

Devolution in the United Kingdom: a case of perpetual metamorphosis

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Abstract

Il processo di devolution, avviato ormai da un decennio dal governo Blair, è ancora in una fase di transizione. Questo articolo indaga le ragioni di questa riforma e gli effetti che essa ha avuto nelle varie parti del Regno Unito. In primo luogo, vi è una discussione circa l'impatto asimmetrico della devolution sulle convenzioni costituzionali dell'Inghilterra e sul ruolo del Parlamento di Westminster. Per quanto attiene alla Scozia, invece, ad essere oggetto di discussione è l'assetto finanziario così come delineato dalle raccomandazioni della Commissione Calman, che a breve dovranno essere attuate da parte del governo. Il terzo aspetto dibattuto riguarda l'incremento dei poteri legislativi dell'assemblea del Galles ed i suoi effetti. Infine, ci si sofferma sull'impatto istituzionale della devolution in Irlanda del Nord e sulla evoluzione in risposta ai cambiamenti in atto sul piano politico.

1. Introduction

The introduction of devolution in the UK was a major constitutional departure which has fundamentally changed the constitutional landscape but devolution was never part of a grand constitutional design, rather, in each case a form of devolved government was tailored to meet local conditions in response to political pressures which were felt at the moment of its conception. Reviewing the situation after more than a decade we find that not only have the political conditions been transformed with the election of a Conservative/Liberal Democrat coalition government at Westminster but also the ground rules of devolution itself have already been modified or are facing extensive revision. Moreover, the economic environment has also been transformed. The government has announced cuts in public expenditure

which go beyond anything experienced in recent times¹. Against this background this article touches on the debate over the funding of devolution. Evidently, these cutbacks will affect future allocations to Scotland, Wales and Northern Ireland under existing arrangements but it is of particular current significance that the Cameron/Clegg government has already committed itself to implementing the recommendations of the Calman report which promises to change the financial parameters of funding north of the border. Turning to Wales, it will be apparent that the institutional structure and legislative potential were modified by the *Government of Wales Act 2006* in the light of the practical difficulties faced by the Assembly after its launch back in 1999. Now there appears to be discernible trend to convergence as a referendum is to be held in March 2011 in Wales to decide whether the Assembly should be given full law making powers comparable to those granted to the Scottish Parliament and the Northern Ireland Assembly. In order to deal with the conflicting political pressures which led to many years of conflict a complex system of devolution was devised for Northern Ireland but once again it will be evident that further modifications have been necessary in response to a changing political narrative. This discussion begins with a brief assessment of the constitutional impact of devolution on England. Although there is no sign of any consensus over how to address the English question we will see that devolution has distorted the role of the English Parliament as well as calling into question the distribution of political representation in the United Kingdom.

2. *The English Question*

In terms of overall constitutional design the most striking characteristic of devolution is its asymmetry. This asymmetry is evident in the sense that each of the devolved systems is distinct in its overall conception, but it is most apparent because England by far the most

(1) According to government figures over 4 years the budget allocation for Scotland is expected to be reduced by 10.6%, the budget in Wales will be reduced by 11.4% and in Northern Ireland by 10.7%.

populous part of the United Kingdom² was entirely omitted from the devolution equation. No equivalent nationwide layer of regional or devolved government was proposed to coincide with devolution but nevertheless devolution has exerted a significant influence on the workings of the Westminster system as well as prompting calls for further constitutional reform. The so-called “West Lothian question” has been recognised since the conception of devolution. In essence, establishing a Scottish Parliament, and to a lesser extent a Northern Ireland Assembly and a Welsh Assembly, plays havoc with the notion of representative government in the United Kingdom. Furthermore, Westminster MPs representing English, Northern Irish and Welsh constituencies no longer vote on devolved matters which now become the responsibility of devolved bodies, but Scottish, Northern Irish and Welsh MPs at Westminster retain the right to vote on all bills coming before the Westminster Parliament, including those concerning domestic policy for England. Further still, by the transfer of many domestic functions to the Scottish, Welsh and Northern Irish executives Scottish, Northern Irish and Welsh Westminster MPs have a greatly reduced role to play in relation to their constituents. The obvious line of accountability for the devolved areas of domestic affairs is through their representatives in Edinburgh, Belfast or Cardiff³. Bogdanor points out: “Westminster, therefore, is no longer a Parliament for the domestic and non-domestic affairs of the whole of the UK. 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 might be suggested, a quasi-federal parliament”⁴. Regarding Westminster as a

(2) England (51.4), Scotland (5.1), Wales (2.9), Northern Ireland (1.75), Office of National Statistics 2008.

(3) The significance of Westminster legislation over devolved matters requires Westminster's Scottish MP's to continue to be the guardians of Scottish interests. See A. PAGE and A. BATEY, *Scotland's Other Parliament: Westminster Legislation about Devolved Matters in Scotland since Devolution*, in *Public Law*, 2002, pp. 501-524, at p. 522.

(4) V. BOGDANOR, *The West Lothian Questions*, in *Parliamentary Affairs*, Vol. 63, No. 1, 2010, pp. 156-172, 156.

quasi-federal Parliament might be putting it rather too strongly especially given the fact that for as long as sovereignty is retained it is possible, in theory at least, for the Westminster Parliament to take back the powers it has given away.

What is undeniable however, is that this asymmetry raises further questions which when answered, will result in further change⁵. To date, there has been no strong English backlash to devolution and there are few advocates of an English Parliament with equivalent status to the Scottish Parliament, which in any event would be a very expensive option⁶. The introduction of a balanced confederation as part of a new codified constitution is not in immediate prospect. Furthermore, the proposals by the Labour Government for regional assemblies were decisively rejected at the first hurdle in the referendum held in the North East of England⁷. An alternative approach to this problem seeks to tackle the voting rights of Westminster MPs⁸. The proposal which is much less radical than resorting to an English Parliament or to some form of regional government for England, would be to introduce a new political convention or implement new procedures and rules within Parliament which would prevent Scottish and Northern Irish Westminster MPs⁹ from voting on legislation not applying in Scotland and Northern Ireland¹⁰. It should be pointed out that any attempt to restrict the voting rights of Scottish, Welsh and Northern Irish MPs at Westminster would be politically controversial,

(5) For a more detailed evaluation of the options see R. HAZELL, *Conclusion: What are the answers to the English Question*, in R. HAZELL (ed.), *The English Question*, Manchester, Manchester University Press, 2006.

(6) The case against an English Parliament is set out in more detail in P. LEYLAND, *Post Devolution: Crystallising the Future for Regional Government in England*, in *Northern Ireland Legal Quarterly*, Vol. 56, No. 4, Winter 2005, pp. 435-462, 445.

(7) P. LEYLAND, 2005, p. 453ff.

(8) See M. RUSSELL and G. LODGE, *The government of England by Westminster*, in R. HAZELL (ed.), *The English Question*, Manchester, Manchester University Press, 2006.

(9) The same rule presumably applying to Welsh MPs assuming that the Welsh Assembly gains law making powers following the 2011 referendum.

(10) See M. KEATING, *The UK as a post-sovereign polity*, in M. O'NEILL (ed.), *Devolution and British Politics*, Harlow, Longman, 2004, p. 323.

as Labour traditionally relies heavily on the votes of MPs in Scotland and Wales where its support is concentrated while Conservative support is strongest in England¹¹. A further problem in introducing any restrictive rule over the way legislation is considered by MPs as it passes through Parliament concerns the technical difficulties in drafting legislation with this consideration in mind. For example, where there are mixed clauses some of which only apply to particular parts of the UK¹². The 2010 Conservative party manifesto included a pledge to introduce “English votes for English laws”¹³ but after the general election the ruling Conservative Liberal Democrat coalition has announced its intention to set up a Commission to consider the West Lothian question, including the related issue of the voting rights of Westminster MPs¹⁴. The government elected in May 2010 has proposals to promote localism in England by making local government more autonomous. On 20 October 2010 the controversial spending review announced a 26% reduction in local government revenue funding over four years, but at the same time the government is ending ring fencing of revenue grants to allow greater flexibility in transferring funds between different budget heads¹⁵. In sum, it would appear that in the short to medium term there will be no serious attempt to address the West Lothian question. The present government has no plans for a radical scheme of English devolution. It is mainly concerned to reduce public expenditure but at sub national level it will grant local government more freedom in how it allocates spending between the various services it performs.

(11) RUSSELL and LODGE, 2006, p. 84ff.

(12) For more detailed discussion see B. HADFIELD, *Devolution, Westminster and the English Question*, in *Public Law*, 2005, pp. 286-305, at p. 301.

(13) See Conservative Party Manifesto 2010, p. 84. William Hague, Michael Howard and David Cameron, when leader of the opposition, supported this idea.

(14) See the Conservative Lib-dem agreement reached after the 2010 election.

(15) See e.g., *Council cuts are a confidence trick, Let people power local services*, in *The Guardian*, Friday 22 October, 2010. <http://www.communities.gov.uk/corporate/about/howwework/corporatereports/reportsaccounts/sr2010/>

3. *Scotland*

Scotland was granted the strongest form of devolved government reflecting the high degree of political support for devolution. Scottish devolution is based on a single chamber Scottish Parliament (SP) of 129 elected members with full law making powers over devolved functions¹⁶. The Parliament being elected for a 4 year term¹⁷. Following an election to the SP a government is formed after Parliament has nominated a First Minister. In turn, the First Minister is empowered to appoint ministers from Members of the Scottish Parliament (MSPs) to form a Scottish Executive (now called the Scottish Government). The executive group of ministers is roughly equivalent to the Cabinet (under the Westminster system) and the ministerial appointments are made subject to Royal approval¹⁸. The SP and Government were given responsibility for many aspects of Scotland's domestic policy¹⁹ but at the same time there are particular functions reserved for Westminster²⁰. The Scottish Government is the administrative organ which took over most of the powers of the Scottish Office²¹, and it is responsible for the implementation of policy in Scotland. The SP also exercises an oversight function by way "subject" committees which shadow the main Scottish departments²². The law making power of

(16) *Scotland Act 1998*, s. 6. The *Scotland Act* is herein after referred to as the SA. There is additional member system of election explained in the section on Wales.

(17) SA s. 2 an election can be called prematurely in certain circumstances.

(18) See SA s. 47.

(19) Functions conferred on the Scottish Parliament and Executive include: education, law, courts, prisons, judicial appointments, economic development, agriculture, fisheries, local government, the environment, housing, passenger and road transport, forestry and the arts. Matters reserved for Westminster are listed in some detail in the SA, schedule 5.

(20) See *Scotland Act 1998*, s. 29 and schedule 4. This includes: education, law, courts, prisons, judicial appointments, economic development, agriculture, fisheries, local government, the environment, housing, passenger and road transport, forestry and the arts.

(21) Prior to devolution the Secretary of State for Scotland was the Cabinet minister with executive responsibility for Scotland.

(22) For a discussion of the SPs law making role see A. PAGE, *A Parliament that is Different? Law Making in the Scottish Parliament*, in R. HAZELL (ed.), *Devolution, Law Making and the Constitution*, Exeter, Imprint Academic, 2005.

the SP although described as primary legislation is unlike primary legislation of the Westminster Parliament. This legislative power is strictly limited to matters under the scope of its competence, reflecting the concern of the Westminster Parliament to retain its legal sovereignty²³. In essence, Scottish devolution introduced a locally elected Parliament and the functions previously performed by the Scottish Office were assigned to the Scottish Government. This gave Scotland improved mechanisms of accountability that involve an increased level of political participation and representation²⁴.

4. *The Path to Financial Autonomy?*

In Scotland the most important change on the horizon concerns the financing of devolution. The lack of any built-in correlation between tax and spend has been frequently presented as a fundamental weakness of devolution in general, and Scottish devolution in particular²⁵. The First Minister has recently stated that: "We need to move from financial and economic policy that vitally affects Scotland, being decided outside Scotland, to a position where such key decisions are taken in Scotland, for the benefit of the Scottish economy"²⁶. Given the extent of the powers conferred on the Scottish Parliament this almost complete lack of autonomy is a particularly serious issue in relation to Scotland²⁷. It is argued here that what is desirable in terms of finance depends not only upon the nature of the devolved government in

(23) See *Scotland Act 1998*, section 29(2)(b); G. GEE, *Devolution and the Courts*, in R. HAZELL and R. RAWLINGS (eds.), *Devolution, Law Making and the Constitution*, Exeter, Imprint Academic, 2005.

(24) An impressive feature in Scotland and Wales is the proportion of women in the Scottish Parliament and the Welsh Assembly.

(25) P. LEYLAND, *The Constitution of the United Kingdom: A Contextual Analysis*, Oxford, Hart Publishing, 2007, p. 198.

(26) A. SALMOND, *Choosing Scotland's Future*, Edinburgh Lecture, 12 January 2010.

(27) The Calman Commission which was set up to review the provisions of the *Scotland Act 1998* made recommendations for changing the financial provisions in order to provide greater accountability. The Holtham Commission was established by the Welsh Assembly Government to consider alternative funding mechanism for Wales. See *Funding devolved government in Wales: Barnett and Beyond*, July 2009.

place but that the financial basis requires as near to a consensus as possible on the system employed whatever that system is. It might be suggested that perhaps one can think of the relationship between England and Scotland in terms of a form of arranged marriage. The couple enter into devolution after negotiating the terms and if the parameters are changed, whether or not by the dominant partner, it may increase the potential for endless disputation and eventually divorce. In an important sense the much maligned Barnett formula might be regarded as the magic ingredient of devolution which has prevented anything like this happening so far.

Before discussing proposals for reform in the UK it is important to understand how the Barnett formula works²⁸. The formula sets out a *ratio* by which the total spending is fixed in relation to England²⁹. An overall budget is made available annually by the Westminster Parliament in each departmental field and the “Barnett formula” has determined the allocations for the increase or decrease in expenditure according to a *ratio* calculated on relative population size. In its original form, for every £85 on English services, Scotland received £10, Wales £5 and Northern Ireland £2.75³⁰. The formula relates the levels of spending by the Westminster Parliament to the amounts made available to Scotland, Wales and Northern Ireland. In effect, it guarantees an amount reflecting a proportion of the spending allocated to England. For example, at the time when devolution was introduced in 1998 for every £100 of spending per head in England, £132 was spent in Scot-

(28) D. BELL and A. CHRISTIE, *Finance: Paying the Piper, Calling the Tune*, in A. TRENCH *The Dynamics of Devolution: The State of the Nations 2005*, Exeter, Imprint Academic, 2005, p. 162ff.

(29) There have been changes to the Barnett formula. Until 1985 the formula was applied in real terms with figures rolling forward from one year to another with an in-built allowance for inflation. Post-1985 expenditure changes were allocated in nominal terms only. In 1992 the formula was revised to reflect the population figures given in the 1991 Census. In 1997 the government introduced an annual revision of the Barnett population weighting based on the latest population estimates for England, Scotland and Wales.

(30) See House of Commons Research Paper 98/8, *The Barnett Formula*, January 1998.

land³¹. The formula is sensitive to changes in population. This variable is present because of the way the *per capita* expenditure is calculated. For example, when it first came to be applied the Barnett formula allocated 10/85ths of the increases in comparable English provision to the Scotland program. The formula relates not to the total provision, but only to the increases (or decreases) in allocations made in successive Public Expenditure Surveys. These are now termed Spending Reviews (SRs). The relatively higher expenditure in Scotland per head of population comes not from the formula, but from the then existing expenditure levels when the block and formula arrangements were first established³². Following the UK Comprehensive Spending review announced on 20 October 2010 the amount allocated to Scotland under the formula between 2011-12 and 2014-15 is set to diminish by 10.6% as a *ratio* of the reduced spending allocated in England³³.

The *Scotland Act* allows the Scottish Parliament to pass a resolution to vary the income tax in Scotland by up to 3p in the pound³⁴. However, these tax raising powers have never been used. This is for obvious political reasons, a party offering to tax more heavily, even if this was to increase the services on offer, would be likely to lose popularity and support at the ballot box, and besides, there was no imperative to pursue this course for as long as the Barnett formula ensured that Scotland received relatively generous funding. Continuing with the same financial arrangements concealed the impact both in regard to the rest of the UK and in regard to Scotland. Until recently the effects of devolution³⁵ were barely noticed South of the border³⁵. "One of the

(31) N. KAY, *The Scottish Parliament and the Barnett Formula*, in *Fraser of Allander Institute Quarterly Economic Commentary*, 24, 1, 1998, pp. 22-48.

(32) For example, under the formula for 2007-2008 Scotland received £5,676, Northern Ireland £5,684 and Wales £5,050 while for England the amount will have been fixed at £4,523 per capita.

(33) <http://www.scottish.parliament.uk/business/research/subject/EcoFin.htm>.

(34) SA 1998, Part IV.

(35) D. McCrone, *Conundrums and Contradictions: What Scotland wants*, in C. Jeffery and J. Mitchell, *The Scottish Parliament 1999-2009: The First Decade*, Hansard Society, 2010, p. 111.

most striking features of the early years of the post 1997 devolution arrangements was the lack of public controversy over financial matters. Behind-the-scenes haggling among bureaucrats and politicians did not erupt into political warfare³⁶. A comparison might be made with “fiscal federalism” in Italy which appears to be fundamentally divisive and is likely to have precisely the opposite effect³⁷. The Barnett formula provided a method of making funding allocations that were in line with previous practice. Furthermore, after the introduction of devolution it worked in harness with another distinctive characteristic of devolution, namely, the degree of flexibility granted to the Scottish government in the way it can choose to divide up the cake between the functions that fall under its responsibility³⁸. A relatively generous allocation has provided scope for policy divergence without funding shortfalls and drastic cutbacks in other areas. At the inception of devolution both parties, in the form of the Westminster government and the Scottish government, agreed to carry on with their existing arrangements. After all as Professor McLean points out: “Defenders of the *status quo* may fairly say that Barnett was the deal on which the Scots and Welsh were invited to vote: they voted for devolution on the assumption that Barnett would continue; and therefore it should”³⁹. However, in terms of this relationship the arranged marriage has reached a stage where the original financial terms have been subject to review. The three major national parties going into the May 2010 General Election mentioned support for changes in the Calman Commission, presumably including the replacement of Barnett by a needs

(36) A. KING, *The British Constitution*, Oxford, Oxford, University Press, 2007, p. 197.

(37) P. LEYLAND, “Fiscal Federalism” and Reforming the Financial Parameters of Devolution: Italy and the UK Compared, in *Percorsi costituzionali*, a. II, 2009, pp. 239-249.

(38) The Treasury has confirmed that the devolved executives will continue to be free to allocate funding including between capital and resource budgets in line with their priorities. Funding the Scottish Parliament, National Assembly of Wales and Northern Ireland Assembly: Statement of Funding Policy, HM Treasury, 6th ed., October 2010, at para. 2.20.

(39) I. McLEAN, *What’s Wrong with the British Constitution*, Oxford, Oxford University Press, 2009, p. 171.

based formula⁴⁰. It is interesting that only the Scottish National Party (SNP) who do not support the union accepted the continuance of Barnett. The SNP stated that they would press for the fair application of the Barnett formula⁴¹, which given its fundamental deficiencies seems surprising. Incidentally, the SNP is a party whose policies demand high levels of spending on social policies etc. so it needs high levels of funding in order to meet its obligations.

The Calman Commission which was established by the Scottish Parliament and UK government to review devolution ten years after its introduction has recommended the abolition of variable income tax and its replacement with a new Scottish rate of income tax. This would be reduced by 10p in the pound, but a new needs based block grant allocation from Westminster would be reduced accordingly. The needs based block grant would be determined by a new UK Funding Commission operating at arms length from the treasury. In addition, Scottish Ministers would be given additional borrowing powers and the Scottish Parliament would have the power to introduce new taxes applying in Scotland but only with the consent of the Westminster Parliament⁴². Would the implementation of the Calman proposals mean the end of consensus? Any failure to reach agreement on a revised basis for allocating funding and for local tax raising is likely to lead to serious disputes between the administrations and, metaphorically, the marriage going on the rocks.

In regard to new forms of locally raised funding Professor Muscatelli's report shows that each option has its strengths and weaknesses and these are carefully evaluated. For example, different rates of excise

(40) The Conservative Manifesto 2010, Invitation to Join the Government of Britain, Strengthen the Union, p. 83; Labour Party Manifesto 2010, A Future For All, p. 5; Liberal Democrat Manifesto 2010, A Change that works for you, p. 92.

(41) The SNP argues for a new independent appeal process so that we move away from the current position where the UK is judge and jury in any disputes between the devolved governments and Whitehall. That would stop the Treasury from subverting the Barnett formula. *Elect a Champion. The Scottish National Party Manifesto 2010* advocates "fiscal autonomy for Scotland", see p. 11.

(42) *Serving Scotland Better: Scotland and the United Kingdom in the 21st Century*, Final Report – June 2009, Recommendation 3.1-3.7.

duty would create incentives for tax avoidance⁴³. Devolving corporation tax has been advocated on the grounds that it might be used to promote a more competitive environment in Scotland⁴⁴ but this might have detrimental consequences for the remainder of the UK and the tax might not raise sufficient revenue. Moreover, corporation tax is not paid by ordinary citizens so it does not address the relationship between tax and spend. The question is also whether the alternatives are viable in terms of the scale of revenue raising. The scope for changing the level of VAT is constrained by EU law⁴⁵. The report notes that “the existing tax instruments most suitable for devolving are those based on relatively immobile factors – that is to say the tax base is fixed. This means potential candidates would be stamp duty on property sales (but not equity transactions), landfill tax, air passenger duty and aggregates levy. However, the yield of such taxes is modest – combined they are estimated to contribute around 2% of the total of tax receipts in Scotland”⁴⁶. They may be deemed suitable but such taxes will not provide sufficient revenue.

It seems that an important issue which is in danger of being seriously underplayed is the fairness of any tax regime. The report refers to additional implementation costs of extending Scottish Variable Rate to the higher rate of income tax and that this category of tax payer would be able to minimise their liability⁴⁷. As a progressive tax a form of income tax can be vigorously defended on the grounds that higher earners pay more and a progressive element could equally be built into a revised system of National Insurance Contributions. A clear relationship can be established between higher rates of income tax and higher levels of services and this translates easily into the political arena. Parties promising more public welfare would be required to raise the tax while other parties not believing in high profile govern-

(43) Evidence from the Independent Expert Group to the Commission on Scottish Devolution, 2009, para. 5.3.

(44) *Ibid.*, para. 6.3.

(45) *Ibid.*, para. 7.5.

(46) *Ibid.*, para. 7.6.

(47) *Ibid.*, para. 10.2.

ment could promise reductions in taxation but at a price in terms of health, education, housing etc.

But the rub here concerns another crucial assumption which has been guaranteed by the continuance of Barnett funding, namely, existing UK wide provision of services have been taken as a given. The existence of such services has been regarded as a baseline, a minimum that has been taken for granted, with the surplus that Barnett delivered allowing for more generous provisions North of the border. As Keating points out: "Scotland's financial settlement is unusual in international comparison, since it combines a transfer of accounting of the whole of the Executive's spending with complete freedom of allocation"⁴⁸. Exactly the same point applies to Wales and Northern Ireland. In other words, where a devolved administration does decide to pursue a policy which differs from that followed or approved of by Westminster, they cannot be financially constrained from doing so.

However, Professor Bogdanor has explained that under different circumstances devolution has the potential to undermine the fundamentals of the Welfare State. He points out that: "Devolution allows the non-English parts of the Kingdom to develop their own distinctive priorities in public policy. But the Welfare state was founded on the principle that the needs of the citizen should be determined not locally, but by central government, which alone could balance the requirements of different parts of the Kingdom, and the needs of those living in different parts of the Kingdom"⁴⁹. To take one prominent example, in regard to providing residential care for the elderly, the Scottish Parliament has decided to provide a general entitlement to such care which goes considerably beyond that available in the remainder of the United Kingdom⁵⁰. The problems would arguably be much greater if the decision had been to cut back on such services so that they were less generous than those in the remainder of the UK.

(48) M. KEATING, *Policy Convergence and Policy Divergence in Scotland under Devolution*, in *Regional Studies*, Vol. 39.4, June 2005, pp. 453-463, 459.

(49) V. BOGDANOR, *The New British Constitution*, Oxford, Hart Publishing, 2009, p. 111.

(50) See, for example, A. BOWES and D. BELL, *Free Personal Care for Older People in Scotland: Issues and Implications*, in *Social Policy and Society*, 2007, 6, 3, pp. 435-445.

A fundamental assumption which has underpinned the welfare state from its inception is the recognition of a uniform base level of consistency in service provision applying to areas such as health, pensions and other social benefits. This is now reinforced by the *Human Rights Act 1998* which applies to all parts of the United Kingdom and which makes the European Convention on Human Rights enforceable under domestic law⁵¹. Although the convention does not cover social and economic rights as such, it could be maintained that citizens convention rights had been breached in one of the devolved parts of the United Kingdom on grounds of deprivation of the right to life or discrimination if citizens were denied access to such basic provisions⁵². Unless the needs based replacement for Barnett accepts a relatively generous baseline of funding there are several dangers. The first is that Westminster progressively legislates to ring fence categories of funding, and in doing so, restricts the scope of devolved government to pursue distinctive policy in accordance with local preferences. The second is that it raises the spectre of a regular haggle on the annual determination of block grant funding allocation from the Treasury. One way to avoid haggling is to establish an independent arbiter to perform the task. The example of the Australian Commonwealth Grants Commission was cited as an independent expert body⁵³. It advises the federal Government in Australia with terms of reference framed by the Commonwealth Treasurer after consultation with the states and the territories. Crucial to that operation is the fact that its impartiality is accepted by the states and the territories and the fact that the commission's advice has always been accepted by the federal Government without any hesitation. We will have to see how future legislation designs such a body and whether it can secure its independent status but it will have many controversial factors to weigh in

(51) P. CRAIG, *Administrative Law*, 6th edn., London, Sweet and Maxwell, 2008, p. 614.

(52) See e.g. *R. (Rogers) v Swindon NHS Primary Care Trust* [2006] 89 BMLR 211.

(53) First Evidence from the Independent Expert Group to the Commission on Scottish Devolution, Part 3: Some experiences from around the World, November 2008, p. 31ff.

making its recommendations. How much weight will be given to the relative wealth of Scotland, Wales and Northern Ireland? How much account will be taken of the previous approach under Barnett and pre-Barnett? What allowance is made for Scotland's climate and geography? To what extent should the special health needs of Scotland be taken into account? etc.

Although devolution fell short of the objective of some nationalists it was designed to satisfy the aspirations of most of the Scottish electorate. There is no doubt that Scottish devolution has been accepted as a permanent fixture by all the major political parties in Scotland and in England. Moreover, the devolution arrangements have provided considerable scope for policy divergence as we will see in the next section. Nevertheless, the political climate has been changeable. By the time of the 2007 elections for the Scottish Parliament Labour had lost their ascendancy as the party in power only to be replaced by a minority Scottish Nationalist government committed to holding a referendum on Scottish independence in face of co-ordinated opposition from the other parties. The tide of support for independence has ebbed and flowed since 2007 as the economic climate has changed. For example, North Sea oil revenues which the nationalists have long argued belonged to Scotland are now very much in decline. Also, the Republic of Ireland when its economy was riding high had been singled out by prominent nationalists as a model for an independent Scotland within the EU, but the collapse of the Irish economy has exposed the potential weakness of an independent Scotland. This weakness was underlined when the British Treasury bailed out the banks including the Royal Bank of Scotland⁵⁴. The recession appeared to have brought home uncomfortable economic factors⁵⁵. On the other hand since the May 2010 general election and the subsequent announcement of cuts to the Scottish budget the level of support for Scottish independence has increased but there is still a comfortable majority in favour of the union. More than two thirds of the Scottish electorate believe the Scottish Parliament should have more powers.

(54) *UK banks receive £37bn bail-out*, BBC, 13 October 2008.

(55) *850bn: official cost of the bank bailout*, in *The Independent*, 4 December 2009.

5. *Wales: Evolving towards a uniform UK model?*

Although Wales has a strong cultural tradition and a living language widely spoken in parts of the country there was much less public support for devolution in 1998. Only just over 50% voted yes in the referendum required to trigger its introduction. The story in Wales has been one of consolidation and development. Wales began in 1999 with the most limited form of devolution which had many obvious structural affinities with local government⁵⁶ but we will see that there has been a trend towards convergence of types between the form of devolution in Wales and Scotland. The *Government of Wales Act 1998* established a single chamber Assembly for Wales, consisting of 60 members which is elected every four years by a combination of simple majority and additional member system⁵⁷. Following an election the Assembly Members elect a First Secretary who in turn appoints the other Assembly Secretaries forming the Welsh government (cabinet of ministers)⁵⁸. These cabinet members have the equivalent of departmental responsibility for their given policy areas but whereas the Scottish Parliament is granted general competence, subject to the reserved matters under the *Scotland Act*, in the case of Wales powers are conferred in respect of particular areas of policy⁵⁹. A major difference in comparison with Scotland and Northern Ireland was the distinct form of government, in the sense that the Assembly was originally only a body corporate or a collective repository of functions. There was no separate executive. "At the core of the Assembly, government

(56) For a compelling study of the parameters of Welsh devolution see: R. RAWLINGS, *Delineating Wales: Constitutional, Legal and Administrative Aspects of National Devolution*, Cardiff, University of Wales Press, 2003.

(57) GWA ss. 3-7.

(58) GWA s. 53(1) and (2).

(59) The principal matters devolved are: agriculture, forestry, fisheries and food, environmental and cultural matters, economic and industrial development, education and training, health, housing, local government, social services, sport and tourism, town and country planning, transport, water and flood defences and the Welsh language. The Assembly and executive are also responsible for many Welsh quangos (non-departmental governmental organisations, funded and appointed by government e.g., Welsh Health authorities, Welsh Tourist Board).

structure [took] on a hybrid character. The development reflect[ed] the competing claims of a cabinet model versus a committee or classical local government model of administration”⁶⁰. This meant that all functions were legally vested in the Assembly with power then delegated to the First Secretary and then to the other Assembly secretaries responsible for implementing policy. Even before any formal changes were considered a distinction had emerged between the legislative assembly and the Welsh Assembly government. Without any statutory authority by 2002 assembly secretaries were called ministers and the *de facto* executive was referred to as the “Welsh Assembly Government”. Following the recommendations of the Richard Commission this change was officially sanctioned under part 2 of the *Government of Wales Act 2006*. A strong executive in Wales has been identified as part of the legacy arising from this institutional feature⁶¹.

The devolved administration took on the functions previously in the hands of the Welsh Office, the Whitehall department for Wales. The Welsh form of executive devolution involves the horizontal division of powers between primary and secondary law making which included “the specific enumeration of the powers devolved, statute by statute”⁶². The Welsh Assembly is required to form policy and take decisions in its particular areas of responsibility, and through its subject committees it is responsible for executive scrutiny.

The second major difference at its inception was that the Welsh Assembly unlike the Scottish Parliament and Northern Ireland Assembly was not granted the power to pass legislation in its own right. The fact that Welsh bills had to take their place in the queue before being shepherded through the Westminster Parliament by the Welsh Secretary was regarded as serious drawback⁶³. Otherwise, the Welsh

(60) R. RAWLINGS, 2003, p. 7.

(61) A. TRENCH, *Wales and the Westminster Model*, in *Parliamentary Affairs*, Vol. 63, No. 1, 2010, pp. 117-133, 124.

(62) R. RAWLINGS, 2003, p. 5.

(63) R. RAWLINGS, *Law Making in a Virtual Parliament: The Welsh Experience*, in R. HAZELL and R. RAWLINGS (eds.), *Devolution, Law Making and the Constitution*, Exeter, Imprint Academic, 2005.

Assembly only had the power to pass secondary legislation⁶⁴. The Richard Commission was set up in 2002 not only to look into the status of the Welsh Assembly government already mentioned and the electoral arrangements in Wales but it also considered the question of the lack of any direct legislative powers⁶⁵. There had been almost immediate calls after devolution to give the Welsh Assembly the power to pass laws.

Following the publication of the Richard Commission report the Labour Party promised to: “develop democratic devolution by creating a stronger [Welsh] assembly with enhanced legislative powers”. Under section 93 of the *Government of Wales Act 2006* the Assembly were granted powers to pass a form of law known as a “Measure of the National Assembly of Wales”. These “measures” are enacted by first receiving scrutiny and approval by the Assembly, and then the measure is referred to the Westminster Parliament for approval by resolution of each House before being recommended as a new form of Order in Council⁶⁶. In effect, this new procedure created a special form of delegated legislation which potentially could be vetoed at Westminster. However, in practice, the new procedure overcame the problem of securing the passage of legislation required for Wales through the Westminster Parliament. Previously, Welsh bills had to take their place in the queue and then they were shepherded through Parliament by the Secretary of State for Wales⁶⁷. In another sense these measures to enhance the law making capacity of the Welsh As-

(64) GWA 1998, ss. 64-68. These powers might be compared to those available to local authorities.

(65) *Report of the Richard Commission on the Powers and Electoral Arrangements of the National Assembly for Wales* (March 2004). The Commission also recommended that the membership of the Welsh Assembly should expand from 60 to 80 members and that it should be elected by single transferable vote (STV) rather than the present additional member system.

(66) GWA 2006, s. 94. Orders in Council are usually secondary legislation issued under powers in a parent act and they are often used for transferring powers and responsibilities.

(67) R. RAWLINGS, *Law Making in a Virtual Parliament: The Welsh Experience*, in R. HAZELL and R. RAWLINGS (eds.), *Devolution, Law Making and the Constitution*, Exeter, Imprint Academic, 2005.

sembly⁶⁸ have a wider incidental impact as there is now distinctively “English” legislation introduced before the Westminster Parliament⁶⁹. While the introduction of Measures of the National Assembly of Wales circumvent the logjam at Westminster they might be regarded as a stop gap pending the grant of full legislative powers⁷⁰. Indeed, it was recognised that these revised arrangements could prove problematic if there is a strong conflict of wills between the Welsh Assembly and the government at Westminster. This would be more likely to occur if Labour retained its strength in the Assembly but a Conservative or Conservative/Libdem government were to be elected at Westminster. In such circumstances the veto powers could be exercised to reign back the Welsh Assembly or the Secretary of State could use powers granted under the 2006 Act to refuse with reasons to lay the measure before Parliament. The revised arrangements for Welsh legislation have not been tested since the May 2010 general election which resulted in a change of government. In fact, the Conservative Libdem Government have promoted the holding of a referendum to grant full legislative powers to the Assembly, if carried, this would render this entire procedure redundant. The Welsh electorate will be asked on March 3 2011: “Do you want the Assembly now to be able to make laws on all matters in the 20 subject areas it has powers for?” From the standpoint of constitutional design, if the answer is in the affirmative and the Welsh Assembly acquires the right to make laws, the Welsh form of devolution will have evolved to closely resemble its Scottish counterpart.

6. *Northern Ireland*

The form of devolution in Northern Ireland is fundamentally different to the systems in Scotland and Wales. The *Northern Ireland Act 1998* (NIA) was designed to restore devolved government after nearly

(68) See *Better Governance for Wales*, Cm. 6582, 2005.

(69) R. RAWLINGS, *Hastening Slowly: The Next Phase of Welsh Devolution*, in *Public Law*, 2005, pp. 824-852, 841.

(70) GWA 2006, s. 103 makes provision for the holding of a referendum before full legislative powers are granted under ss. 107-116.

thirty years of violent conflict⁷¹. It resulted from protracted negotiations between the main political parties which led to the Good Friday Agreement in 1998. Before discussing the reasons for the initial difficulties with devolution in NI it will be helpful to sketch out the key features of the system.

Northern Ireland has a directly elected Northern Ireland Assembly consisting of 108 members elected every four years⁷². These members are elected by Single Transferable Vote (STV) from 18 six-member constituencies. The Assembly is given competence to exercise legislative authority⁷³ over those matters falling under the responsibility of the shared office of First and Deputy First Minister and the ten Northern Ireland Government Departments⁷⁴ (with the possibility of taking on responsibility for other matters as detailed elsewhere in the Good Friday Agreement). The Presiding Officer of the Assembly examines proposed legislation to ensure it falls within the legislative scope of the Assembly. Legislation passed by the Assembly requires the Royal Assent⁷⁵ and the NIA further provides that this law making power should not affect the sovereignty of the UK Parliament⁷⁶.

The NIA created a unique system of compulsory power sharing at every level of decision-making to ensure joint participation by both communities in the processes of government. The point being that: "All of the institutional arrangements are based on principles of cross

(71) C. McCrudden, *Northern Ireland, The Belfast Agreement and the British Constitution*, in J. Jowell and D. Oliver (eds.), *The Changing Constitution*, 5th ed., Oxford, Oxford University Press, 2005.

(72) See *Northern Ireland (Elections) Act 1998*, s. 1 and *Northern Ireland Act 1998*, Part II.

(73) See G. Anthony and J. Morison, *Here, There and (Maybe) Here Again: The Story of Law Making for Post-1998 Northern Ireland*, in R. Hazell and R. Rawlings (eds.), *Devolution, Law Making and the Constitution*, Exeter, Imprint Academic, 2005.

(74) The NI departments are: Agriculture and Rural Development, Culture, Arts and Leisure, Education, Employment and Learning, Environment, Enterprise Trade and Investment, Finance and Personnel, Health, Social Services and Public Safety, Regional Development and Social Development.

(75) NIA s. 5(2).

(76) NIA s. 5(6).

community support. Thus there is no single person who is head of government in Northern Ireland. A bicephalous head of government ‘the First Minister’ and ‘Deputy First Minister’ takes charge of a multi-party executive⁷⁷. Under the revised arrangement following the St Andrews Agreement in 2006 the nominating officer of the largest political designation nominates a person as First Minister while the nominating officer of the second largest political designation nominates a person to hold office as Deputy First Minister⁷⁸. A method of proportional representation determines the allocation of ministerial posts and other positions⁷⁹. Furthermore, the notion of power sharing is carried on into the decision making process itself. Key decisions have to be taken on a cross community basis. In the sense that for a decision to be approved there has to be a majority for the measure among unionists and nationalists⁸⁰. Any agreement would have to be founded upon satisfying basic demands of the conflicting factions. Changes to these basic elements would then only be possible with the consent of each community.

As well as establishing a system of devolved government, the main objective in Northern Ireland was to accommodate the deep-seated political differences between unionist and republican communities. Specialist watchdog bodies were designed to oversee the wider process of reconciliation. In particular, a Northern Ireland Human Rights Commission was set up under s.68 of the NIA to promote awareness of the importance of human rights in Northern Ireland. At the same

(77) N. BURROWS, *Devolution*, London, Sweet and Maxwell, 2000, p. 86. The single transferable vote method works as follows: Quota = total votes cast in a constituency, divided by the number of seats, plus one. Any candidate reaching the quota is elected and surplus votes from any candidates exceeding the quota are redistributed to other candidates until all the seats are filled.

(78) See *Northern Ireland (St Andrews Agreement) Act 2006*, s. 20.

(79) See *Northern Ireland Act 1998*, ss. 18 and 19.

(80) In order to achieve a proportional weighting between the two communities all elected members regardless of party must be designated Nationalists, Unionists or other. For parallel consent, there must be consent of more than 50% in each of these designated categories. Alternatively there can be a “weighted majority” of more than 60% which must include 40% of designated Unionists and 40% of designated Nationalists.

time, the Equality Commission for Northern Ireland was established under s.73 of the NIA as an independent public body responsible for the elimination of discrimination, and also for promoting good relations between different racial groups.

In order to accommodate Nationalist aspirations for a united Ireland the system of government is linked to that of the Irish Republic. To satisfy Unionists fears that the union could be severed without consent there are links with the United Kingdom. The North-South Ministerial Council brings together members of the executive of the Northern Ireland Assembly and representatives of the Irish government for the purposes of co-operation on issues of common interest. The British-Irish Council is a body to consider broader mutual interests with the UK. It consists of representatives from the Scottish Parliament, Welsh Assembly, Channel Isles and Isle of Man. Furthermore, to satisfy nationalist aspirations the need for on-going consent to remain part of the UK is built into the devolution legislation⁸¹.

7. The St Andrews Agreement and the resumption of devolution

This extremely complex form of devolution in NI was specially conceived over a period of painstaking negotiations to bring peace and reconciliation but the framework outlined, in itself, was not sufficient. In order to reach a political agreement on the institutional features of devolution based on power sharing and at the same time get the show up and running, the controversial question of disarmament of paramilitary elements and policing in Northern Ireland was set to one side as a separate process to be realised in stages. In consequence, the new arrangements were plagued with difficulties. In particular, during the first period (1999-2002) lack of progress with the disarmament process led to delays, and later repeated breakdowns in the operation of devolved government itself. On each occasion that the NIA was suspended responsibility for government reverted to the Northern Ireland Office⁸². The point that needs stressing is that the implanta-

(81) *Northern Ireland Act 1998*, s. 1.

(82) The Assembly was suspended in February 2000, August and September 2001 and from October 2002 until May 2007.

tion of devolution was being attempted as the political backdrop was itself shifting on both sides of the sectarian divide. The original agreement in 1998 was between moderate unionism mainly represented by factions of the Ulster Unionist Party led by David Trimble who served as first minister for the initial period. At this stage some Ulster Unionists members and all of the more extreme Democratic Unionist Party under the leadership of Ian Paisley refused to participate in the politics of devolved government. On the other side of the sectarian divide, the significant breakthrough in the lead up to the Good Friday agreement had been the indefinite ceasefire from the IRA. This was followed by a permanent commitment to the peace process by Sinn Fein, the political wing of the IRA, but the Social Democratic and Labour Party (SDLP) which represented moderate republicanism was the largest party (in the 1999 elections). For as long as the Ulster Unionists were split and the DUP remained hostile to devolution the prospect for the successful functioning of the devolved bodies was remote because of the lack of broad based political support on the unionist side. In subsequent NIA elections in 2003 and 2007 support increased significantly for the DUP and Sinn Fein, the more extreme Unionist and Nationalist Parties. This was at the expense of support for the more moderate Ulster Unionists and SDLP⁸³. The survival of devolution, in this form at least, now depended on resolving the outstanding issues of disarmament of the paramilitaries and the devolution of policing.

In 2005 the decommissioning issue was finally resolved. The Independent International Commission on Decommissioning reported that the IRA had put all of its arms beyond use. The last remaining obstacle concerned the future of policing in Northern Ireland. But now the changes in the political complexion of the Assembly meant that all the main parties were involved in the negotiations which led to the St Andrews agreement. The success or failure ultimately depended on the parties on both poles of the political divide, namely, the DUP under leader Ian Paisley, and Sinn Fein under leaders Gerry Adams

(83) The result of the 2007 election: DUP 36, Sinn Fein 27, Ulster Unionist 17, SDLP 16, Alliance 7, Green 1, Independent 4.

and Martin McGuinness being prepared to work in tandem when the Assembly resumed service. The St Andrews agreement reached in October 2006 set out a timetable for the restoration of devolved government which was subsequently put into statutory form⁸⁴. This included agreement for the distribution of ministerial portfolios following elections in March 2007. Before the show was put back on the road the Sinn Fein membership had been consulted and voted to support local policing in Northern Ireland and the DUP executive had agreed to share power with Sinn Fein. From the moment of restoration the Assembly in its revised form has functioned effectively. Wilford has pointed out that: “With the re-devolving of Powers in May 2007 a fresh opportunity was created for its politicians to demonstrate that devolution could be a process rather than a series of fitful events ... 23 Executive Bills have received the Royal Assent and a further nine were at various stages of the legislative process when the Assembly rose for the summer recess in July 2009. In addition, the statutory committees had published a total of 27 reports, tabled four motions for debate, submitted 39 responses to their associated departments on various aspects of policy, examined almost 600 statutory rules and were engaged in a wide range of self-selected inquiries”⁸⁵. Although the Assembly was relaunched in May 2007 the details of policing in Northern Ireland were not fully resolved until March 2010. It was at this point that the Assembly passed the *Department of Justice Act* (Northern Ireland 2010) which set up a new Department of Justice responsible for policing, prisons and courts in Northern Ireland⁸⁶. To secure agreement for this last symbolic hand over the controversial Justice ministerial portfolio was granted to David Ford of the non-sectarian Alliance Party.

(84) See *Northern Ireland (St Andrews Agreement) Act 2006*, Part 1.

(85) R. WILFORD, *Northern Ireland: The Politics of Constraint*, in *Parliamentary Affairs*, Vol. 63, No. 1, 2010, pp. 134-155, 135 and 151.

(86) See *Northern Ireland Act 1998* (Devolution of Policing and Justice Functions) Order 2010.

8. *Conclusion*

This selective discussion demonstrates the dynamism and flexibility of the UK constitution⁸⁷. During the first decade of its operation devolution was modified significantly on a pragmatic basis to improve the workability of institutions such as the Welsh Assembly and to continue the peaceful resolution of the political situation in Northern Ireland. Glancing forward, if the Calman proposals are implemented the further significant changes in prospect will seek to correct, in part at least, the lack of accountability built into the financing of devolution by introducing a substantial amount of revenue raising at devolved level in Scotland. Moreover, an altogether different change, the conferral of law making powers to the Welsh Assembly would greatly reduce the asymmetry between the three devolved systems. Otherwise, there is no sign of any further move towards a federal constitution. The introduction of some form of devolution for England would be needed for the West Lothian issue to be addressed. Finally, viewed from a different perspective it might be observed that the essential principle of the UK constitution remains intact. The Westminster parliament has maintained its sovereignty. The fact that it has retained the capacity to continually revise devolution in response to changing circumstances might be regarded as *the* crucial element in ensuring its innovation and its durability.

(87) There are other constitutional developments which relate to devolution. For example, the introduction of a Supreme Court for the United Kingdom under the *Constitutional Reform Act 2005* which is granted the jurisdiction for devolution issues previously in the hands of the Judicial Committee of the Privy Council.

