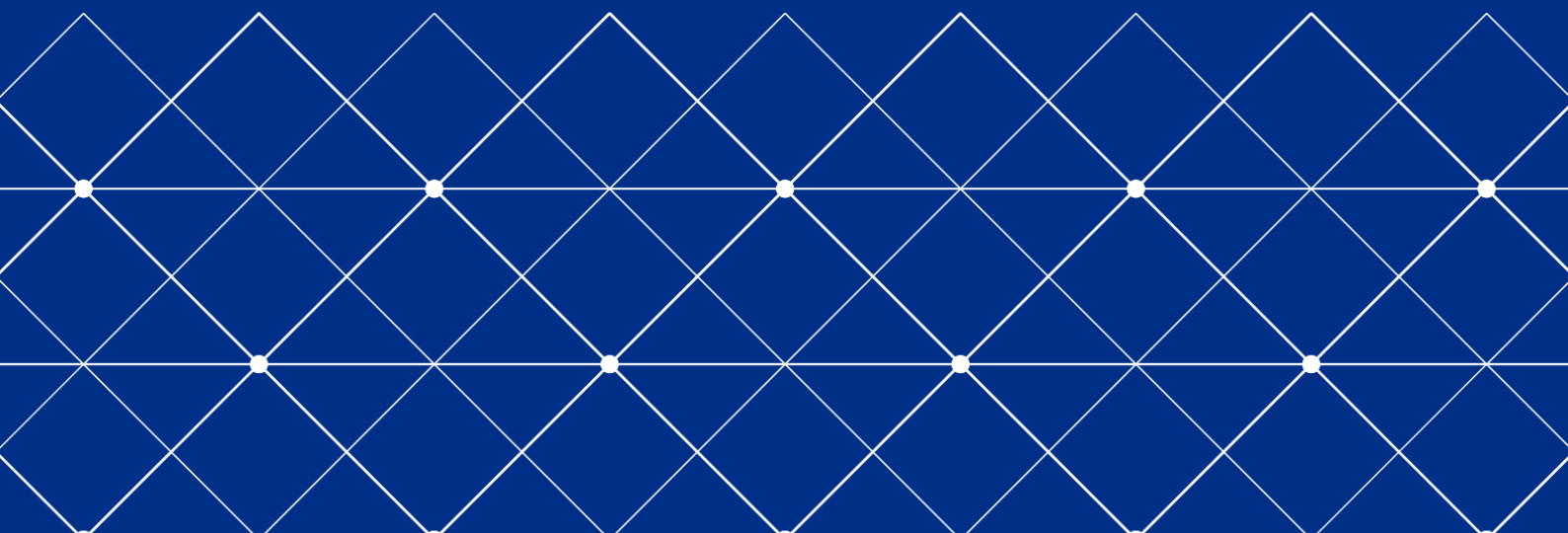
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# Brexit and Devolution: Laws and Land Grabs?

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Once the UK leaves the European Union, some repatriated powers will come to Westminster and some to the devolved legislatures. But the European Union (Withdrawal) Bill has been criticised as a "land grab" not just by the SNP's Nicola Sturgeon, but the Welsh First Minister Carwyn Jones. Commentators and perhaps some in the devolved administrations see this as presaging a new and more limited form of devolution where they are an agent of central government with constrained powers. Does the Bill indeed demonstrate that Whitehall has not accepted the reality of devolved power and, unable successfully "to take back control" from Brussels, defaults to taking control wherever it can? To understand what is going on, we need to look at the detail of the legislation.

## *Retaining EU law*

It's not a "great repeal" bill. That would have breached the Trades Descriptions Act. Mostly it keeps European law going after Brexit, creating a new category of "retained EU law". This is sensible, as chaos could otherwise result. But EU law today constrains the devolved administrations. They cannot act contrary to it, and in areas like agriculture they simply administer it. The bill means "retained EU law" still applies to them, so on exit day nothing changes. Significantly, however, it also stops the devolved legislatures amending this body of law, and seeks to keep it reserved, even if subsequently amended or replaced, unless explicitly devolved by an Order in Council.

There is some sense here. Continuity is needed in the immediate transition, and a case can be made for coordinated replacement of EU law with UK law. It is also increasingly likely that in a transition deal much European law will continue to apply in the UK; as this bill is being considered before any deal is done, it's not possible to say what that might comprise, so reservation for a while might be prudent. Before we know what's coming home from Brussels, it's premature to start dividing up the spoils.

For the longer run, the government argue that common UK frameworks may have to replace some EU law. This too is correct: agriculture and state aids rules are obvious examples. Reserving retained EU law enables UK ministers to decide where such frameworks are required. But is that a decision for them unilaterally, and if so to what extent? The answer is more complex than meets Whitehall's eye, and requires it remember the constitutional

division of powers in the UK today, and to do something new: distinguish clearly between its UK and English responsibilities.

### *Replacing different kinds of European framework*

If the UK had never been in the EU, it would have had to provide, by law or otherwise, UK arrangements for many things the EU now does. Devolution legislation would have incorporated these UK constraints in some way. But the government cannot simply write the rules that might have been into today's devolution settlements. It has to start from the constitutional division of powers in the UK today, and their implications for common frameworks.

Three different sorts of framework might be needed. The first relates to international obligations and here the UK government is in quite a strong position. For example, the UK hopes to have continuing trade relationships with the EU and supposedly other trade deals as well. At a minimum, it will be a member of the World Trade Organisation, which puts constraints on domestic policy – eg on subsidising productive industries. It is beyond doubt this is a UK responsibility. Domestic law must enable the government to meet such obligations.

As it happens, domestic law already does secure this. There is no need to reserve anything to achieve that result. Each of the devolution settlements contains reserve powers (never so far used) to enable the UK government to direct the devolved bodies if necessary to meet international obligations<sup>1</sup>. But reserve powers are just that: a backstop and unlikely to be easy to use for the kind of complex arrangements which might replace wide-ranging and intrusive European rules. Instead, a UK-wide legal framework for a subject is likely to be better than continually issuing directions. Such a framework would have to be negotiated with the devolved administrations and the legislation subject to devolved consent: from the perspective of Cardiff and Edinburgh, this is better than being directed all the time.

The UK government could rely on seeking devolved consent for individual pieces of the necessary legislation bill by bill (secure in the knowledge that they had reserve powers). Alternatively and preferably, the EU Withdrawal bill could contain provisions setting out a specific procedure for replacing EU frameworks when necessary to meet international obligations, with the formal involvement of the devolved bodies. Either way, the UK government has obligations of consultation before entering into international obligations.

This is not in fact unprecedented. "Executive devolution" is a well-established practice in the UK territorial constitution. In Scotland, for example, the ambit of ministerial powers includes not only the legislative powers of the parliament, but other additional executive powers typically operated under UK legislation. One example is the interception of communications under the Regulation of Investigatory Powers Act 2000. Another more recent and widely used is the operation of the rail franchising system in Scotland. Powers over the franchising rail

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<sup>1</sup> Section 58 of the Scotland Act 1988, section 82 of the Government of Wales Act 2006 and section 26 of the Northern Ireland Act 1998.

services inside the GB railways legislative framework were transferred to Scottish ministers under the Railways Act 2005.

It is conceivable that other areas of EU law in devolved areas will not in future give rise to international obligations but will nevertheless require UK uniformity to secure reserved UK policy aims, perhaps under the general description of maintaining the single UK domestic market in goods and services. No power of direction for such matters exists, and no examples have been identified. Reserving EU retained law in to deal with this possibility is hard to justify, as any cases which arise can be dealt with by agreement. None of the devolution settlement contains a power for the United Kingdom government to direct the devolved governments except insofar as it is necessary to meet international obligations, and not to meet other UK reserved objectives.

In many other policy domains coordination will be desirable, though not necessary for reserved UK aims. Environmental protection, for example, is devolved, but a strong case can be made for coordination of policy. Here the UK government is acting as government of England, and while it might reasonably expect to take a lead, it requires to negotiate and agree any common framework. It is not proper for the government England to direct the other UK government over matters within devolved responsibility. There is no need, and no constitutional case, to reserve EU retained law in relation to these matters.

#### *A land grab?*

The UK government argue that their approach is essentially a holding operation until an appropriate allocation of powers can be made. This looks like a rationalisation: it is always easier to retain power, especially when you have no clear idea what will need to be done, as with much of Brexit. This is however inconsistent with the approach of devolving responsibility unless there is good reason to reserve it, and it is not consistent with the devolution deals for Scotland, Wales and Northern Ireland. The extent to which there might be reasons to reserve EU retained law is summarised in the following table:

| <b>Topic</b>   | <b>Issue</b>   | <b>Reservation?</b>   | <b>Comment/Problem</b>   |
|--|--|---|--|
| <i>Before and during the transition period</i>                 | Whether matters might have to be reserved is not yet clear.      | Likely to be justified for a period by uncertainty.   | The bill provision is without time limit.  |
| <i>Relating to new or continuing international obligations</i> | Existing reserve powers to direct effective but confrontational. | Temporary reservation should be replaced by new UK wide frameworks to deliver international obligations consistently with the | Model of executive devolution well precedented and effective. Could be done through Sewel consent for each Bill but better by an |

|  |   |  |   |
|--|---|--|---|
|  |   | exercise of devolved powers.   | agreed process, set out in the EU bill.   |
| <i>Other reserved objectives currently secured by EU law</i> | No reserve powers currently exist           | No examples, and agreement might well be sufficient. Continuing reservation hard to justify. | No reasoned case has been made for reservation on these grounds and it is not consistent with the devolution settlements. |
| <i>UK coordination desirable</i>                             | No case for statutory powers or reservation | Not justified on any grounds.  | Bill assumes UK ministers can decide unilaterally whether coordination is compulsory.                                     |

### *A better bill*

The devolved legislatures could refuse to give consent to the bill under the Sewel convention, but this would be an empty gesture. The convention is not legally enforceable. (Things might be legally different in a federal country with a codified constitution where powers were entrenched and could not be altered without formal constitutional amendment.) In any event, it is politically unrealistic to expect that they could prevent Brexit to secure an allocation of powers, particularly when the UK government can point out that they lose no powers they exercise today and stand only to gain some.

Nevertheless they can, and should, argue for amendment of the bill:

- There should be a time limit placed on the blanket reservation of EU retained law;
- the bill should explicitly recognise the need for UK wide frameworks to implement international obligations which replace EU obligations, and that such legislation would require devolved consent;
- all other UK wide coordination should be by agreement, in line with the allocation of powers in the devolution settlements.

As it stands, the bill arrogates to UK ministers and the UK Parliament all powers currently exercised in Brussels. While this might be defensible in the short run – when it remains deeply unclear what leaving the EU might mean, what transitional arrangements might be, and what might replace the UK's EU obligations – it is not consistent with the UK's territorial constitution. This should be recognised explicitly in the legislation, but it, and the devolved governments, should also acknowledge the powers the UK government will need for continuing international obligations, while leaving other UK frameworks to be settled by mutual agreement between the different governments. That is the architecture of the devolution settlements: the UK government and Parliament are fully empowered to deal with

International relations, even where they impact upon devolved responsibilities, but otherwise the devolved legislatures and governments have primacy within their own responsibilities.