Devolution after Brexit

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Introduction

Between 1999 and 2016, the scope and depth of devolved powers tended to grow. These increases in 'self rule' in Scotland, Wales and Northern Ireland were not accompanied by equivalent increases in the 'shared rule' often seen in federal countries. Shared rule would give the devolved governments a voice in those policy fields reserved to the UK parliament that impact upon devolved policy responsibilities, for example, via inter-governmental processes or a chamber of nations and regions.

Instead, successive UK Governments practiced a 'devolved and forget' approach. Devolution was viewed as a tool to manage Scotland, Wales and Northern Ireland, not a system to govern the whole Union. Whitehall and Westminster were largely unchanged after its introduction. The Sewel Convention meant the UK Parliament did not normally make laws on devolved matters without consent from the devolved institutions. Brexit, however, has unsettled devolution and prompted changes in the UK Government's approach. Some of these have generated significant new challenges for devolution.

Devolution and the European Union

The EU provided 'scaffold' that supported devolution. Its internal market allowed public policy differences to emerge across the UK, within limits set by the shared Europe-wide system of rules that governed access to the European (and therefore the UK) market. UK courts developed a new role in judging EU law. Domestic (constitutional) changes, such as such as the Human Rights Act (1998) and the Constitutional Reform Act (2005), also changed the context for the courts. A novel structure of constitutional law and adjudication emerged, with a place for devolved institutions and statutes. Arguably this approach placed practical limits on the sovereignty (the authority) of the Westminster parliament.

The Brexit Pivot

The UK's exit from the European Union was always going to disrupt devolution; the UK government's pursuit of a hard exit ramped up its impact. Though arrangements for Northern Ireland emerged as a major issue, devolution was not, in general, a priority for Brexit policymakers.

After Brexit, all governments recognized the need for new frameworks of economic regulation across the UK, to replace the frameworks that had been provided by EU law. But the UK Internal Market Act (UKIMA), passed by the UK Parliament in 2020, was imposed from London against deep opposition from the devolved institutions and without their consent. Eurosceptics envisioned the EU internal market as a centralizing machine to build a European state. UKIMA is an exaggeration of the EU system, applied to an already tightly integrated market. It seems set to centralise regulation and weaken devolution. While, formally, devolved policymaking competences are preserved, UKIMA weakens the practical effectiveness of devolved rules. Some politicians in Scotland and Wales called this legislation a "power grab".

Conservative ministers and parliamentarians speak instead of a "power surge", since devolved authorities have assumed new responsibilities for previously EU-made policies. But without more legislative or administrative capacity, significant new responsibilities will prove challenging. Currently under consideration at Westminster, the *Retained EU Law (Revocation and Reform)* Bill could remove large parts of the existing structure of law (the 'statute book') thereby creating a heavy burden of uncertainty for devolution. The *Bill of Rights* Bill ('British Bill of Rights') could further unsettle devolution. Ministers in all governments have gained new discretionary powers, largely unsupervised by their parliaments. This new legislation also includes powers for UK ministers to act in devolved areas, without provision for the devolved institutions to give Sewel Convention-style consent.

Hard Brexit has inevitably disrupted devolution. Hyperactive pursuit of Brexit opportunities risks causing chaos for devolved arrangements. Undoubtedly, relations between the UK and devolved governments are marked by mutual suspicion and hostility. But no-one – at the UK centre or elsewhere – seems to have a clear vision of how UK territorial governance should work. This begs the basic question: (how) can devolution be made to work better in the future?