



## **Devolution and The Territorial Constitution**

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The four component parts of the United Kingdom are now governed in four different ways. Three of the component parts - Scotland, Wales and Northern Ireland - have devolved bodies - the Scottish Parliament, the National Assembly of Wales and the Northern Ireland Assembly - while England does not.

Scotland, Wales and Northern Ireland, moreover, have devolved bodies of quite different types. Scotland enjoys a Parliament with legislative powers, but the National Assembly of Wales enjoys powers only over secondary and not primary legislation. This means that its powers are restricted to implementing Westminster legislation. Power to pass laws still remains with Westminster.

Northern Ireland enjoys an Assembly with legislative powers, but the provisions of the Northern Ireland Act of 1998 require the executive to contain representatives of both of the two warring communities in the province. That is of course very different from the kind of government we are used to in Westminster. It is as if the government in London were required to contain both Tony Blair and Michael Howard to make it workable!

England, the largest component of the United Kingdom, containing around 85% of the population, has no devolved body to represent her interests, and calls for an English Parliament enjoy little resonance.

These variations between different parts of the United Kingdom have been defended as a justified response to dissimilar conditions in different parts of the country. Yet, one commentator, the former Conservative minister, Douglas Hurd, has said that it has led to 'a system of amazing untidiness - a Kingdom of four parts, of three Secretaries of State, each with different powers, of two Assemblies and one Parliament, each different in composition and powers from the others'.

Devolution poses two fundamental constitutional issues. The first is whether it is likely to be a prelude to the break-up of the United Kingdom; or whether, as its supporters hope, it is likely to strengthen the United Kingdom by acknowledging the differences between the component parts. For the Blair government, which implemented devolution in 1998, following referendums, the main aim was to avoid break-up and to hold the United Kingdom together, by containing the centrifugal forces of nationalism in Scotland and Wales, and providing a guaranteed role in government for the minority, nationalist, community in Northern Ireland.

In Scotland, however, the nationalists welcomed devolution because they believed that it would encourage break-up rather than avert it; while, in Northern Ireland, Sinn Féin welcomed devolution as a step towards detaching the province from the rest of the United Kingdom. Opponents of devolution, therefore, maintained that it was a policy which, far from holding the kingdom together, would disrupt it by creating friction between London and Edinburgh, and a deadlocked form of government in Northern Ireland which, unable to operate effectively, would encourage the men of violence. The first issue then is whether

devolution is likely to lead to break-up or whether it will prove a means of holding the kingdom together.

The second issue is whether asymmetrical devolution, devolution for just some parts of the United Kingdom and not others is viable. There is a great contrast between devolution in Britain and, for example, the federal government in the United States which is symmetrical. As it is at present, devolution seems to breach the principle of equal rights for all citizens, since those living in Scotland, Wales or Northern Ireland enjoy devolution, while those in England do not. Will this form of devolution prove stable; or will it merely encourage fresh demands. Already there is pressure in Wales for the National Assembly to be given more powers, the same powers, in fact, as the Scottish Parliament enjoys. Devolution, the former Welsh Secretary, Ron Davies, once declared, would be a process rather than an event. Thus, the second issue posed by devolution is whether an asymmetrical structure such as we have at the moment, can yield a stable settlement.

Many people have rushed to judgment on these matters, and many of these judgments have been pessimistic. Some commentators indeed have diagnosed Britain as now in a state of terminal decline. A Scottish commentator, Tom Nairn, has written a book called *After Britain*, in which he insists that 'Britain has already broken up in spirit and the fact will soon follow'. Andrew Marr, the television journalist, has written a book about devolution called *The Day Britain Died*; and another journalist, Peter Hitchens, has written a book called *The Abolition of Britain*.

Those who fear the break-up of Britain are afraid of an imbalance between a Scotland straining to burst the bounds of the devolution settlement and an England unable to express its nationalism for fear of disrupting the kingdom. People on the Left tend to emphasise the strength of Scottish nationalism; people on the Right tend to emphasise the frustrations of the English. It may be that the fears of both are exaggerated. It is certainly too early to tell whether they are right. For the answer to the two questions posed above must be, in the words of the famous Chinese proverb, that it is far too early to tell.

In the second edition of a great classic, *The English Constitution* (sic), published in 1872, Walter Bagehot wisely remarked that it was

*'too soon as yet to attempt to estimate the effect of the Reform Act in 1867. The people enfranchised under it do not yet know their own power ---. A new constitution does not produce its full effect as long as all its subjects were reared under an old constitution, as long as its statesmen were trained by that old constitution. It is not really tested till it comes to be worked by statesmen and among a people neither of whom are guided by a different experience'.*

It is perhaps natural to seek a verdict on whether devolution has 'worked' or not, just six years after the first Scottish Parliament and the first National Assembly of Wales were elected. Yet, any judgments as to the effectiveness or success of devolution can only be highly tentative. It would be very dangerous to make rash generalisations about the workings of a new constitutional settlement, based on just six years experience. For new institutions and organisational structures take at least ten years and perhaps longer,

to establish their own distinctive patterns.

Thus any judgment of the consequences of the Great Reform Act of 1832 made in 1838, or the Life Peerages Act of 1958 made in 1964, would almost certainly have been falsified by later events. Constitutional reforms take time to percolate and for their full effects to be understood.

Devolution, moreover, is more than a mere institutional or organisational change. It is a very radical constitutional reform, creating a form of government hitherto unknown in the United Kingdom, except for the rather limited experience of Northern Ireland between 1921 and 1972. The experience of Northern Ireland was of course deeply influenced by the religious-cum-tribal conflict in the province and by the electoral system, which allowed for the permanent dominance of one political party, the Unionists, who enjoyed an overall majority in the Parliament throughout its existence. Experience in Scotland and Wales is likely to be influenced by the evolution of party politics not only in Edinburgh and in Cardiff, but also at Westminster. From this point of view, the relationship between Westminster and the devolved bodies since 1999 has been, in a sense artificial, in that a Labour government in London has been complemented by Labour/Liberal Democrat administrations in Edinburgh, and, since autumn 2000, in Cardiff also. No true test of whether devolution is 'working' or not will be possible until the majorities in Edinburgh and Cardiff find themselves in conflict with, rather than complementary to, the majority at Westminster – until, in other words, a Labour/Liberal administration in Cardiff or Edinburgh is faced with a Conservative government in London; or a Labour government in London is faced with a nationalist administration in Cardiff or Edinburgh.

Devolution establishes new constitutional relationships between the different parts of the United Kingdom, relationships familiar perhaps in federal states, but wholly new in Britain, with the very limited exception of the 1921-1972 Northern Ireland experience.

Devolution can be contrasted with federalism, the form of government in the United States, since it preserves the sovereignty of Parliament. The Blair government was particularly insistent in emphasizing this. The White Paper, Scotland's Parliament, which preceded devolution and was published in 1997, declared that 'The United Kingdom Parliament is and will remain sovereign in all matters'. The Scotland Act, 1998, repeated this claim, declaring that, 'This section', which provided for the Scottish Parliament to make laws, 'does not affect the power of the Parliament of the United Kingdom to make laws for Scotland'.

In practice, however, it can already be seen that the sovereignty of Parliament has been limited by devolution. Westminster has agreed, by convention, that it will not normally legislate on matters devolved to Scotland without the consent of the Scottish Parliament. Scottish ministers at Westminster - the Secretary of State and his team - no longer accept questions on Scottish domestic affairs, since they are no longer responsible for them.

Even on Welsh matters, despite the fact that powers over only secondary and not primary legislation have been devolved to the National Assembly of Wales, ministers refuse to accept questions on Welsh domestic affairs. Thus, in practice, whole swathes of policy-making have been removed from the purview of Westminster. The Scottish Parliament and the National Assembly of Wales are bodies with powers to legislate over a wide range of domestic activity, and bodies which represent national feeling in Scotland and Wales.

It would not be easy for Westminster unilaterally to alter the devolution settlement. There is much talk at the present time of revising the financial terms of the settlement, since, under it, Scotland gains around 20% more per head in terms of public expenditure than England. But substantial revision would require full consultation with the Scottish Parliament and this, in practice, will probably mean that the Scottish Parliament will enjoy an effective veto on change.

It is therefore difficult to resist the conclusion that Westminster is in practice no longer sovereign over the domestic affairs of Scotland and Wales; or that, at the very least, the sovereignty of Parliament means something very different in Scotland, and to some extent in Wales from what it means in England. In England, the sovereignty of Parliament corresponds to a genuine supremacy over 'all persons, matters and things'. In Scotland, by contrast, it seems to mean little more than a vague right of supervision over the Scottish Parliament. Parliament's sovereignty over England still corresponds to a real power to make laws affecting every aspect of England's domestic affairs. In Scotland, by contrast, it no longer corresponds to such a real power, but to a power-fairly nebulous in practice, one may suspect- to supervise another legislative body which enjoys the real power to make laws over a wide area of public policy. Perhaps, then, devolution is nearer to federalism than might at first sight appear.

Perhaps, however, the logic of devolution points to a constitution laying down the precise division of powers between Westminster and the devolved bodies, and the means by which disputes should be settled. Perhaps devolution will lead to us having a constitution.

There is a further radical change which devolution has introduced into Westminster. For in the past, with the exception of the Northern Ireland experience between 1921 and 1972, Westminster has always been characterised by the principle that every Member of Parliament enjoys similar rights and duties. There were no territorial differences in the responsibilities of MPs from different parts of the United Kingdom, since every Member of Parliament was equally responsible for scrutinising both the domestic and non-domestic affairs of every part of the United Kingdom. Since 1999, however, Members of Parliament have not been able to play any part in legislating for the domestic affairs of Scotland or Northern Ireland, or any part in drawing up secondary legislation for the domestic affairs of Wales. Only with regard to England do Members of Parliament continue to enjoy the power which hitherto they have enjoyed for the whole of the United Kingdom, of scrutinising both primary and secondary legislation.

Thus, Westminster is no longer a Parliament for the domestic and non-domestic affairs of the whole of the United Kingdom. It has been transformed into a parliament for England, a federal parliament for Scotland and Northern Ireland, and a parliament for primary legislation for Wales. Westminster has become, it could be argued, a quasi-federal parliament.

There is a further consequence, namely that Members of Parliament for Scotland and Northern Ireland have been deprived of most of their constituency duties. For most of the matters on which constituencies contact their Member of Parliament, matters such as housing and education, are now in the hands of the devolved bodies. Members of Parliament for Scotland and Northern Ireland are responsible primarily for foreign affairs, defence and macro-economic policy. Thus, while MPs from England retain their constituency responsibilities, MPs from Scotland and Northern Ireland have hardly any constituency responsibilities, and MPs from Wales have much reduced constituency responsibilities.

In 1999, in the House of Commons, a Conservative MP proposed that the allowances of MPs representing Scottish and Northern Ireland constituencies be reduced since they had few if any constituency duties. In reply, the then Leader of the House, Margaret Beckett said, 'I strongly hold the view - that there is not and should not be such a thing as two different kinds of Members of Parliament'. But perhaps Mrs. Beckett was turning a Nelsonian blind eye to a real problem. Her answer had no basis in logic. For the first time in its history, with the exception of Northern Ireland between 1921 and 1972, there were indeed two kinds of Members of Parliament at Westminster - or three if the unique position of Welsh MPs is also to be taken into account.

Thus, the forthcoming general election will not decide domestic policy for Scotland, Wales or Northern Ireland. Of New Labour's five policy pledges in 1997, at least two - the pledge to reduce class sizes and the pledge to reduce NHS waiting lists - now lie beyond the government's control outside England. The

Scottish Parliament, indeed, could, if it so wished, abolish the National Health Service entirely. Thus, in England, voters will still be electing a Parliament which will be responsible for their domestic affairs. In Scotland, Wales and Northern Ireland, by contrast, voters are electing a Parliament for a quasi-federal state.

England is of course the anomaly in the devolution settlement. It is by far the largest and most populous part of the United Kingdom, yet it is the only part of the United Kingdom without a Parliament or assembly of its own. England indeed has always resisted federalism, but it has also resisted, in the 20th century at least, the integration of the non-English parts of the United Kingdom, preferring a system of indirect rule, which allowed the indigenous institutions of the non-English parts of the United Kingdom to be preserved. Nor has English nationalism been a particularly strong force for much of the 20th century. Part of the reason for this no doubt is that, with a characteristic lack of logic, many in England have failed to recognise the distinction between being English and being British, treating the two as interchangeable. In 1924, Stanley Baldwin, speaking at the annual dinner of the Royal Society of St George, was able to confess to 'a feeling of satisfaction and profound thankfulness that I may use the word 'England' without some fellow at the back of the room shouting out 'Britain' '. Because so many use 'English' and 'British' as interchangeable terms, English nationalism has found itself without any obviously recognisable patriotic symbols of its own.

If, however, the English were to seek to express their Englishness to the full, they could easily, as the dominant nation in the United Kingdom, threaten the unity of the country. Some might argue that it is no longer reasonable to expect the English to submerge their identity solely in order to hold the United Kingdom together. Why should English nationalism not also be given expression?

Survey evidence, however, enables us to cast considerable light upon the reality of English attitudes, as opposed to the claims of the commentators as to what they are or ought to be. Such evidence shows that the English, for the time being, at least, have come to accept devolution in Scotland and Wales. Indeed, there seems now to be a majority amongst English voters for devolution in Scotland and Wales. But the English do not want devolution for themselves. The late Donald Dewar once said that devolution was the 'settled will' of the Scottish people. Devolution to Scotland and Wales, but not to England, now appears as the settled will of the English people too. The English have adjusted to the new status quo, but are uninterested in further constitutional change. England does not seem to want a parliament of her own; and when, during the 1997-2001 Parliament, William Hague, the Conservative leader, sought to put himself at the head of an English army by proposing one, he found himself bereft of followers. Moreover, the outcome of the referendum on a regional assembly in the North-East in November 2004, where regional feeling was thought to be strong, resulted in a heavy defeat for devolution. This seems to show that the English do not want regional devolution either, and indeed that they do not at present want devolution for themselves at all; although this of course could change with time.

Perhaps there has been too much emphasis upon the factors tending towards the break-up of the United Kingdom. It is worth remembering that the Scottish National Party achieved its highest vote in a general election - 30% - over 27 years ago, in October 1974. Its vote in the most recent general election, in 2001, was 20%. This means that 80% of Scottish voters voted for unionist parties and that the SNP has lost one-third of its vote over the last quarter-century. If to be British is to wish to continue to be represented at Westminster, then there can be little doubt that there is a majority in each of the component parts of the United Kingdom for remaining British.

Perhaps there has been too little analysis of the factors which hold the United Kingdom together. Perhaps too much has been written explaining what has not happened, the break-up of the United Kingdom, and too little on the factors which hold Britain together. Britain may be held together by common economic and social concerns. Survey evidence in Scotland seems to show that support for devolution is based primarily on a belief that a Scottish Parliament would improve the quality of public welfare, especially health and education. The Scots seemed to regard constitutional change as a means rather than an end in itself. They



hope that devolution will make a difference to their lives in terms of the services they want it to provide. Those are the grounds on which its effectiveness is likely to be judged, rather than as an expression of nationalism.

Devolution, however, does threaten one fundamental principle which has lain at the basis of British politics from the time of the Attlee government, if not from the era of Lloyd George. It is that the benefits which the individual derives from the state, and the burdens imposed upon him should depend, not upon geography, but upon need. Devolution, however, now allows the non-English parts of the kingdom to develop their own distinctive priorities in public policy. Yet the Welfare State was founded on the principle that the needs of citizens should be determined not locally but by central government, which alone could balance the requirements of different parts of the kingdom. The alternative would be what is now contemptuously called a postcode lottery. Devolution thus may not threaten the unity of the United Kingdom, but it does undermine the power of central government to correct territorial disparities.

Devolution may then threaten a fundamental principle of the welfare state and of social democracy. Already, after only six years, important divergences have appeared in welfare benefits between Scotland and the rest of the United Kingdom. For the Scottish Parliament has decided to provide for the finance of university students, the salaries of teachers, and the needs of those in residential care, in a more generous way than that adopted by Westminster. As devolution progresses, it is likely that the non-English parts of the United Kingdom will continue to establish priorities of their own, distinct from those of Westminster. It is not clear how far this process can go within a single state. Perhaps a new definition of what social and economic rights are fundamental and should remain uniform throughout the kingdom would be helpful. What cannot be denied is that devolution threatens the power of the government of the United Kingdom to secure equal social and economic rights for all of its citizens. It is difficult to see how the state can secure these equal rights if it has been fragmented and cut into pieces by devolution.

The legislation providing for devolution to Scotland, Wales and Northern Ireland, establishes a new constitutional settlement amongst the nations comprising the United Kingdom. The United Kingdom is, as a result of devolution, in the process of becoming a new union of nations, each with its own identity and institutions - a multi-national state rather than, as the English have traditionally seen it, a homogeneous British nation containing a variety of people.

Moreover, it seems to have become implicitly accepted that the various nations comprising the United Kingdom enjoy the right of self-determination, and that this includes the right of secession. Since the time of the Northern Ireland Constitution Act of 1973, it has become accepted that the constitutional status of Northern Ireland cannot be changed without the consent of the people of Northern Ireland; if, however, a majority in Northern Ireland seeks to leave the United Kingdom and join with the Republic of Ireland, that wish will be accepted by the British government, which will indeed facilitate the transfer.

In Scotland in 1988, the Claim of Right, the foundation document of the Scottish Constitutional Convention, declared that 'We, gathered as the Scottish Constitutional Convention, do hereby acknowledge the sovereign right of the Scottish people to determine the form of Government suited to their needs'. On this view, sovereignty lay with the people of Scotland, not with Westminster, a claim that has been implicitly accepted by the Blair government. For, in drawing up its proposals for devolution in Scotland, the government followed closely the ideas of the Convention, and resisted departures from them on the grounds that they did not represent the wishes of the Scottish people. Significantly, the Claim of Right was ceremonially handed over to the Presiding Officer of the new Scottish Parliament just prior to its opening on 1 July 1999. There is thus some degree of conflict between the idea of the sovereignty of Parliament and the idea of the sovereignty of the Scottish people. From this point of view, the Scotland Act represents a self-generated constitution, a constitution rooted, as it were, in Scottish soil, rather than, as the term 'devolution' implies, one imposed by Westminster. Moreover, there can be little doubt that if, at some time in the future, it became the 'settled will' of the Scottish people to break the link with Westminster, the British government of the day would respect that wish, rather than, as it did in the 19th century in the case of

Ireland, resist it. Thus, in both Northern Ireland and Scotland, it has come to be accepted that their constitutional status depends not only upon the decisions of a supposedly sovereign Parliament at Westminster but also upon the wishes of their people

The unitary British state was the expression of a belief that the non-English sections of the United Kingdom formed part of a single British nation. Devolution, by contrast, is the expression of a belief that the non-English parts represent separate nations which, nevertheless, choose to remain within the larger multi-national framework of the United Kingdom.

But, as well as providing for a new constitutional settlement amongst the nations comprising the United Kingdom, the devolution legislation of 1998 establishes a constitutional settlement between the nations comprising the United Kingdom, and the other nation sharing these islands, namely the Irish nation. For the international treaty which gave legislative expression to the Belfast Agreement, signed on Good Friday, 1998, created a British-Irish Council, whose role it would be, in the words of the Belfast Agreement, 'to promote the harmonious and mutually beneficial development of the totality of relationships among the people of these islands'. The members of this Council will be Britain and Ireland, the devolved bodies in Scotland, Wales and Northern Ireland, and also representatives of three British Crown dependencies which are not part of the United Kingdom, the Isle of Man, Guernsey and Jersey. The Council is to meet at summit level, twice a year: it is primarily consultative and will consider such issues as transport links, agriculture, environment and culture, health, education and approaches to the European Union. It can agree upon common policies, but has no power to bind individual members, who can choose to opt out or not to participate in common policies.

The creation of devolved bodies in Scotland, Wales and Northern Ireland, together with the British-Irish Council, not only transform a unitary state into a quasi-federal one; they also provide for a confederal link between the United Kingdom as a multinational state and the Irish Republic. These arrangements constitute an attempt to recognize the various and distinctive national identities of the peoples living in these islands, and also of the close and complex links between them. The devolution legislation and the British-Irish Council propose a solution which both recognises and yet seeks to transcend nationalism through institutions which express not only the separate national identities of the components making up the United Kingdom and the Republic of Ireland, but also their underlying unity.

To give effect to and yet to seek to transcend nationalism may seem contradictory aims. Yet that, after all, is the logic of federalism, and also the logic of the peculiar quasi-federal system with confederal elements that makes up the new British constitution. The sociologist, Karl Mannheim once said that the British had 'a peculiar genius for working out in practice the correlation of principles which seem to be logically opposed to each other'. That genius will certainly be needed if the devolution settlement is to prove a success. The Russian painter, Wassily Kandinsky, predicted that the 20th century would see the triumph of 'and' over 'either/or'. The history of the 20th century refuted this prediction. It is just possible, however, that the evolution of the British state in the 21st century could prove him to have been right before his time.

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