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BREXIT AND THE NATIONS

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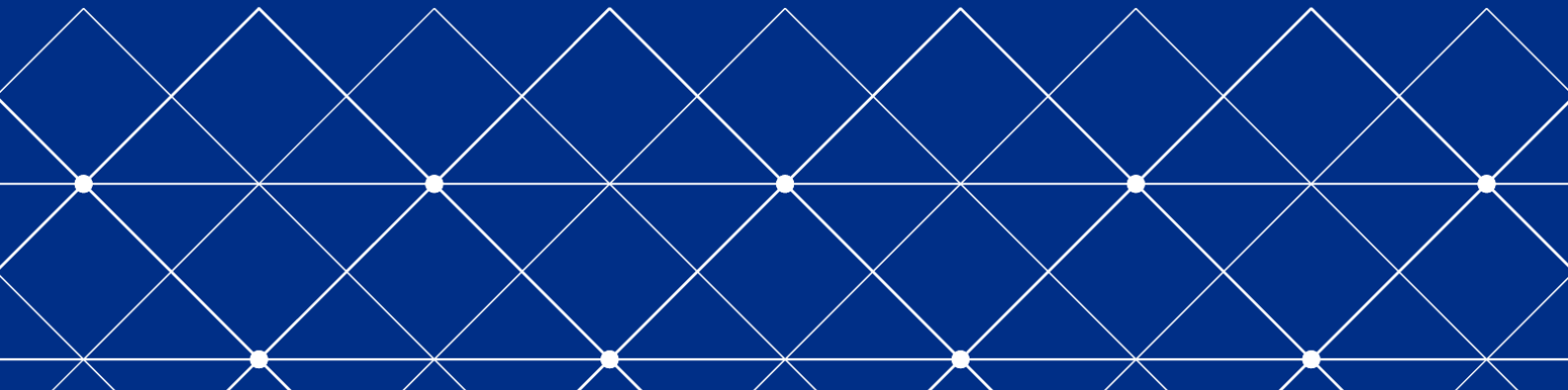

Brexit and the Nations
Evidence on the Scottish Government's *UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill*

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The Scottish government's UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill is not intended to become law. It is intended to put pressure on the United Kingdom government to amend its own withdrawal legislation to be more compatible with the devolution settlement. To characterise the Bill as a negotiating tactic is not to condemn it. But it does justify making the primary focus of evidence on the Bill what is necessary to avoid enacting it.

Why this Bill should not become law

The UK's planned departure from the European Union has been well compared to removing the egg from the omelette. Assuming it goes ahead, the complexity of the necessary changes in law which will unpick over 40 years of gradually extending EU involvement in the laws of England, Scotland and Northern Ireland is unprecedented. Legal continuity will be essential, but two competing statutes each seeking to provide legal continuity on devolved matters would be wholly unacceptable; similarly – as the Scottish government themselves acknowledge – it is highly desirable that there should be a single mechanism for both devolved and reserved matters throughout the UK by which this is achieved.

The European Union (Withdrawal) Bill currently before Parliament at Westminster is intended to be that mechanism. It is subject to a number of criticisms, not least that the government is promoting legislation in advance of knowing what the UK's future relationships with the EU will be – both in the transitional or implementation period and in the long run. It is highly unlikely, therefore, that that Bill will survive unamended. Further legislation will inevitably be needed. Given the state of negotiations – and the UK government's handling of them – it is impossible to say when and what that further legislation will be. Similar criticisms, inevitably, apply to the proposed Scottish legislation, as discussed below. Putting this Bill onto the statute book in a period of three weeks inevitably implies that it will be amended, if not repealed, before long.

How to avoid this Bill becoming law

Assuming Brexit goes ahead in a year's time, powers will be repatriated from Brussels to the United Kingdom. Absent provision to the contrary, some of these powers will fall to the Scottish Parliament in line with the allocation of powers in the Scotland Act 1998. It is only because of the provision partly to the contrary in the UK Withdrawal Bill that the Scottish government have introduced this this legislation. The Bill will become unnecessary – and should immediately be dropped – if the Welsh, Scottish and UK governments can agree on

how these powers should be allocated, consistently with the principles of the devolution settlement, and reflecting also the practical realities of how matters which are subject to UK wide regulation by virtue of EU law can be dealt as the UK leaves.

Both sides of this argument have a point. The United Kingdom government are right to emphasise that many such matters will require consistent legislative or other frameworks across the UK to replace European structures. The Scottish government are right to argue that the idea UK ministers can decide unilaterally that matters should be reserved (temporarily or a fortioti permanently) is inconsistent with the principles of the devolution settlement.

The UK government have already indicated an intention to amend the relevant provision (clause 11) of the Withdrawal Bill. Instead of reserving all "retained EU law" until it is devolved by Order, they propose instead a power to reserve certain (as yet publicly undefined) aspects of it. There is some ambiguity as to whether all such reservations would be merely pending the agreement of replacement UK frameworks, or whether it is intended that some reservations might be continuing.

It cannot and should not be asserted that any reservation is ipso facto inconsistent with the principles of the devolution settlement. Quite the opposite. The UK's territorial constitution clearly envisages that some matters are reserved to Parliament at Westminster, because they can be best dealt with at that level. Not might it be unreasonable to reserve temporarily until there is greater clarity in the UK-EU relationship. A principle that nothing currently dealt with at an EU level can be reserved to Westminster is a principle of nationalism, not of devolution.

What is however wrong with the UK government's approach is that the decisions on reservation are unilateral, and while this might be defensible as an interim measure at the time of deep and continuing uncertainty, it is not consistent with the principles of devolution that the powers of the Scottish Parliament be amended without its consent. (Of course, leaving the EU was not contemplated from that principle was developed: but the implication of that is that there is a responsibility on the Scottish government and Parliament not to withhold that consent unreasonably, or on purely partisan grounds.)

A simple solution to this problem would be to make clause 11 subject to a "sunset clause" so that the reservation of retained EU law was temporary. During the temporary period, greater clarity might emerge over the relationship between the UK and the EU, and in the light of that knowledge the UK and Scottish (and Welsh) governments could agree what frameworks were practically necessary across the UK and how these might be put into practice. There would be some "equality of arms" between the UK and devolved administrations in those negotiations, in that the allocation of powers in the existing devolution settlement would be the fallback position, but the UK government would be secure in the knowledge that no immediate or unpredictable changes in the legislative framework would take place.

The two governments however appear to be pursuing a different approach. They are examining each area of policy where devolved competence overlaps with EU powers, and

which of them might require some form of UK-wide coordination. This approach produces some challenges, the most significant that we still do not know whether, to what extent and for how long EU law might continue to apply in the UK during the planned transitional period. Additionally, since the UK government remains ambiguous about whether any of the proposed UK frameworks require reservation, as opposed to agreement, it is not absolutely clear what the nature of the negotiation is. (It should be remembered that the UK government has under the devolution settlement powers of direction over the devolved administrations in relation to international obligations, and it might even be for some issues that reservation is a better solution than the exercise of those powers.)

If this approach is to work, four things are needed.

- Clarity from the United Kingdom government about whether there are any areas in which it proposes reservation rather than agreed UK frameworks (involving, say, UK legislation subject to devolved consent);

- Identification of any such areas: candidates might include, for example, new state aids rules to the extent that the EU framework no longer applies in future;

- Willingness by the Scottish government not to rule out on ideological grounds that there may be areas where reservation can be justified: the principle that matters should be devolved unless there is good reason to reserve them implies as much;

- Subject to these points, or if no permanent reservations are in fact proposed, arrangements to deal with the transitional period during which devolution might not be possible, as EU law may still apply.

Both sides will acknowledge that there is often no hard and fast dividing line which separates devolved from reserved issues. To take only one example, trade policy inevitably impacts on devolved issues such as agriculture. The devolution settlement is clear in giving the UK government primacy (and powers of direction) in ensuring that international obligations are delivered, but as we have seen with EU law, such obligations will often allow for quite wide variations in policy and delivery in practice. If however each side insists on the principle of sovereignty, then these negotiations will fail, the process of EU withdrawal will become even more complex, and serious damage will be done to the territorial constitution of the UK, which the Scottish people voted to retain in 2014. Neither government should allow that to happen.

Issues with the Bill itself

Others may wish to offer detailed evidence on the drafting of the bill, nor on the question of its competence, but I do not. (It is after all primarily a political manoeuvre rather than a legislative proposal.) It suffers however from two major defects, which it shares with the EU Withdrawal Bill.

It assumes that there is cliff-edge withdrawal from the EU, and makes no provision at all for the halfway house of the transitional or implementation period which may yet be agreed.

Indeed it is in my view likely that if such a period is agreed it could well be extended longer then the two years or less currently envisaged. The Bill is also subject to the criticism made in Westminster of very extensive ministerial legislative powers with no special provision for scrutiny. Most notably, a remarkable Ministerial power to repeal the entirety of the Bill itself. It shows scant respect for the legislative process: the Scottish Parliament is invited to legislate in three weeks, and give the Minister an unfettered discretion to repeal its work at any time of his choosing. Not even Henry VIII tried that one. The Scottish government has, understandably, been critical of the UK government's approach: but pot and the kettle are similarly black.