



The Scottish Parliament
Pàrlamaid na h-Alba

Cabinet Secretary for Constitution,
External Affairs and Culture

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By e-mail

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25 May 2023

Dear Cabinet Secretary,

How is devolution changing outside the EU?

As part of the Committee's current inquiry¹ we are examining the impact of constitutional change on how devolution is changing outside the EU, whether this needs to be revised and whether there is a need for further change.

The Committee has agreed to invite you to respond in writing to the summary below of constitutional issues which have arisen during our inquiry and to discuss this response with us before summer recess. The Committee has also agreed to invite the UK Minister for Intergovernmental Relations to do likewise.

Background

An on-going theme of the Committee's work has been consideration of the constitutional impact of the UK's departure from the EU on devolution. In particular, the impact of the removal of the legal obligation to comply with EU law which necessitated a high level of regulatory convergence across the UK. The removal of this statutory constraint has opened up the possibility of more regulatory divergence across the four parts of the UK.

The Committee has previously recognised a tension between regulatory divergence and open trade across the UK. While there are economic benefits for businesses and consumers in ensuring open trade, the fundamental basis of devolution is to decentralise power so as to allow policy and legislation to be tailored to meet local needs and circumstances.

¹ [How is devolution changing post EU? | Scottish Parliament Website](#)

The initial response of the four governments across the UK in addressing this tension was to establish common frameworks based on a number of principles. These include enabling the functioning of the UK internal market while acknowledging policy divergence and respecting the devolution settlement. However, the UK Government subsequently passed the UK Internal Market Act 2020 which introduced the two market access principles: mutual recognition and non-discrimination.

This legislation was passed at Westminster despite the consent of the devolved legislatures being withheld. All of the devolved governments have raised considerable concerns about the impact of the market access principles on the effectiveness of devolved legislation because of the disapplication of divergent regulation and have suggested that the nature of the Act is contrary to the principles of devolution. This has impacted negatively on relations between the UK Government and the devolved governments which, in turn, has raised concerns about the efficacy of inter-governmental working including the common frameworks programme.

Inter-governmental relations

Some of our witnesses suggested that the UK's constitutional arrangements need to be robust enough to accommodate political differences between governments across the UK. In particular, where there is a breakdown in trust, there needs to be institutional mechanisms which allow inter-governmental working to continue. The Committee heard, therefore, that consideration should be given to providing inter-governmental relations with a statutory underpinning. For example, by placing statutory obligations on each of the four governments across the UK to participate in regular meetings.

The Committee has also highlighted the need for transparency around intergovernmental decision making in relation to constitutional developments outside of the EU. In particular around the operation of common frameworks and the process for seeking and agreeing exclusions to the market access principles of the UK Internal Market Act 2020.

The Committee would welcome your views on whether there have been negative relations at an inter-governmental level and whether this could be addressed to some extent through legislation.

The Committee notes that the dispute resolution process, including in relation to the process for considering UKIMA exclusions in Common Framework areas, does not appear to have been used despite a number of inter-governmental disagreements. It would be helpful to understand why the process has not been triggered.

The Committee would also welcome an update on progress at an inter-governmental level in delivering appropriate levels of transparency around the operation of common frameworks including the process for considering UKIMA exclusions.

The need for constitutional reform?

A key theme in our current inquiry is whether the tension between the UK Government and the devolved governments is primarily a consequence of political differences arising from leaving the EU or deeper institutional and constitutional difficulties. The Committee heard from a number of retired senior civil servants and a number of academics who highlighted the need for institutional and constitutional reform.

The Committee heard that the UK's departure from the EU has put a considerable strain on the effectiveness of the informal and uncodified parts of the UK's constitution in relation to devolution which was designed whilst the UK was a member state; a mutual mistrust having undermined a system of government based around conventions or other non-legal constitutional norms. Consequently, a number of our witnesses highlighted the need for more codified constitutional mechanisms to replace these non-legal norms and conventions. One suggested that more "of our constitutional arrangements need to be crystallised in law" while another suggested that, from a devolved perspective, "a rules-based system would be preferable to a system based on discretion". At the same time it was recognised that this "would bring up questions about the extent to which you would want the courts to be involved in regulating relations between Governments."

Parliamentary sovereignty

However, the Committee also heard that the doctrine of parliamentary sovereignty potentially acts as a brake on codifying these constitutional arrangements including the possibility of further statutory protection of the powers of the devolved institutions.

In the absence of a written constitution which limits the powers of the legislature, the UK doctrine of parliamentary sovereignty means that, in principle, there are no limits on Westminster's legislative powers. This includes the power to legislate in areas of devolved competence.

At the same time the Committee heard from one of our Advisers that much of the debate in the UK has failed to distinguish between *sovereignty* and *supremacy*. The latter is about the relationships of the various institutions and the autonomy of the devolved legislatures. These relationships can and have been changed but there remains uncertainty as to how they can be safeguarded given the supremacy of Westminster.

The Committee would welcome your views on whether you agree that the doctrine of parliamentary sovereignty might constrain the constitutional change which may be necessary to ensure that devolution works effectively outside of the EU. And if so, what can be done?

Sewel convention

The Committee has stated previously that the Sewel convention is "under strain" following the UK's departure from the EU. Although the convention was placed on a statutory basis in the Scotland Act 2016, this did not alter its status and it did not become judicially enforceable. There continues to be considerable debate as to

whether it should be strengthened in law and subject to judicial review or whether it can be strengthened on a non-statutory basis.

The Committee has heard that the former would primarily involve removing the reference to the UK Parliament not “normally” legislating without consent from section 28(8) of the Scotland Act 1998 and making it a binding legal rule. The latter would primarily involve the reform of parliamentary procedures at Westminster requiring greater Ministerial accountability and more detailed scrutiny of decisions to proceed without the consent of the devolved legislatures.

The Committee would welcome your views on whether you agree that the Sewel Convention is under strain and whether, and how, it could be strengthened in law and be subject to judicial review or whether, and how, it could be strengthened on a non-statutory basis.

Delegated powers for UK Ministers to legislate within devolved competence

The Committee heard evidence, including from the chairs of constitution committees in other UK legislatures, about the increasing conferral of powers on UK Ministers to make legislation within devolved competence. There were concerns about the absence of any consistent requirement or mechanism for obtaining the consent of the devolved authorities to the use of these powers by UK Ministers; but also concerns about the devolved administrations too readily acquiescing to their use. It has been suggested that this results in more limited opportunity for scrutiny by the devolved legislatures; more limited opportunity for stakeholder engagement; and loss of control of the devolved statute book by the devolved legislatures.

The Committee would welcome your view on the impact on devolution of the increasing conferral of powers on UK Ministers to make legislation within devolved competence including the impact on effective parliamentary scrutiny.

UK Internal Market

The Committee also heard that the way in which the UK Internal Market Act 2020 (UKIMA) interacts with the devolution statutes is unnecessarily complex. In our inquiry examining the UK internal market, we noted a clear consensus in our evidence that UKIMA places more emphasis on open trade than regulatory autonomy compared to the EU single market. While the market access provisions in UKIMA do not alter the Scottish Parliament’s legislative competence, they potentially limit the effectiveness of devolved legislation by dis-applying requirements which diverge from other parts of the UK. The Committee has previously heard that this may have a freezing effect on policy innovation in Scotland. From a constitutional perspective, the Committee heard that there are good governance reasons as to why constraints on the exercise of devolved competence should in principle be contained within the devolution statutes.

The Committee would welcome your views on whether there is a need for more clarity on the extent to which UKIMA may act as a practical constraint on regulatory divergence, the reasons for this, and the impact on the ability of the devolved governments to develop policy and legislation tailored to meet local needs and circumstances.

The Committee's clerks are available to discuss with your officials possible dates to give oral evidence in the period up to the end of June.

Yours sincerely,

A handwritten signature in black ink that reads "Clare Adamson". The signature is written in a cursive, flowing style.

Clare Adamson MSP, Convener of the Constitution, Europe, External Affairs and Culture Committee