

Devolution and Covid-19: Towards a ‘New Normal’ in the Territorial Constitution?

Keywords: Covid-19; Devolution; Intergovernmental relations; Scotland; Wales

Introduction

The Covid-19 pandemic has proven to be a global public health event. In response, states across the world have announced unprecedented packages of economic assistance and have locked down large parts of society, in attempts to control the impact and spread of the virus. Responsibility for lockdown restrictions in the United Kingdom has involved the coordination and agreement of the UK Government and the Devolved Administrations. This paper analyses the Covid-19 regulations in the UK from a territorial perspective. It is argued that policy differences between the four constituent parts of the UK in response to the pandemic have brought to the fore a number of important issues associated with devolution and territorial governance, in particular in regard to relations between the UK Government and the Devolved Administrations.

Devolution and Divergence

Since 1998, the UK’s territorial constitution has been transformed by the introduction of devolution in Scotland and Wales, and its reintroduction in Northern Ireland. The system of devolution across these three parts of the UK is asymmetrical in form, with the powers held by the three legislatures varying in the range and depth of powers devolved.¹ This model of devolution then becomes doubly-asymmetrical when considered against the absence of legislative devolution in England.²

As a result of this asymmetrical system of devolution, there are certain policy competences which operate by default on an England-only basis, yet where the authority to legislate on England-only matters continues to rest solely with the UK Parliament. In other words, as a consequence of devolution, the UK Parliament has assumed a dual-hatted role as the *de facto* legislature for England, on England-only matters, as well as the legislature for the United Kingdom, on UK-wide matters.³ The same applies to the UK Government.

In relation to the Covid-19 pandemic, we find that a number of the policy areas necessary for responding to the pandemic – public health, education and social care – fall under the authority of separate administrations for England, Scotland, Wales and Northern Ireland. In relation to the lockdown, therefore, the authority of the UK Parliament and executive to make regulations on a UK-wide basis is limited, politically, by devolution.⁴

¹ Scotland Act 1998; Northern Ireland Act 1998; Government of Wales Act 2006.

² Stephen Tierney, “Giving with one hand: Scottish devolution within a unitary state” (2007) 5:4 International Journal of Constitutional Law 730.

³ Charlie Jeffrey, “Dis-United Kingdom” (2012) 19:1 Juncture, 14.

⁴ Government of Wales Act 2006 Sch.7A; Scotland Act 1998 Sch.5; Northern Ireland Act 1998 Sch.2 and Sch.3.

Reinforcing this point, the statutory framework for the enforcement of lockdown restrictions across the UK is also arranged on a four-nation basis. In all four parts of the UK, an important element of this framework comes via the Coronavirus Act 2020 (“the 2020 Act”). The 2020 Act supplements the existing statutory frameworks in all four parts of the UK by conferring powers on all four Governments to impose restrictions on public gatherings and other activities, in areas such as public health, justice and education.⁵ In Scotland, the 2020 Act⁶ supplements the existing statutory framework set out under the Public Health etc. (Scotland) Act 2008, and has subsequently been added to by the two Coronavirus (Scotland) Acts, passed by the Scottish Parliament.⁷ Similarly, in England and Wales respectively, the 2020 Act supplements the statutory framework provided under Part 2A of the Public Health (Control of Diseases) Act 1984⁸, as amended by the Health Protection Act 2008.⁹ In Northern Ireland, the effect of the 2020 Act¹⁰ differs slightly by directly amending, as opposed to supplementing, the Public Health Act (Northern Ireland) 1967, to include the new Part 1A which details new temporary powers for responding to the Covid-19 pandemic in Northern Ireland.¹¹

Territorial Approaches to Covid-19 Regulations

Due to the statutory framework underpinning the response to Covid-19 incorporating areas of devolved competence, moving into the pandemic it was apparent that facilitating a UK-wide response would require the coordination and agreement of the UK Government and the Devolved Administrations. This section maps the intergovernmental response in the lead up to the instigation of the UK-wide lockdown on 23 March 2020, and in the weeks immediately following the implementation of lockdown regulations.

On 2 March 2020, the UK Prime Minister chaired a meeting of the Civil Contingencies Committee (COBRA), tasked with coordinating a UK-wide response to the forecast rise in cases of Covid-19 in the UK. The political leaders of the three Devolved Administrations were each present at the meeting. The next day, with the agreement of the Devolved Administrations, the Cabinet Office published the *Coronavirus: action plan*, detailing proposals for a UK-wide response to the pandemic:

“Recognising the respective roles and responsibilities of the UK Government and the Devolved Administrations, this document sets out what the UK as a whole has already done – and plans to do further – to tackle the current coronavirus outbreak...”¹²

The decision to coordinate the response to the pandemic on a four-nation basis, as opposed to Westminster relying on legislation to assume a more prominent UK-wide role – such as under the Civil Contingencies Act 2004 (hereafter “CCA”) – reflects both the nature of the pandemic and the applicability of the statutory frameworks available. In substantive terms, when compared to the Coronavirus Act 2020, the CCA provides for more extensive executive powers

⁵ For a useful summary, see: *Institute for Government*, “*The Coronavirus Act 2020*” (26 March 2020), <https://www.instituteforgovernment.org.uk/explainers/coronavirus-act> [Accessed 23 August 2020].

⁶ Coronavirus Act 2020, Sch.19.

⁷ Coronavirus (Scotland) Act 2020; Coronavirus (Scotland) (No.2) Act 2020.

⁸ Public Health (Control of Diseases) Act 1984, 45C(1), (3)(c), s.45F(2) and s.45P.

⁹ Health Protection Act 2008, s.129.

¹⁰ Coronavirus Act 2020, Sch.18.

¹¹ Public Health Act (Northern Ireland) 1967, s.25C(1), (3)(c), (4)(d) and s.25F(2).

¹² Cabinet Office, *Coronavirus: action plan* (3 March 2020).

to respond to a national crisis, but also includes additional parliamentary and judicial oversight of such executive action, including a 30-day sunset clause for emergency regulations passed under the Act.¹³ While the powers under the CCA are more wide reaching, their activation includes a high threshold test – “state of emergency”¹⁴ – as well as including an explicit judicial review function.¹⁵

On a practical point, while offering the possibility of a more centralised response, the CCA also does not work to exclude the Devolved Administrations from the decision making process. Under section 29 of the CCA, the UK Government is still required to “consult” the relevant Devolved Administrations on emergency regulations that may affect Scotland, Wales or Northern Ireland. While this duty can be overridden – if the situation is deemed “urgent” – the test for establishing urgency again poses a high statutory threshold, and is subject to scrutiny by Parliament and the judiciary. Due to the unprecedented nature of the pandemic, and the uncertain timeframe required for a response, the choice to rely on an alternative statutory framework to the CCA, and not to impose a state of emergency, seems to have offered a more suitable solution for responding to Covid-19.

In the weeks following the publication of the *Coronavirus: action plan*, the response to the pandemic continued on a coordinated four-nation basis, with the Devolved Administrations continuing to be involved in meetings of COBRA, as well as sending representatives to the Scientific Advisory Group for Emergencies (SAGE). The culture of intergovernmental cooperation and agreement was further articulated in the passage of the Coronavirus Act 2020. The explanatory notes to the Act provide detail of the UK Government’s recognition of devolved policy areas in the response to Covid-19, as well as its role on England-only matters:

“These provisions also take due account of the UK’s devolution settlement in a way that enables swift action to be taken when and where it is needed. UK Government Ministers control the use of provisions on matters that are reserved or England only. This is intended to be a streamlined system that is nonetheless consonant with the role of the Devolved Administrations.”¹⁶

The explanatory notes also detailed the UK Government’s view that it “would be appropriate” to seek the legislative consent of the Devolved Administrations – through the Sewel Convention – on the provisions in the Bill relating to areas of devolved competence.¹⁷ On 24 March, the Welsh Parliament, along with the legislatures in Scotland and Northern Ireland, gave legislative consent to the Coronavirus Bill. In its legislative consent memorandum to the Senedd, the Welsh Government detailed its support for the “cohesive UK approach” fostered by the Bill in tackling the pandemic.¹⁸

Examination of the statutory instruments containing the main executive response to the pandemic also points to coordination between the four governments. For example, in England and Wales respectively, the regulations detailing the initial lockdown restrictions were identical on many points, with the main provision in both countries outlining: “during the emergency

¹³ Civil Contingencies Act 2004, s.26.

¹⁴ Civil Contingencies Act 2004, s.19.

¹⁵ Civil Contingencies Act 2004, s.22(5).

¹⁶ *Coronavirus Act 2020 Explanatory Notes*, para.10.

¹⁷ *Coronavirus Act 2020 Explanatory Notes*, paras 158-159.

¹⁸ Welsh Government, Legislative Consent Memorandum to the Coronavirus Bill (24 March 2020), para.45.

period, no person may leave the place where they are living without reasonable excuse.”¹⁹ Furthermore, while minor territorial differences did exist, the main executive message at the beginning of the lockdown was consistent across all four parts of the UK: “stay at home, save lives, protect the NHS”.

While scholars of other decentralised constitutional systems may not be surprised by the level of cooperation and coordination between the UK Government and the Devolved Administrations on the road into the lockdown, the showing of intergovernmental cooperation during this period marked a stark contrast to the situation in the months and years preceding the pandemic.

Over much of the past two decades of devolution, the system of intergovernmental relations (IGR) between the UK Government and the Devolved Administrations has been subject to sustained political and academic scrutiny. Academic debates have focused on the relatively underdeveloped system of IGR or ‘shared rule’ to accompany the substantive provisions for ‘self-rule’ provided for under the devolution statutes. Indeed, unlike the robust devolved administrations that have emerged in Edinburgh, Cardiff and Belfast, the structure of UK IGR has historically developed along informal channels, beset by ad hoc meetings and an entrenched culture of hierarchy from the UK Government.²⁰ The lack of formality in the IGR arrangements, and the lack of equal status for the Devolved Administrations, has been highlighted particularly following the Brexit referendum in June 2016.

The impact of the soured relations between the two levels of government after June 2016 is effectively captured in Richard Rawlings’ description of the new era of “uncooperative devolution” that emerged after the 2016 referendum.²¹ Indeed, two months prior to legislative consent being passed for the Coronavirus Bill, all three devolved legislatures withheld legislative consent on the European Union (Withdrawal Agreement) Bill.²² Despite this unprecedented showing of opposition by the Devolved Administrations, the UK Government moved to push ahead with the Bill, which received royal assent two weeks later. Thus, while sobering at a time of national crisis, the promise of a shift in the culture of IGR in response to Covid-19 offered promise of a turning point in the dynamics of shared rule – or at the very least a reversal of the period of uncooperative devolution.

Territorial Divergence

In all four parts of the UK, the statutory framework for the lockdown required that a review of the regulations take place every 21 days.²³ The first review of the four sets of regulations took

¹⁹ The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, reg.6; The Health Protection (Coronavirus Restrictions) (Wales) Regulations 2020, reg.8; For commentary, see: Jeff King, “The Lockdown is Lawful” (1 April 2020), *UK Constitutional Law Association blog*, <https://ukconstitutionallaw.org/2020/04/01/jeff-king-the-lockdown-is-lawful/> [Accessed 19 May 2020].

²⁰ Wilfried Swenden and Nicola McEwen, “UK Devolution in the shadow of hierarchy? Intergovernmental relations and party politics” (2014) 12:4/5 *Comparative European Politics* 488.

²¹ Richard Rawlings, “Brexit and the Territorial Constitution: Devolution, Reregulation and Intergovernmental Relations” (The Constitution Society, 2017), p.28.

²² *BBC*, 21 January 2020, <https://www.bbc.co.uk/news/uk-wales-politics-51181641> [Accessed 18 May 2020]

²³ The Health Protection (Coronavirus Restrictions) (Wales) Regulations 2020, reg.3(2); The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, reg.3(2); The Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020, reg.2(2); The Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2020 reg.2(2).

place in mid-April, and saw the four administrations continue a cohesive approach to maintaining the lockdown, in light of the continuing rise in cases of Covid-19 across the UK.²⁴ Over the next three-week period moving to the second review stage in early-May, a slowing in the number of cases of Covid-19 began to alter the debate and raise speculation on plans for a future easing of lockdown restrictions. On 24 April, in preparation for a future easing of restrictions, the Welsh Government published its white paper detailing its targets and preferences for moving out of the lockdown:

“The whole of the UK entered ‘lockdown’ in the same ways and at the same time, and our preference as a government would be that all four nations retain a common approach to lifting the restrictions. However, we have been consistent in making clear that we will take the right decisions in the interests of the people of Wales.”²⁵

The message conveyed by the Welsh Government in this statement matched similar announcements made by the political leaders of Scotland and Northern Ireland; a desire to maintain a coherent four-nation approach to the lockdown, but not ruling out the possibility of policy divergence should epidemiological data indicate it to be necessary. At this point, the reality of devolution had begun to raise the possibility of different approaches between the four parts of the UK in exiting the lockdown.

On 7 May 2020, following the second review of the lockdown regulations, the political leaders of Scotland and Northern Ireland both announced additional three-week extensions to the lockdown. On 8 May, the First Minister of Wales announced that the lockdown would also be extended in Wales, with only modest easing of some restrictions to allow for the reopening of garden centres, and permitting unlimited exercise that did not involve travelling a significant distance from a home address.²⁶ As was the case on the road into lockdown, while some minor differences existed in the regulations across the three devolved parts of the UK, the overarching message remained consistent in reiterating the extension of the lockdown, and the executive guidance to “stay at home”.

On 10 May, the Prime Minister announced the outcome of the review of lockdown restrictions in England. In contrast to the devolved parts of the UK, it was announced that restrictions in England would be partially relaxed to allow citizens living in England to leave their home area and travel an unlimited distance (in England) to undertake exercise. Moreover, the government guidance accompanying the change in lockdown restrictions in England was amended from “stay at home” to “stay alert”, and some workers unable to work from home were encouraged to return to work from 13 May.²⁷

As of 11 May, therefore, a clear divergence had emerged in the territorial response to Covid-19 between England and the devolved parts of the UK. On this point, it is important to note that on a number of the key aspects of territorial difference, the divergence in restrictions was not the result of a substantive alteration of the legal regulations governing the lockdown, but of a change in government guidelines on the restrictions. For example, in England, the decision to allow individuals to travel an unlimited distance for exercise did not require an amendment

²⁴ *BBC*, 16 April 2020, <https://www.bbc.co.uk/news/uk-52313715> [Accessed 20 May 2020].

²⁵ Welsh Government, *Leading Wales out of the coronavirus pandemic: a framework for recovery* (24 April 2020), <https://gov.wales/leading-wales-out-coronavirus-pandemic.html> [Accessed 20 May 2020].

²⁶ *BBC*, 8 May 2020, <https://www.bbc.co.uk/news/uk-wales-52584690> [Accessed 23 May 2020].

²⁷ *BBC*, 10 May 2020, <https://www.bbc.co.uk/news/uk-52605819> [Accessed 23 October 2020].

to the statutory instrument, as the regulations – as originally enacted – included provision for exercise during the lockdown, with no reference included to distance limits.²⁸

Investigating the governmental responses leading to the divergence on 11 May, we find that an aspect of the initial four-nation approach that appears to have reduced as the pandemic developed relates to communication between the four governments, and in particular between the UK Government and the Devolved Administrations. In the week following the beginning of substantial policy divergence from 11 May, the First Minister of Wales indicated that communication with the UK Government since the first review of lockdown restrictions had come in “fits and starts”. It was reported that there had been a two-week gap in intergovernmental communication over this period, followed by a series of ad hoc meetings in the days before the public announcements in early May.²⁹ Similarly, the Scottish First Minister claimed that the Scottish Government had only learned of the UK Government’s change of messaging from “stay at home” to “stay alert” via an article in the Sunday Telegraph, and had received no prior briefing on the changes in England.³⁰

Two important constitutional issues arise here. The first concerns whether the four governments had any *duty* to communicate the outcome of their reviews of lockdown restrictions to each other prior to announcing the results to the public. The Memorandum of Understanding (MoU), which sets out the system of IGR between the UK Government and the Devolved Administrations, states in paragraph 4 that:

“All four administrations are committed to the principle of good communication with each other, and especially where one administration’s work may have some bearing upon the responsibilities of another administration.”³¹

Nevertheless, the constitutional status of the MoU is explicit as a “statement of political intent” that “does not create legal obligations between the parties”.³² Thus, while the parties may be *committed* to good communication, there exists very little in the way of constitutional architecture or sanction to fall back on should such commitments diminish, or disappear.

Central to this argument is a wider point on the structure and constitutional culture underpinning UK IGR. The informal mechanics of IGR are a remnant of the initial devolution settlement in 1998. As already noted, this created a heavily asymmetrical model of devolution, against which multilateral IGR was often not required or feasible. Moreover, the fact that the Labour Party initially formed the governments in Westminster, Wales and Scotland meant that policy difference and dispute resolution was often handled within party channels, and did not always require a formal architecture for IGR. Despite the devolution settlement having evolved significantly since 1998 – becoming more symmetrical (outside of England); seeing an increase in the powers of the Devolved Administrations on financial matters; as well as the emergence party political incongruity between the four Governments – the informal architecture of IGR, at least on a multilateral basis, has remained relatively unchanged.³³ Mixed with the culture of

²⁸ The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, reg.6(2)(b).

²⁹ *BBC*, 15 May 2020, <https://www.bbc.co.uk/news/uk-politics-52677444> [Accessed 16 May 2020].

³⁰ *The Guardian*, 10 May 2020, <https://www.theguardian.com/world/2020/may/10/nicola-sturgeon-leads-criticism-of-uks-new-stay-alert-coronavirus-lockdown-advice> [Accessed 23 August 2020].

³¹ *Memorandum of Understanding and Supplementary Agreements*, (HMSO: October 2013), para.4.

³² *Memorandum of Understanding and Supplementary Agreements*, para.2.

³³ Nicola McEwen, “Still better together? Purpose and power in intergovernmental councils in the UK” (2017) 27:5 *Regional and Federal Studies* 667.

hierarchy of the UK Government – as well as the complexity of its dual-hatted role on England-only matters – and the different territorialised perspectives of power and authority advanced by the Devolved Administrations, the absence of a formal architecture for IGR provides only limited opportunity for *commitments* to be meaningfully practised or sustained.

The second point relates to the practical outcomes of territorial difference between the four parts of the UK. In the weeks following the initial divergence in lockdown restrictions after 11 May, reports circulated in Wales and England of public confusion concerning which regulations applied to border communities, or cross-border commuters.³⁴ In July 2020, the Scottish Government noted also that the faster pace for the relaxing of restrictions in other parts of the UK could lead to changes to the Scottish regulations, whereby citizens from other parts of the UK might be required to quarantine when entering Scotland.³⁵ In both cases, the visibility of territorial divergence in the lockdown regulations offered notable examples of devolution in action, as well as also highlighting the issues associated with the dual-hatted role of the UK Government. Indeed, since early May, the UK Government's reduced communication with the Devolved Administrations – in particular regarding England-only regulations – has exposed some of the problems in the informal and unequal mechanisms for intergovernmental cooperation. The visibility of the regulations has also highlighting public confusion on the dual-hatted role of the UK Government acting at two territorial levels.

Leaving aside the possibility, if not the probability, that Covid-19 regulations will continue to be necessary for a number of months, the weaknesses of the mechanisms for intergovernmental cooperation between the UK Government and the Devolved Administrations – and for effectively communicating territorial difference to the public – look set to continue to strain UK territorial politics. Whether or not a more coordinated system of intergovernmental cooperation can emerge in future, therefore, promises to exert a lasting effect on the UK response to Covid-19, but also over the wider dynamics and stability of the territorial constitution.

Towards a 'New Normal' in the Territorial Constitution?

The lockdown regulations are by no means the first example of policy differentiation across the UK. Nevertheless, the significance and visibility of the regulations – and the territorial differentiation between the four parts of the UK – has served as a high-profile example of devolution in action. As mentioned, a notable aspect of this episode has been to highlight the impact of devolution on traditional understandings of territorial governance between the four component parts of the UK.

In England, as well as the rest of the UK, the divergence in regulations has raised questions of the UK Government concerning the need for clarity in the communication of its dual-hatted role. In future, a lot may turn on Westminster's ability to facilitate UK-wide coordination and agreement, while also representing the interests of England and respecting the political limits imposed by devolution.

³⁴ *LSE Blog*, "Different lockdown rules in the four nations are confusing the public" (22 May 2020), <https://blogs.lse.ac.uk/covid19/2020/05/22/different-lockdown-rules-in-the-four-nations-are-confusing-the-public/> [Accessed 23 May 2020].

³⁵ *BBC*, 12 July 2020, <https://www.bbc.co.uk/news/uk-scotland-scotland-politics-53380900> [Accessed 25 August 2020].

In addition to England and Westminster, the Covid-19 pandemic has also raised the profile of devolution across the rest of the UK. In May 2020, the First Minister of Wales acknowledged: “It is certainly true that people outside Wales and in London appear to have woken up from a 20-year sleep on the devolution agenda”.³⁶ Indeed, in Wales, the difference in lockdown restrictions has afforded clear examples of the Welsh Government’s willingness to utilise its constitutional position in response to the pandemic, and in asserting the authority of Welsh Law when doing so.³⁷ While recognising the unprecedented context from which these statements have emerged, it is nevertheless apparent that the events of the lockdown have added confidence to the devolution process in Wales and, in the future, may reopen debates on the model of devolution operating in Wales.

While it is unlikely that the events associated with the Covid-19 pandemic will in themselves lead to a radical amending of the territorial constitution, the territorial response to the pandemic has opened a number of questions on the need for better recognition of devolution, as well as the need for a more coordinated framework for shared rule between the four parts of the UK.

Concluding Remarks

The territorial response to the Covid-19 pandemic has focused attention on a key objective of devolution: the ability to tailor policy in relation to territorial need. In future, a lot may hinge on the ability of the UK Government and the Devolved Administrations to better communicate territorial policy difference, both in the enactment of regulations, as well as in providing the clarity needed to enable political accountability. Finding a ‘new normal’ to facilitate a more formalised and coordinated system of intergovernmental cooperation between the four governments remains one of the biggest challenges facing the UK devolution settlement.

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³⁶ *Senedd Record of Proceedings, Plenary, (20 May 2020), para.41.*

³⁷ *BBC News*, 11 May 2020, <https://www.bbc.co.uk/news/av/uk-wales-52625419/coronavirus-it-is-welsh-law-that-applies-in-wales> [Accessed: 12 May 2020].