



LexisNexis
An introduction to devolution
(2019)
19th October 2019

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**An introduction to devolution
(2019)**
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Introduction

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Overview of devolution in the United Kingdom

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What is Devolution?

- 'Devolution' arises from two fundamental (and related) questions about how a nation state should be governed:
 - at what level within a state should political power be exercised?
 - to whom, and how, should the holders of that power be accountable?
- In countries created from smaller political units (e.g. the USA, Germany) the question is how much power should be transferred upwards to the centre.
- In countries which start as centralised, unitary states (e.g. the UK, France, Spain) the question is how much power should be devolved downwards.
- So devolution in the UK is about the de-centralisation of power – how much, where, to whom, and in what manner?
- The answer often depends on powerful forces such as nationalism and fear of secession, rather than on rational administrative choice.

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Devolution in the UK – 1998

- In recent history, prior to 1998, political power in the UK was concentrated heavily in the Westminster Parliament (as the national legislative assembly) and Whitehall (the executive centre of government)
- The sovereignty of Parliament was, and remains, the cornerstone of the UK constitution
 - Devolved powers emanate from Parliament
 - Devolution does not change the fact of Parliamentary sovereignty
- In the first term of the Tony Blair government, Parliament passed three significant devolution statutes:
 - Government of Wales Act 1998
 - Scotland Act 1998
 - Northern Ireland Act 1998

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Scotland, Wales and Northern Ireland – Post-1998

- Over time, devolution tends to become self-perpetuating. There was further legislation devolving more powers over the following two decades
- Scotland
 - Scotland Act 2012
 - Scotland Act 2016
- Wales
 - Government of Wales Act 2006
 - Wales Act 2014
 - Wales Act 2017
- Northern Ireland
 - Northern Ireland Act 2009

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Scotland, Wales and Northern Ireland – Legislative Competence

- All devolution settlements in Scotland, Wales and Northern Ireland create both a legislature (Assembly/Parliament) and an executive (Government/Executive)
- The legislature is empowered to pass 'Acts' which change the law, including existing Acts of the Westminster Parliament.
- However, an Act 'is not law' if it is outside the 'legislative competence' of the assembly. This means it must not:
 - form part of the law of a territory other than [S/W/NI] or confer or remove functions otherwise than in relation to [S/W/NI]
 - relate to reserved matters
 - breach EU law or European Convention rights
 - breach other specific statutory restrictions

(Scotland Act 1998 section 29, Government of Wales Act 2006 section 108A, Northern Ireland Act 1998 section 6)

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Scotland, Wales and Northern Ireland – Reserved Matters

- 'Reserved' means reserved to the Westminster Parliament (i.e. not devolved)
- The common theme for all 'reserved matters' is that they are those –
 '...which the UK as a whole has an interest should continue to be the responsibility of the UK Parliament at Westminster. They include matters which are affected by its treaty obligations and matters that are designed to ensure that there is a single market within the United Kingdom for the free movement of goods and services.'
 (Lord Hope in **Imperial Tobacco v Lord Advocate**)
- Each Act contains a long list (similar but not the same) of subject-matter that is 'reserved' and therefore cannot be legislated for by the assemblies
- Everything not reserved is 'transferred' (i.e. devolved)
- Reserved matters have been amended over time – e.g. taxation is generally reserved, but Scotland and Wales have now both been given powers by the UK Parliament to vary income tax rates and thresholds
- Northern Ireland is more complex. Some matters (known as 'excepted') are reserved unless Westminster transfers them; others (called 'reserved') can be transferred by secondary legislation

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Scotland, Wales and Northern Ireland – Challenges

- Since Acts of a devolved assembly are 'not law' if they stray outside the legislative competence, rights of challenge are available which cannot be used against Westminster legislation
- An example of this was in **Christian Institute v Lord Advocate**, in which:
 - provisions of the Children and Young People (Scotland) Act 2014 were held by the Supreme Court to be a disproportionate interference with rights under Article 8 of the European Convention
 - as such, those provisions were, in effect, void.
- Law officers in each jurisdiction can refer questions of legislative competence to the Supreme Court after a Bill is passed but before royal assent.
- The definition of some 'reserved' matters is open to interpretation – e.g. in **In re Recovery of Medical Costs from Asbestos Diseases (Wales) Bill**, a duty on employers to make payments to the NHS for costs of asbestos treatment did not relate to 'organisation and funding of the NHS'.

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Scotland, Wales and Northern Ireland – Legislative Consent

- The provisions on legislative competence, and the ability to challenge Acts – effectively on the basis that they are *ultra vires* - emphasise that devolved assemblies are creations of Westminster legislation and do not have the same constitutional status as the UK Parliament
- Moreover, Westminster, by devolving power, has not lost any of its own. It can still legislate for Scotland, Wales and Northern Ireland. This raises the risk of conflicting legislation, and a constitutional clash
- The practical resolution is in a convention (the Sewel Convention) adopted by the UK Parliament that it will 'not normally legislate with regard to devolved matters without the consent of the [devolved assembly]' given in the form of a Legislative Consent Motion.
- The convention is written into the Scottish and Welsh devolution statutes (Scotland Act 1998 section 28(8), Government of Wales Act 2006 section 107(6)), but it is not legally binding - **R (Miller) v Secretary of State for Exiting the European Union**

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Scotland, Wales and Northern Ireland – Permanence

- All devolution legislation establishes an Executive ('Government' in Scotland and Wales) alongside the legislative assembly. This makes provision for a first minister, departmental ministers and supporting departments similar to the Whitehall structure. Various executive functions are transferred to ministers to exercise in the devolved territories
- A declaration of permanence of both assemblies and executives -
 - 'The Scottish Parliament and the Scottish Government are a permanent part of the United Kingdom's constitutional arrangements.
 - The purpose of this section is, with due regard to the other provisions of this Act, to signify the commitment of the Parliament and Government of the United Kingdom to the Scottish Parliament and the Scottish Government
 - In view of that commitment it is declared that the Scottish Parliament and the Scottish Government are not to be abolished except on the basis of a decision of the people of Scotland voting in a referendum.'

(Section 63A of the Scotland Act 1998; equivalent provision in section A1 of the Government of Wales Act 2006)

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Northern Ireland – Periods of Suspension

- The Northern Ireland Act 1998 mandates a 'consociational' form of government which requires the involvement of the largest parties representing the unionist and nationalist communities.
- Without a degree of political co-operation, devolution cannot function
- The Northern Ireland Act 2000 made provision allowing for the suspension of the devolved institutions and the restoration of 'direct rule'. These powers were used briefly in 2000, in 2001, and for a longer period from 2002 to 2007
- Since 2017 the institutions have again (in practice) been suspended, but without a return to direct rule. This has tested the limits of what decisions civil servants can make without ministers – **Re Buick**
- NI is notionally in a period of 'executive formation' for which extra time has been allowed under the
 - NI (Executive Formation and Exercise of Functions) Act 2018
 - NI (Executive Formation etc.) Act 2019

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England – the Exception

- England is an exception. Around 85% of the UK population lives in England and many English regions have a population and economy comparable to or larger than the largest devolved nation (Scotland). But no satisfactory devolution arrangements within England have ever been agreed upon
- English Votes for English Laws (EVEL) was a change to the House of Commons Standing Orders in 2015 to deal with an anomaly of devolution elsewhere. It adds a vote of English MPs into the procedure for provisions in Bills certified as England-only
- But devolution *within* England has been strictly limited.
- The principal example is Greater London. There is an authority, directly elected assembly and directly elected mayor under the Greater London Authority Act 1999 (with powers extended under the Greater London Authority Act 2007).
- The GLA is responsible for a range of strategic London-wide functions in areas such as housing, transport and the environment

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England – the Regions and Devolution Deals

- Two approaches to date:
 - Prescott – Draft Regional Assemblies Bill 2004 (never enacted)
 - Osborne – Cities and Local Government Devolution Act 2016
- The Cities and Local Government Devolution Act 2016
 - Makes provision for directly elected mayors of combined (local) authorities
 - Allows for the transfer of functions from other public bodies to a combined authority under secondary legislation
- The government has agreed a series of 'devolution deals'
 - With local government – mostly combined authorities, and mostly for city regions such as Greater Manchester, Sheffield, Liverpool and the West Midlands
 - Transferring some administrative functions, budgets and (under the 2016 Act) statutory powers

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An Introduction to Devolution
Devolution after Brexit

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Introduction

- This presentation will consider the potential impact of Brexit on the UK devolution settlement.
- Three key issues will be considered:
 - How Parliament and the devolved institutions have responded to the referendum result
 - The establishment of new common frameworks to govern the relationship between the UK government and the devolved administrations
 - The effect of the European Union (Withdrawal) Act 2018 on the principle of consent under the UK devolution settlement

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The Devolved Institutions and Brexit
Redefining the Constitutional Relationship

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Devolution since the 2016 Referendum

- 2016, a Joint Ministerial Committee for EU Negotiations — JMC (EN) — was set up to foster intergovernmental collaboration and provide oversight of EU negotiations
 - More formal meetings between Scottish, Welsh and UK ministers in the 32 months since the 2016 referendum than in the 17 years of devolution that preceded it.
- Focus on the integrity of the UK 'internal market'
 - Limiting divergence in the way the four nations regulate business and manage key policy areas e.g. environment, agriculture and fisheries
 - New approach to co-operation between the UK's government
 - The Northern Ireland backstop
- With only weeks until 31 October 2019 Brexit deadline position of devolved institutions remains unclear
 - challenges to creating new legal and administrative relationship within the constitutional structure of the UK devolution settlement
 - Reaching agreement on new UK wide frameworks

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New UK Common Frameworks

Principles and Objectives

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What are the UK Common Frameworks?

- Current devolution settlements are predicated on the UK's membership of the EU
 - transfer of shared and exclusive competences to the EU
 - mechanisms for compliance
- Brexit means a repatriation of competences
 - UK, Scottish and Welsh govts. agreed that new UK-wide arrangements should be created to replace EU law in some areas, to provide legal certainty and regulatory consistency – 'COMMON FRAMEWORKS'
 - Northern Ireland only represented by civil servants
- SIX broad principles proposed to determine where new UK-wide 'common frameworks' should be established:
 - four apply to agriculture, fisheries and environment including management of common resources
 - provide access to justice in cases with cross border element
 - safeguard the security of the UK
- Devolved administrations would not lose any autonomy under new frameworks
 - new frameworks only as restrictive as current EU law

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Establishing UK Common Frameworks

- Why are UK wide common frameworks required?
 - Potential risk of regulatory divergence within the UK internal market
 - A UK devolution 'backstop'
- A framework will set out a common UK, or GB, approach and how it will be operated and governed. Includes
 - S.12 EU Withdrawal Act 2018
 - common goals
 - minimum or maximum standards
 - limits on action or mutual recognition
- Frameworks may be implemented by legislation, by executive action, by memorandums of understanding, or by other means depending on the context
- In broad terms, policy areas will fall into three categories
 - no further action is required, where full policy divergence poses no risks
 - non-legislative agreements between the UK and devolved governments on how they will work together
 - legislative frameworks, where binding legislation is necessary to ensure regulatory consistency across the UK

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Principles for new UK wide agreements

- Potential conflict between centralisation and devolution
- An agreed definition of the six principles will be crucial:
 - scope for disagreement and room for interpretation
 - what is understood by UK 'common resources'?
 - what constitutes the UK internal market?
- UK-wide legislation will provide greater certainty for businesses and third country trading partners, either by setting legally enforceable outcomes or through detailed regulations
 - essential to functioning of UK internal market
 - completion and implementation of trade deals
- Legislation should be passed with consent, keeping amendments to the devolution settlements to a minimum
 - UK wide exclusive power – **s.12 EU Withdrawal Act 2018**
 - maintain current division of competences
- Where more formal mechanisms for co-operation are unnecessary, divergence can present a learning opportunity for the different nations in the UK

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UK Wide Frameworks – Challenges Beyond Brexit

- UK-wide agreements will need to adapt over time, either as a result of changes in government and policy, or as the UK enters new international agreements
 - time limited agreements
 - use of ad hoc agreements
- Establishing new regulators and public bodies across the UK
 - centralised bodies more efficient and coherent
 - 'four-nation' approach to regulatory governance may be preferable where there is policy divergence e.g. environmental policy
- Enforcement of commitments
 - no future role for the Court of Justice
 - Scope for governance gap in e.g. environmental policy in areas such as planning law
- Brexit and its longer term impact upon UK constitution
 - IndyRef 2?
 - Northern Ireland

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**Devolution and The EU
Withdrawal Act 2018**

The future of the Sewel Convention

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Legislative Consent, Devolution and Brexit

- Since 1999, UK Governments have followed a POLITICAL convention that Westminster does not usually interfere in devolved areas without agreement from the devolved legislatures - the Sewel Convention
- The convention states that the UK Parliament "will not normally legislate with regard to devolved matters without the consent" of the devolved parliaments. Applies when legislation:
 - changes the law in a devolved area of competence
 - alters the legislative competence of a devolved legislature
 - alters the executive competence of devolved ministers.
- Supreme Court in Miller (No.1) held that since Sewel remains a political convention, "policing the scope and manner of its operation does not lie within the constitutional remit of the judiciary".
- Miller (No.1) also confirmed that none of the devolved legislatures had "a legal veto on the United Kingdom's withdrawal from the European Union
- S.12 EU (Withdrawal) Act 2018 gives the UK government the legal authority to introduce regulations that would 'freeze' temporarily devolved powers, even if the devolved legislatures withheld their consent to preserve UK internal market
- Agreement still needed on how common frameworks will operate in practice

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Concluding Remarks

- There is a disjuncture between discussions on common frameworks and the UK internal market, on the one hand, and EU negotiations on the other.
- The rationale for new devolution constraints is predicated on the UK leaving the EU single market and, as a consequence, the ambit of EU regulations. Yet, we still have no idea what Brexit will entail.
- Even if the UK does leave the single market:
 - close alignment with EU regulations remains highly probable.
 - legal effects of transition still need to be considered
- This could make redundant the case for new mechanisms or laws designed to constrain divergences between the policies pursued by the UK's four governments.
- Common frameworks should therefore be seen as a UK government wide 'backstop' an insurance policy to prevent regulatory divergence
- Ultimately, how they operate will depend on any UK-EU Withdrawal Agreement and the future relationship

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