

The Scottish Referendum, the funding of territorial governance in the United Kingdom and the legislative role of the Westminster Parliament

Peter Leyland

L'articolo affronta l'impatto costituzionale del referendum per l'indipendenza tenutosi in Scozia nel settembre 2014, partendo dalla descrizione del contesto in cui l'evento si è inserito, per giungere a valutare il dibattito costituzionale sui livelli di governo subnazionali nel Regno Unito. La prima parte si concentra sui profili finanziari della devolution e considera la rilevanza delle raccomandazioni della Smith Commission circa il potenziamento delle deleghe e l'impiego delle accresciute competenze – che saranno conferite al Parlamento scozzese con la nuova legislatura del 2015 – per l'incremento delle entrate. Nella seconda parte, invece, l'attenzione si rivolge all'Inghilterra, ove sono in discussione nuove forme di governo territoriale e di devolution fiscale addizionale per le città, in risposta al rafforzarsi del decentramento verso la Scozia. La sezione finale, poi, riferisce dei più recenti tentativi di far valere la West Lothian question e si focalizza sulle proposte di riforma delle procedure di voto in seno al Parlamento di Westminster, proposte che replicano all'irrobustimento della devolution per il tramite di restrizioni al diritto di voto dei parlamentari. L'Autore rimarca che, nonostante la chiara scelta di rimanere parte del Regno Unito, il referendum scozzese importerà conseguenze di ampia portata per il Regno Unito stesso e che, peraltro, l'incidenza dei cambiamenti finanziari sarà ancora più pronunciata, a fronte dei tagli senza precedenti alla spesa pubblica necessari per raggiungere l'equilibrio di bilancio entro il 2019.

1. Introduction: the Scottish Referendum 2014

In the wake of the referendum which was held in Scotland on 18 September 2014 this article assesses the prospects for the reform of territorial governance in the United Kingdom with particular attention to the modifications in the financial arrangements that are due to be implemented in Scotland and England. The fluidity of the political process

as negotiations between parties take place has meant that events have been reported as a narrative is unfolding with considerable momentum, and, therefore, there is every likelihood that further changes will result as legislation is enacted, particularly if there is a change of government in the General Election due to be held in May 2015.

First, let us briefly review the event itself. The 2014 referendum for Scottish Independence was unlike any devolution referendum held to date because it was a binding test of opinion¹. A vote in favour of an independent Scotland would have precipitated the break up of the United Kingdom. Given its possible implications and that sovereignty remains with the Westminster Parliament, it might appear strange that this referendum was ever allowed to take place. Well before the advent of devolution the Scottish Constitutional Convention of 1989 had recognised the sovereign right of the Scottish people to determine the form of Government best suited to their needs². Notwithstanding such aspirational statements as the Scottish 'claim of right'³, in constitutional terms one of the characteristics that made devolution distinctive from federalism as a method for dealing with territorial governance was the fundamental assumption that sovereignty would be retained at national level by the Westminster Parliament⁴. Under the Scotland Act 1998 the issue of independence is clearly a constitutional issue and therefore a reserved matter for the Westminster Parliament and UK government⁵. A unilateral decision by the Scottish government to hold a binding referendum in Scotland would have been in direct conflict with the legal position and may

(1) P. LEYLAND, 'Referendums, Popular Sovereignty, and the Territorial Constitution', in R. RAWLINGS, P. LEYLAND and A.L. YOUNG (eds.), *Sovereignty and the Law: Domestic, European and International Perspectives* (Oxford: Oxford University Press, 2013), 145 ff.

(2) A. TOMKINS, 'Scotland's choice, Britain's future' [2014], *Law Quarterly Review*, 215-234, at 216.

(3) N. MACCORMICK, *Questioning Sovereignty: Law, State and Practical Reason* (Oxford: Oxford University Press, 1999), 59.

(4) P. LEYLAND, 'The multifaceted constitutional dynamics of UK devolution', *ICON* (2011), Vol. 9, No. 1, 251-273, at 253 ff.

(5) See Scotland Act 1998, Sched 5, para 1(1)(b); See S TIERNEY *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford: Oxford University Press, 2012), 146-7.

have led to protracted litigation⁶. In other words, the consent of the UK government to the holding of this referendum was essential in order for any electoral approval to Scottish secession to be legally valid⁷. By way of contrast we have seen recently that the proposal to hold a referendum in Catalonia has been challenged on grounds of its constitutional legality. The matter was referred to the Spanish Constitutional Court on the grounds that it was undemocratic and in breach of Article 8 of the Spanish Constitution⁸.

In the UK the Scottish referendum was conceded by Prime Minister Cameron on behalf of the Westminster coalition government after the political situation changed as a result of the election in May 2011. The Scottish Nationalist Party, with a manifesto commitment to hold a referendum on independence, secured an overall majority in the Scottish Parliament. It was this unexpected electoral success, indicating a clear mandate in Scotland for an independence referendum, that prompted the UK government to enter into direct negotiations with the Scottish Government on the holding of such a referendum. A referendum exposed the nation to the genuine risk of constitutional disintegration, but equally a decisive rejection after a full debate might assist the Westminster government in stemming the incoming tide of nationalism. By way of contrast, the Spanish government despite the demands of the popular movement within Catalonia will rely heavily on a clear constitutional statement of the territorial integrity of Spain by the Constitutional Court to resist holding a binding referendum⁹.

Turning next to the result, in response to the question: 'should Scotland be an independent country?', in statistical terms 2,001,926 voted

(6) A referendum on Scottish independence might have been organised by the Scottish Government as a form of consultation.

(7) See Scotland Act 1998, sch 5, para 1(1)(b) and LEYLAND *supra* (2013) 153 ff.

(8) 'Spanish government asks court to block Catalan referendum', *The Guardian*, 29 September 2014.

(9) XAVIER VILLA CARRERA, 'The Domain of Spain: How Likely is Catalan Independence?', *World Affairs*, January/February 2014.

to remain part of the Union by registering a 'No' vote, while 1,617,989 voted in support of independence with a 'Yes' vote. Although at one stage opinion polls suggested the campaigns were close this outcome amounted to a decisive margin of 55.3% against with 44.7% in favour. The turnout of 3.6 million comprising 84.6% of the electorate was very high by UK standards and it included many 16 and 17 year olds who were able to vote for the first time. Against this backdrop of falling participation in elections the referendum was viewed by many commentators as a victory for the democratic process because of the high turnout and the sophistication of the debate¹⁰. Both unionists and nationalists share a belief in Scotland's nationhood but unionists cling to the idea that national aspirations can be reached within the United Kingdom. A national discussion in Scotland ranged over a series of crucial, and, at the same time, controversial issues with the prospect of independence adding to the intensity of the debate. For instance, whether Scotland would have been able to retain the pound as its currency following a vote for independence was an important feature of the campaign. Incidentally, the relevance of economic questions concerning the viability of independence has since been underlined with the collapse in the oil price in the closing months of 2014. This is because the volatility in the price of crude oil has called into question the capacity to exploit Scotland's remaining North Sea reserves economically. While these matters would have impacted on projections of Scotland's future prosperity, in an altogether different context, it was also unclear whether an independent Scotland would have been accepted as an independent member of the EU. Admitting Scotland would of course have carried with it wider implications for the EU as a whole since other member states such as Spain are confronted with the possibility of secession¹¹. At the same time, there was no doubt that a 'Yes' vote for independence in the referendum would have had far reaching consequences for the United Kingdom. Despite the relatively large number of powers already

(10) J. STANTON, 'Democracy and Scotland: Turning out for something special', *UK Const L Blog*, 19 November 2014.

(11) See V. COMELLA, *The Constitution of Spain: A Contextual Analysis* (Oxford: Hart Publishing, 2013), 190 ff.

devolved to Scotland the disentanglement would have been extremely complicated. For instance, in addition to the questions of to the national debt, shared currency and EU membership re-arranging defence would have been another crucial issue since key naval and nuclear submarine bases are situated in Scotland¹².

The first part of this article looks at the financial basis of devolution in order to consider the impact of the enhanced revenue raising powers which will be granted to the Scottish Parliament. In the second section attention turns to England as it will be explained that new forms of territorial governance and additional fiscal devolution for English cities are being touted as an appropriate response to the major re-enforcement of devolution North of the border. The final section considers the possible impact of these changes on the Westminster Parliament. It will be argued in the discussion that follows that despite a clear decision to remain part of the United Kingdom the Scottish referendum is having a seismic constitutional impact which will extend beyond Scotland and include territorial governance in England. Moreover, the strident calls for constitutional change in Scotland, and to some extent in England, will coincide with the execution of savage cuts in public expenditure to achieve a balanced budget by 2019¹³. Given a backdrop of economic and political instability, the radical overhaul of funding and the reform of Parliament are presented here as parallel themes which frame the discussion. Of course, some reform of the Westminster Parliament to adjust to the new forms of fiscal devolution might be expected as entirely legitimate. However, it will be apparent that the spirit of national debate that characterised the Scottish referendum seems to be over, and what is currently on offer is being rushed through by the political élite with minimal deliberation. The danger is that the reforms in prospect will be piecemeal and fail to take account of the wider picture and the overall constitutional impact.

(12) See White Paper: Scotland analysis: Defence, October 2013, Cm 8714.

(13) See e.g. S. KEYNES and G. TETLOW, Survey of Public spending in the UK, *Institute of Fiscal Studies*, Briefing Note BN43, December 2014.

2. *The path to fiscal devolution*

The failure to include any built in mechanism to connect levels of spending and local revenue raising was identified from the outset as a fundamental weakness of devolution¹⁴. The grant of taxraising powers featured prominently in the discussion that preceded the introduction of the devolution legislation and featured as a question in the 1998 Scottish referendum to approve of the principle of devolution. In addition to the funding allocated under the Barnett formula (explained below) the Scotland Act 1998 conferred limited tax raising powers on the Scottish Parliament¹⁵. Despite the attention devoted to this issue, the financial powers actually granted by the Scotland Act 1998 were relatively modest¹⁶. The Scottish Parliament was empowered to vary the rate of income tax in Scotland by up to 3p in the pound by means of a Scottish income tax which could provide extra revenue totalling around £450 million¹⁷. The Scottish Variable Rate was never used for political reasons. A party offering to tax more heavily, even if this was in order to increase the services on offer, was likely to lose popularity and support at the ballot box. Furthermore, there was no imperative to pursue this course for as long as the Barnett formula guaranteed that Scotland received relatively generous funding. As rates of taxation remained constant continuing with the same financial arrangements concealed the impact of devolution, both from the standpoint of Scottish taxpayers and that of taxpayers from other parts of the United Kingdom.

3. *Why has the Barnett Formula survived?*

In order to understand the present position it is helpful to revisit the approach to devolution which has applied to date. A block grant meth-

(14) P. LEYLAND, *The Constitution of the United Kingdom: A Contextual Analysis*, 2nd ed. (Oxford, Hart Publishing, 2012), 260 ff.

(15) See Scotland Act 1998, section 73. These powers have not been used since the introduction of devolution in 1999.

(16) Scotland Act 1998, Part IV.

(17) The referendum in Scotland to approve devolution held in 1998 had a second question asking for the endorsement of a Parliament with tax raising powers.

od was first introduced for the distribution of funding between England, Scotland, Wales and Ireland in 1888 by George Goschen who was Chancellor of the Exchequer between 1887-1892. Between 1959 and 1978 the system changed so that over this period financial limits were settled by departmental negotiations with the Treasury in the same fashion as for spending programmes concerning other departments. The block grant allocation from Westminster based on the so called Barnett formula was first adopted under the Labour government (1974-79) and this has been the favoured method for financing devolution ever since. Lord Barnett recently explained that: 'There was already a long-established convention for funding public spending in Scotland, based on the relative populations of England and Scotland almost a century before. [This formula] merely adjusted the figures to take account of changes in the relative populations of the four home nations and drew up the spending figures accordingly – which actually resulted in a 2 per cent reduction in funding for Scotland.'¹⁸ Lord Barnett also pointed out another shortcoming as the formula has been applied on the basis of out-dated population statistics.

The adoption of the Barnett formula to allocate Scottish block grant expenditure was officially confirmed by Secretary of State for Scotland, George Younger, in 1980¹⁹. In fact it is illustrative of the extreme secrecy prevailing at the time, that the previous Labour government had not revealed the existence of the formula when it was first introduced²⁰. The Barnett formula was established nearly two decades before the introduction of devolution and it survived during the years of the Thatcher and Major governments (1979-1997) largely because it succeeded in diverting adequate resources to Scotland while at the same time avoiding

(18) Lord Barnett: 'I demand the shamefully unfair Barnett Formula is scrapped', *Daily Mail*, 21 September 2014. See also J. BARNETT, *Inside the Treasury* (London: Harper Collins, 1982); Lord Barnett died on 1 November 2014.

(19) See The Barnett Formula, House of Commons, Research Paper 01/108, 30 November 2001, 8. Scottish Aspects of the 1980-84 PEWP.

(20) See D. HEALD, 'Territorial Equity and Public Finances: Concepts and confusion, University of Strathclyde', *Centre for the Study of Public Policy*, No. 75, 1980.

having to deal with the question of devolution as a parliamentary or a constitutional issue²¹.

The formula sets out a *ratio* by which the total spending is fixed in relation to England²². 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 £2.75²³. 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 Scotland²⁴. The formula is sensitive to changes in population. This variable is present because of the way the *per capita* expenditure is calculated. When it first came to be applied the Barnett formula allocated 10/85ths of the increases in comparable English provision to the Scotland programme. The formula relates not to the total provision, but only to the increases (or decreases) in allocations made in successive Spending Reviews (SRs).

Despite the misgivings of Lord Barnett and others it has been argued

(21) It has been pointed out that there is no direct scrutiny of this expenditure at Westminster. See P. LEYLAND, 'Multi-Layered Constitutional Accountability and the Re-Financing of Territorial Governance in the UK', in N. BAMFORTH and P. LEYLAND (eds.), *Accountability in the Contemporary Constitution* (Oxford: Oxford University Press, 2013), 318 ff.

(22) 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.

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

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

that the Barnett formula has delivered a remarkably stable *per capita* public expenditure in Scotland, Wales and Northern Ireland since 1999²⁵. From its inception it was a method of budgeting which avoided departmental haggling. Nevertheless, a needs-based alternative was considered by the Calman working groups as part of the inquiry into greater fiscal devolution. The example of the Australian Commonwealth Grants Commission was cited as an independent expert body²⁶. It advises the federal Government in Australia with terms of reference framed by the Commonwealth Treasurer after consultation with the states and the territories. For it to function effectively it is crucial that the impartiality of the body is accepted by the states and the territories without further discussion. Adopting such an approach would however require answers to a series of complex economic and social questions. For example, how much allowance should be made for the relative wealth of England, Scotland, Wales and Northern Ireland, including North Sea Oil and gas? What special allowance might be made for climate and geography which are obviously relevant factors when considering the devolved parts of the United Kingdom? To what extent should the special health and transport needs of Scotland (Wales and NI) be allowed for? Finally, to what extent should account be taken of the previous approach both pre-Barnett and under Barnett in introducing any transition to a needs based formula²⁷? In view of the controversy involved in seeking to answer such questions, it is perhaps not surprising that the three leaders of the main Westminster parties still believe in preserving a version of the Barnett formula. In 2012-13 the formula resulted in spending *per capita* of £10,152 for Scotland against £8,512 for England. Wales despite being poorer than Scotland received £9,709 *per capita* and Northern Ireland £10,876. The absence of any legal designation of

(25) See e.g. A. CHRISTIE and J. KIM SWALES, 'The Barnett Allocation Mechanism: Formula Plus Influence', *Centre for Public Policy for Regions*, University of Sterling, Discussion Paper No. 10, December 2005, 21.

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

(27) D. BELL and A. CHRISTIE, 'Finance: Paying the Piper, Calling the Tune', in A. TRENCH (ed.), *The Dynamics of Devolution: The State of the Nations 2005* (Exeter: Imprint Academic, 2005), 169 ff.

finance to particular policy areas (commonly referred to as ring fencing) has meant that once funds have been handed over as a lump sum to the devolved administrations each government can allocate the funds according to their own preferences.

4. The Calman Commission and the Scotland Act 2012

Five years in advance of the 2014 referendum the shortcomings of devolution funding in Scotland were comprehensively reviewed by the Calman Commission which reported in 2009. Indeed, the main recommendations of Calman have since been enacted in the Scotland Act 2012²⁸. For the adoption of new forms of locally-raised funding Calman discussed not only the respective strengths and weaknesses of several forms of taxation, but also whether the options were viable in the scale of revenue raised, and whether they would be perceived as fair. Devolving corporation tax was advocated by some experts presenting evidence to the Commission on the grounds it might be used to promote a more competitive business environment in Scotland²⁹, but on the other hand, such a change might have detrimental consequences for the remainder of the UK. In addition, there was evidence that it would raise only limited revenue, and in any case corporation tax is not paid by individual voters, so this change would not help address the core issues, namely, the relationship between tax and spend, and accountability. Another proposal would have been to allow different rates of excise duty, but this change was rejected as it was likely to create incentives for tax avoidance³⁰. The scope for changing the level of VAT at devolved level is constrained by the requirements of EU law³¹.

In line with the recommendations of the Calman Commission a new Scottish rate of income tax was due to be charged on the non-savings

(28) Scotland Act 2012, Part 3, section 80A to set a rate of income tax to be paid by Scottish Taxpayers and under section 80B the power to add new devolved taxes.

(29) *Ibid.*, para 6.3.

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

(31) *Ibid.*, para 7.5.

income of Scottish taxpayers from 2016. This would have been the most important change due to be brought in under the Scotland Act 2012³². The rate paid would have been calculated by reducing the basic, higher and additional rates of income tax levied by the UK Government on Scottish taxpayers by 10 pence in the pound³³. The UK Treasury would have reduced income tax rates in Scotland by 10p, thus requiring the Scottish Parliament to make a tax decision each year (*i.e.* whether to restore the 10p or to set a Scottish rate that is higher or lower than the rate in the rest of the UK). The block-grant allocation under the Barnett formula was set to be adjusted downwards to allow for the extra revenue raised under the Scottish income tax. Under these arrangements, if spending levels remain as they were, the financial allocation would have remained more or less at parity with existing levels.

In addition, it was envisaged by Calman that the Scottish Parliament would have the power to introduce new taxes applying in Scotland but only with the consent of the Westminster Parliament³⁴. Calman recognised that the taxes most suitable for devolving would be those with a fixed tax-base³⁵. In line with this recommendation stamp duty, landfill tax and the aggregates levy will be devolved to the Scottish Parliament under the Scotland Act 2012. However, the yield of such taxes will be modest, with a contribution of around 2% of the total of tax receipts in Scotland³⁶. Finally, it was recommended that Scottish Ministers should be granted additional borrowing powers and this has been included in the Scotland Act 2012. Alongside these tax powers, the Act also provides the Scottish Government with commensurate capital borrowing powers to support further investment in infrastructure. Under the Scot-

(32) See Scotland Act 2012: A new Scottish rate of income tax which will be charged on the non-savings income of Scottish taxpayers.

(33) 'Clarifying the Scope of the Scottish Rate of Income Tax', HM Revenue and Customs, Technical Note, May 2012.

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

(35) *Ibid.*, Recommendation 3.2.

(36) *Ibid.*, para 7.6.

land Act 2012 the Scottish Government is able to borrow up to a total of £2.2 billion for capital investment via the National Loans Fund. The UK Government announced in February 2014 that it was granting the Scottish Government the ability to issue its own bonds. This will broaden the sources of financing available to the Scottish Government for capital investment when borrowing powers are implemented in 2015-16. Following the introduction of these changes it was estimated that 35% of revenue in Scotland would have been raised locally.

5. The Smith Commission and the implementation of the next phase of devolution

The Westminster government acted immediately following the outcome of the 2014 referendum. Without pausing for expert deliberation or undertaking further consultation to consider the overall financing of devolution a Commission was set up by the Prime Minister under Lord (Robert) Smith of Kelvin comprising representatives of all the major parties. The task of shaping future arrangements was placed in the hands of the established political élite. Under a tight time frame the Commission was required to agree on a concrete package of proposals in the form of a coherent set of powers for Scotland based on the promises by the pro union parties during the referendum campaign³⁷. The objective being to strengthen the Scottish Parliament's ability to pursue its own vision, goals and objectives, whatever they might be at any particular time and increase the accountability of the Parliament. Although this article is mainly concerned with the impact of the devolution of fiscal powers, it is important to recognise that the financial changes will be introduced as part of a much broader package. After agreement was reached among the party representatives a series of recommendations were made that will form the basis of legislation scheduled to be passed by the Westminster Parliament in 2015³⁸. In terms of the overall constitu-

(37) The Smith Commission: Report of the Smith Commission for further devolution of powers to the Scottish Parliament, 27 November 2014.

(38) The Smith Commission: Report of the Smith Commission for further devolution of powers to the Scottish Parliament, 27 November 2014. Published in the form of a command paper with a draft bill as *Scotland in the United Kingdom: An enduring settlement*, January 2015, Cm 8990.

tional *status* of Scotland the permanence of the Scottish Parliament and the Sewel Convention allowing for legislative consent motions will be placed on a statutory footing³⁹ and secondly the Scottish Parliament will assume all powers in relation to the holding of elections for the Scottish Parliament and for local government in Scotland⁴⁰. In addition, the list of powers devolved to the Scottish Parliament in the draft bill is extensive and is headed in importance by the devolution of welfare benefits which will mean that the Scottish Parliament will have autonomy in determining the structure and value of existing benefits or of any new benefits which might replace them⁴¹. Further, the Scottish Parliament will take over responsibility for the support for the unemployed⁴². In addition, certain powers in relation to energy efficiency and fuel poverty will be transferred to Scotland⁴³. In the domain of broadcasting there will be a formal consultative role for the Scottish Government and Scottish Parliament in reviewing the Charter under which the BBC operates and in appointments to and the setting of strategic priorities for the broadcasting regulator OFCOM⁴⁴. Other areas where additional powers will be devolved include consumer advice and advocacy, rail franchising, roads and onshore oil and gas extraction⁴⁵.

Returning to the reform of the financial parameters of devolution, unlike the Calman Commission the narrow remit of the Smith Commission left little scope for discussion of the possible replacement of the Barnett formula with a needs-based alternative (see discussion above) and the pro-

(39) Draft Scotland Bill clauses 1 and 2. Discussion of the implications of such provisions fall beyond the scope of this article but as Mark Elliott explains, whether or not such a statutory provision can be constitutionally entrenched in the UK, given the nature of parliamentary sovereignty, is matter of debate. See: 'A "Permanent" Scottish Parliament and the Sovereignty of Parliament: Four Perspectives', *Constit L A Blog*, 28 November, 2014.

(40) Draft Scotland Bill clauses 4, 5, 6, 7, 8, 9.

(41) Draft Scotland Bill clauses 16, 17, 18, 19.

(42) Draft Scotland Bill clause 22.

(43) Draft Scotland Bill clauses 38 and 39.

(44) Draft Scotland Bill clauses 34, 43 and 44.

(45) See *Scotland in the United Kingdom: An enduring settlement*, January 2015, Cm 8990.

posals for tax raising in Scotland were not required to take account of revenue raising plans for Wales and Northern Ireland⁴⁶. As we have already noted the Scotland Act 2012 was already set to make a significant difference to devolution finance by devolving a number of tax powers to the Scottish Parliament from 2016⁴⁷. The 2015 legislation will set out a revised fiscal framework for the United Kingdom in the form of a set of rules and institutions used to set and co-ordinate sustainable fiscal policy for the United Kingdom. A complex set of new measures are to be agreed so that the UK government manage UK-wide risks while the Scottish Government should in the future manage Scotland's specific risks. For example, it is envisaged surpluses will be retained by the Scottish Government and used as a contingency reserve and then the Scottish⁴⁸. Also, subject to the new fiscal rules an increase in the Scottish Government's ability to borrow for capital spending will be introduced.

Most significantly in terms of new powers, the Scottish Parliament will be able to set the rates of income tax and the thresholds at which these are paid for the non-savings and non-dividend income of Scottish taxpayers. This change will mean that the Edinburgh government will have the power to vary the rates and bands, but not the overall structure or the personal income tax allowance. From the moment of its implementation the Scottish Government will receive all income tax paid by Scottish tax payers. At the same time the receipts raised in Scotland by the first 10 percentage points in the standard rate of Value Added Tax will be added to the Scottish Government's budget⁴⁹. In view of the critical discussion of the new proposals below, it is interesting to note that the Calman Commission which had re-

(46) The Wales Act 2014 which received the Royal Assent in December 2014 grants revenue raising powers to the Welsh Assembly for the first time and opens up the possibility of powers to raise income tax following the holding of a referendum. Similar proposals have been discussed for Northern Ireland. See report prepared by Price Waterhouse Cooper on behalf of the Northern Ireland Council for Voluntary Action's Centre for Economic Development, June 2013.

(47) A. MIDWINTER, 'Fiscal autonomy in Scotland: an assessment and critique', *Public Money and Management*, January 2012, 49-52.

(48) *Scotland in the United Kingdom: An enduring settlement*, January 2015, Cm 8990, 2.4.

(49) Draft Scotland Bill clause 13.

ported in 2009 rejected the devolution of the structure of the income tax system noting that a progressive tax system redistributes proportionately more resources away from higher earners and such decisions have effects that are redistributive across different parts of the UK as well as between individuals⁵⁰. This new power over income tax will place in the hands of the Scottish Parliament a progressive tax which is earnings-related and thus fair in the sense that the amount paid is related to the capacity of individual taxpayers to pay it. In addition, some other taxes including Air Passenger Duty and the aggregates levy will be devolved to the Scottish Parliament⁵¹. Although according to the agreement Scotland's block grant allocation from the Westminster Government will continue to be determined by the Barnett formula which is explained above. The amount payable will be adjusted to take account of future tax transfers from the UK Treasury of locally raised income tax. If spending levels were to be increased in Scotland there is now an assumption that any funding shortfall would be met by increased revenue raised at the local level.

These modifications to the tax system will pose technical questions of tax collection and distribution⁵². This related issue arises because with the changes proposed under the Scotland Act 2012 the levying of income tax will be at devolved level⁵³. Since the variable tax rate was never implemented *post* 1999, no distinct mechanism was introduced to perform this task. During the passage of the 2012 Act through Parliament the Government set up a High Level Implementation Group (HLIG), jointly chaired by the Exchequer Secretary and the Secretary of State for Scotland, but with input from the relevant representative devolved bodies, to implement the introduction of the Scottish rate⁵⁴.

(50) *Serving Scotland Better: Scotland and the United Kingdom in the 21st Century*, Final Report (Calman Commission), June 2009, para 3.104.

(51) Draft Scotland Bill clauses 14 and 15.

(52) 'HMRC could veto any new Holyrood tax plans', *The Herald*, 31 May 2012.

(53) It is assumed the Scottish rate of income will be administered by the HMRC for Scottish tax payers.

(54) 'Clarifying the Scope of the Scottish Rate of Income Tax', HM Revenue and Customs, Technical Note, May 2012, paras 17-19.

6. *The impact of fiscal devolution*

The implications of increased fiscal devolution in Scotland may turn out to have unintended and indeed unwelcome consequences North of the border. Professor Tierney points out that the devolution of extensive tax and welfare competences within such a highly integrated state needs to be tested to assess the impact both on Scotland and on the rest of the UK⁵⁵. In particular, the ability of the Scottish government to sustain its policies might well be called into question. In a debate in the House of Lords following the referendum Lord Turnbull, a former Head of the Home Civil Service, stated: 'Scottish public spending is now £1,600 per head greater than in England and £500 per head greater than in Wales. These are huge sums in relation to income per head, of the order of £20,000 a year. This disparity funds policies in Scotland, such as care for the elderly, university fees and prescription charges, which are simply unaffordable elsewhere in the UK. To put it another way, a Scottish family of four receives the same social security benefits as an English family, but on top receives an extra £6,000 per year in what we used to call the social wage.'⁵⁶ The grant of these additional revenue raising powers may limit rather than increase the options available to Scottish ministers. In one study Fiscal Affairs Scotland has estimated that Scotland could have a large deficit after full fiscal autonomy is devolved⁵⁷. More spending in Scotland will now translate into higher taxes. According to one leading economist: 'There is only one way in which the Scottish government's new freedom to vary income tax can be exercised, and that is to raise it. That was not what the supporters of devolution had in mind when they asked for additional powers.'⁵⁸ When the power is used the Inland Revenue will be required to pay into the Scottish Consolidated Fund an amount equal to the estimated yield of any increased

(55) S. TIERNEY, 'Solomon Grundy does Constitutional Change: The Smith Commission Timetable to Transform the Scottish Parliament', *Constit L A Blog*, 3rd November 2014.

(56) Lord Turnbull, *Hansard*, 29 October 2014, 1227.

(57) See Scotland's Fiscal Balance position: Better or worse off under Independence as part of the UK?, *Fiscal Affairs Scotland*, August 2014.

(58) J. KAY, 'Income tax in Scotland can only go up if new powers are exercised', *Financial Times*, 3 December 2014.

Scottish Variable Rate of Income Tax. However, this would be a relatively small amount when set against an annual budget of £26 billion from Westminster under the Barnett formula. For example, if to make up the shortfall the 40 per cent rate was increased to 45 per cent it would realise £500 million.

In sum, the provisions of the Scotland Act 2012 and the implementation of the recommendations of the Smith Commission mean that the failure to include a significant element of fiscal devolution as part of the original devolution package has now been addressed. Although the Barnett formula remains in place, continuing a block grant element to devolution finance, the Scottish Parliament will soon be responsible for raising a substantial proportion of its revenue directly by levying income tax and several other taxes placed under its control. Scotland has more extensive welfare provision than the remainder of the United Kingdom and to maintain levels of spending in such areas it is unclear how the radical changes to the tax regime in Scotland will effect the burden falling on Scottish taxpayers.

7. Devolution and the revitalisation of local government

In this article it is pointed out repeatedly that the pronounced asymmetry in representation and accountability caused by devolution is most apparent because no further progress has been made with attempts to introduce a comparable form of democratically elected governance for England. Of course, the only partial exception as we shall soon observe was the launch of a Mayor and Assembly for London in 2000⁵⁹. But it will be remembered that the Labour government made a half-hearted attempt to introduce a weak form of regional government⁶⁰. This initiative was to be achieved in stages, commencing with the North-East of England, but it was abandoned at the first hurdle after the prototype for the new form of regional government failed to gain more than 20% in a

(59) See the Greater London Authority Act 1999 and the Greater London Authority Act 2007.

(60) See P. LEYLAND, 'Post Devolution: Crystallising the Future for Regional Government in England', *Northern Ireland Legal Quarterly*, Vol. 56, No. 4, Winter 2005, 435-462, at 453 ff.

referendum. However, coterminous with the 2014 Scottish referendum there have been proposals to hand back power to local communities by reforming local government. A general trend towards elected Mayors responsible for large metropolitan areas might amount to a significant development associated with the redesign of sub-national government in England. After the Scottish referendum result a document was published in November 2014 to mark the agreement between HM Treasury and ten local authorities in the Greater Manchester Area⁶¹.

Turning first to London, in terms of its remit and powers the revised London wide arrangements introduced in 2000 under the government of Prime Minister Tony Blair were not equivalent to the devolved executives in Edinburgh, Cardiff and Belfast⁶². The London Mayor has a strategic role and his or her functions are narrowly defined, more closely mirroring the Greater London Council abolished by the Thatcher government in the 1980s. The Mayor and Assembly are primarily responsible for London Transport through setting the annual budget for Transport for London. The Mayor is also responsible for the Metropolitan Police and fire service, the promotion of economic development through the London Development Agency, and for the improvement of the environment by setting out policies for planning and developing a London Plan. Although this role involves deciding on the allocation of an annual budget of £14.6 billion, no local tax raising powers were granted to the mayor and assembly. As one commentator points out, 'The Mayor is the most visible face of the new Authority and is the main source of initiatives in policy affecting London as a whole, as well as being responsible for coordinating agencies and bodies across the capital.'⁶³ Both London Mayors have contributed to giving the office a high profile and the reward from central government has been an increase in powers⁶⁴.

(61) See Written Ministerial Statement at HC Deb 3, 3 Nov 2014.

(62) D. OLIVER, *Constitutional Reform in the UK* (Oxford: Oxford University Press, 2003), 278-282.

(63) I. LEIGH, 'The New Local Government', in J. JOWELL and D. OLIVER (eds.), *The Changing Constitution* (Oxford: Oxford University Press), 306 ff.

(64) See Greater London Authority Act 2007.

In an attempt to build on this success in London the coalition government has embarked on the process of reviving a strategic level of local governance with the launch of a directly elected mayor of Greater Manchester⁶⁵. The Manchester Mayor will be responsible for a devolved consolidated transport budget, with a multi-year settlement. This will be coupled with responsibility for franchised bus services. It will also have powers over strategic planning and control of a new £300 million investment fund. Additional powers will include responsibility for devolved support budgets and control of apprenticeship grants. The Manchester Mayor and authority will have an estimated budget of £1 billion. Once elected, political oversight will be provided by the scrutiny committee of the combined authority which will be empowered to reject spending plans by a two-thirds majority. Following the passage of legislation expected in the next Parliament (after 2015 general election) the first city region mayoral election will take place in early 2017⁶⁶. Nevertheless, it will be apparent that this blueprint falls a long way short of providing the new mayor with the functions currently exercised by the devolved executives, nor will the mayor have a budget or revenue raising powers which are comparable to the next phase of devolution. It is estimated that £22 billion is spent annually by all public bodies across the region. In fact the new authority more closely resembles the Metropolitan County Councils introduced in the 1970s and abolished by the Thatcher government under the Local Government Act 1985 in the 1980s⁶⁷. It is not clear whether the model to be adopted in Manchester will be replicated in the other urban conurbations such as Birmingham, Merseyside, West Yorkshire. Given the current emphasis on cutting public expenditure the abolition of the previous generation of Metropolitan County Councils as an intermediate layer of government was defended on

(65) The towns and cities of Greater Manchester consist of: Bolton, Bury, Manchester, Oldham, Rochdale, Salford, Tameside, Trafford and Wigan.

(66) 'Devo Manc: What powers will the new Greater Manchester mayor have?', *The Guardian*, 3 November 2014.

(67) M. LOUGHLIN, *Legality and Locality: The Role of Law in Central-Local Government Relations*, (Oxford: Oxford University Press, 1996), 118.

the grounds that this would streamline and simplify local government while at the same time saving money⁶⁸.

At the same time a revision of fiscal arrangements for local government in England is very much on the political agenda⁶⁹. The Communities and Local Government Select Committee has recently backed the principle of fiscal devolution for England on the grounds that it would promote economic growth and called upon the government to devise a framework for fiscal devolution to local authorities. This approach is viewed by many MPs of all parties as the only way forward given that regional government for England or an English Parliament are unlikely to be introduced in the foreseeable future⁷⁰. Faced with a lack of engagement with local politics which has been reflected in extremely low turnouts at local elections, the Localism Act 2011 was a recent attempt by central government to re-invigorate locally government by seeking to empower local communities⁷¹. At the same time as the increase of devolution has drawn attention to the question of how England is governed. In consequence, there seems no doubt that localism has been put back on the agenda⁷². The proposal is to move towards a system of place-based budgeting in order to remedy the fact that in contrast to other comparable European nations the UK has been marked out by a disproportionate reliance on central government funding. A trend towards fiscal devolution would not only allow local authorities the right to determine how money is spent locally but might also grant them responsibility for designing local infrastructure. The effect would be allow localities to achieve enhanced control over spending and allow policies to be pursued

(68) M. LOUGHLIN, *Legality and Locality: The Role of Central-Local Government Relations* (Oxford: Oxford University Press, 1996), 118.

(69) For further discussion of recent changes to local government in the United Kingdom including referendums for city mayors see: P. LEYLAND, 'The Localism Act 2011: Local Government Encounters the "Big" Society"', in this Journal, 4, 2012, Anno XXXIII, ottobre/dicembre, 767-789.

(70) Devolution in England: the case for local government, Communities and Local Government Committee, First Report of Session 2014-15, HC 503, 3.

(71) Localism Act 2011, s. 11.

(72) M. SANDFORD, 'Devolution to local Government in England', House of Commons Library, SN/PC/07029, 19 November 2014, Part 3.

in each area which reflect the preferences of the local electorate. Furthermore, viewed from a technical standpoint the Public Accounts Committee has reported that the 'formula funding systems (for local government) are complex, difficult to understand and have led to inequitable allocations'⁷³. Nearly 20% of all authorities funded by Formula Grant in 2011-12 received allocations which are more than 10% different from calculated needs. The PAC is particularly critical of the lack of transparency over the mechanism adopted. For example, as with the Barnett calculations relating to Scotland, Wales and Northern Ireland discussed above, often the formula may be based on out of date population data which is at least ten years old⁷⁴.

The other side of this coin is the extremely challenging economic environment and indeed the uncertainty raised by the prospect of cuts in expenditure leading to cuts in services. A prominent economic think tanks points out that: 'By the end of 2013-2014 just 46% of the government's deficit reduction plan had been achieved. Almost three quarters of the total tightening is intended to come from spending cuts. But as the Institute of Fiscal Studies (IFS) points out, we are only a third of the way through the material cuts in public spending, with the easier cuts already made, and tax rises implemented. This means that during the next Parliament people will be seeing economic growth alongside substantial, sustained cuts in services.'⁷⁵

The present Conservative government is committed to carrying through these drastic cuts in Government expenditure aimed at balancing the budget. If the Conservatives are returned with an overall majority after the May 2015 election retention of these financial targets looks set to impose enormous limitations on spending levels by central and by local government⁷⁶. On the other hand, the Labour opposition which is also commit-

(73) Public Accounts Committee Fifty-Fifth report Formula Funding of Local Public Services, 9 November 2011.

(74) Conclusion and recommendation 5.

(75) 'Things can only get worse: a call for sustainable public finance', CIPFA Manifesto, 2015, 4.

(76) See Fiscal aims and austerity: the parties' plans compared, IFS Briefing Note, BN158, *Institute of Fiscal Studies*, December 2014.

ted to balancing the budget has a different set of priorities. It has indicated that it supports the principle of more fiscal devolution and that it will divert £30 billion of funding from Whitehall to local communities⁷⁷. The Liberal Democrats have proposed giving power to the people by way of passing an English Devolution Enabling Act whereby devolution is in principle available to any principal local authority outside London which has a population of a million or more people. The local authority in the relevant area would negotiate a deal with the Secretary of State based on the devolution of an individualised package of powers⁷⁸. This is because the grant of greater autonomy to local government will allow political differences of political outcome in particular localities to be reflected in the policies which are adopted by individual local authorities. In turn, these differences in emphasis might have profound implications with the potential to undermine the relatively uniform provision of social services administered by local government⁷⁹.

These initiatives for local government (as opposed to devolution) are limited responses to growing demands for greater local autonomy which have been strongest in the North of England. The trend is being spurred on by developments in Scotland and the other devolved parts of the United Kingdom. However, even if the Greater Manchester model is replicated for other major English conurbations, and coupled with budgetary autonomy granted to individual cities, it will be apparent that the proposals currently in prospect fall a long way short of the quasi-federalism soon to be further consolidated in Edinburgh, Cardiff and Belfast⁸⁰.

(77) <http://press.labour.org.uk/post/97288906664/hilary-benns-letter-to-local-authority-leaders>. The policy would include new powers to directly invest in infrastructure such as transport and housing, greater control over skills budgets, a lead role on delivering the work programme.

(78) Power to the People, Policies for Political and Constitutional Reform, Liberal Democrats, April 2014.

(79) P. LEYLAND, 'Multi-Layered Constitutional Accountability and the Re-Financing of Territorial Governance in the UK', in N. BAMFORTH and P. LEYLAND (eds.), *Accountability in the Contemporary Constitution* (Oxford: Oxford University Press, 2013), 328.

(80) P. LEYLAND, 'The multifaceted constitutional dynamics of UK devolution', *ICON* (2011), Vol. 9, No. 1, 251-273, at 253.

8. *Tackling the West Lothian question and the reform of Parliament*

At the same time as welcoming the referendum result which supported the union and pledging to implement the 'vow' by the pro-union party leaders to devolve further powers to Scotland, Prime Minister David Cameron indicated that the West Lothian question must be addressed by changing the way legislation is considered at Westminster⁸¹. The proposed reform is commonly referred to as 'English Votes for English laws'. With the grant of added powers to Scotland the search for a solution to the 'West Lothian question' has become more pressing but it remains extremely challenging. Simply put, there is no equivalent level of government for England and thus a problem arises relating to democratic representation. This is because the Parliaments/Assemblies in the devolved parts of the UK now have law making capacity coupled with responsibility for many policy areas in their respective parts of the United Kingdom. In consequence, Westminster MPs representing English constituencies no longer have a direct voice over the matters which have been devolved. However, Westminster MPs representing Scottish, Welsh and Northern Irish constituencies continue to have the right to fully participate in the legislative process for legislation at Westminster which applies only to England. The recent trend towards greater devolution intensifies this perceived democratic deficit⁸². As we have seen in the discussion above, the financial arrangements of devolution have until now tended to mask the wider issue of the distribution of public spending and economic benefits⁸³. The so called 'West Lothian question' will be felt more acutely with the grant of additional powers to Scotland and Wales, including enhanced tax raising and increased spending capacity. But there is little political support in England for a conventional federal solution based on the introduction of an English Parliament

(81) 'Scottish referendum: Cameron pledges devolution revolution after no vote', *The Guardian*, 19 September 2014.

(82) 'The Implications of Devolution for England', December 2014, Cm 8969.

(83) R. HAZELL, 'Westminster as a "Three-in-One" Legislature for the UK and its Devolved Territories', in R. HAZELL and R. RAWLINGS (eds.), *Devolution, Law Making and the Constitution* (Exeter: Imprint Academic, 2006).

with comparable powers to its Scottish counterpart⁸⁴. In any event, this would further impact on the *status* of the Westminster Parliament and it would be an expensive way of correcting the anomaly.

The upshot is that by default the Westminster Parliament has become mainly a Parliament for England. But MPs from all parts of the UK are able to vote on English matters without any formal limitation⁸⁵. To address this problem the Conservative Party included a proposal for English Votes for English laws in its 2010 manifesto, and although it lacked a mandate or a majority to proceed with enabling legislation, the coalition agreement included a commitment to set up a commission to consider the West Lothian question⁸⁶. Given that Labour usually has a high proportion of MPs representing Scottish⁸⁷ and Welsh constituencies English Votes for English Laws, certainly in its crudest form, is highly controversial, and, as we shall see, the change could create more constitutional problems than it in fact solves. As we proceed to briefly evaluate the alternatives, it is worth remembering that Westminster has always been a multi-level territorial legislature, passing different laws for different parts of the United Kingdom⁸⁸. In fact a strong constitutional precedent exists for adopting different legislative procedures at Westminster for the respective parts of the United Kingdom. Prior to the launch of devolution in 1999 Scottish, Welsh and Northern Ireland legislation passing through the Westminster Parliament followed a different procedure. For example, since 1907 a Scottish Grand Committee consisting of all Scottish MPs at Westminster (72 until 2005 and now 59) considered the principles of Scottish Bills. The committee which *post* devolution has virtually no business to consider often met in Scotland to take the committee stage and

(84) <http://johnredwoodsdiary.com/2014/09/13/an-english-parliament-can-devolve-to-cities/>.

(85) In practice Sinn Féin MPs and SNP MPs generally do not participate in the legislative process at Westminster.

(86) R. HAZELL, 'Case Study I: Constitutional Reform', in R. HAZELL and B. YOUNG (eds.), *The Politics of Coalition: How the Conservative Liberal Democrat Government Works* (Oxford: Hart Publishing, 2012), 158.

(87) The SNP may gain seats mainly at Labour's expense in the 2015 election.

(88) HAZELL, note 69 above, at 226.

report stage of non-controversial Scottish legislation. With the drop in political support for the Conservative party in Scotland during the Thatcher/Major period (1979-1997) the Conservatives representing the government would often be in a minority on the committee⁸⁹. The Scottish Grand Committee was able to propose amendments but it lacked the power to vote on legislation in its final form. Lastly, it is worth pointing out that from a technical standpoint a change of this kind creates problems in the legal drafting of legislation in an increasingly complex environment of overlapping powers between Westminster and the devolved legislatures.

After the referendum result was announced the Prime Minister stated that his government was intent on reforming the Westminster Parliament by introducing English Votes for English Laws. Such a change would be designed to prevent Scottish MPs (and MPs from Wales and Northern Ireland which now also both have law making assemblies) from exercising full voting rights on English laws. The first method of approaching English votes for English laws published by the government⁹⁰ proposes reforming the consideration of a bill at all its stages through Parliament. After being certified by the Speaker of the House of Commons a bill that deals exclusively with English matters would proceed through Parliament by way of an English only process. In the case of a bill that combined areas that were both devolved and reserved the legislation would need to pass through two parallel processes. There are obvious reasons why this proposal might be strongly contested. The problem is that English Votes for English Laws in this form undermines the role of Westminster as a national Parliament by creating two distinct classes of MPs depending upon the subject matter of legislation. This change not only excludes Scottish, Welsh and NI MPs from amending English legislation but it could also deprive an elected UK government from having a majority in Parliament. For example, in situations where a [Labour] government depended on Scottish MPs for its majority there might be a UK majority for Labour on non-devolved matters such as foreign affairs and economics but an al-

(89) V. BOGDANOR, *Devolution in the United Kingdom* (Oxford: Oxford University Press, 1999), 115.

(90) The Implications of Devolution for England, December 2014, Cm 8969.

ternative majority for devolved matters⁹¹. In addition, changing MPs voting rights runs the risk of impacting on the pivotal notion central to Westminster style democracy, namely, that the continuation of the government depends on its capacity to maintain its overall parliamentary majority.

Indeed, the Democracy Task Force in 2008 and the McKay Commission in 2013 which both reported on the issue of voting rights for MPs recognised this conundrum. By way of contrast, it will be apparent that for the second and third options for the introduction of changes to voting rights there are also parallels with the way Scottish only legislation was handled prior to devolution and with legislative consent (Sewel) motions *post* devolution⁹². The second option proposes modifying the amending stages of England only bills. A certified English bill would be treated in the same way as any other bill until it reached the committee stage where it would be referred to a committee of English MPs only, in proportion to their party representation in the House of Commons. At report stage the bill would be voted on only by English MPs but at third reading the Bill would be voted on by the whole house.

The third option has similarities with option two and is closely related to the recommendation by the McKay Commission which incidentally rejected English Votes for English laws⁹³. The second reading of the certified English bill would be taken as normal by all MPs. Then, as for option 2, the Committee stage of legislation relating only to England would be considered only by English MPs in committee, selected in proportion to their party representation in England⁹⁴. The report stage would be tak-

(91) V. BOGDANOR, 'Why English votes for English laws is a kneejerk absurdity', *The Guardian*, 24 September 2014.

(92) See e.g. B. WINETROBE, 'A Partnership of Parliaments? Scottish Law Making under the Sewel Convention at Westminster and Holyrood', in R. HAZELL and R. RAWLINGS (eds.), *Devolution, Law Making and the Constitution* (Exeter: Imprint Academic, 2005).

(93) Report of the Commission on the Consequences of Devolution for the House of Commons (The McKay Commission), March 2013, para 204; http://webarchive.nationalarchives.gov.uk/20130403030652/http://tmc.independent.gov.uk/wp-content/uploads/2013/03/The-McKay-Commission_Main-Report_25-March-20131.pdf.

(94) English regional grand committees were established at Westminster in November 2008.

en by all MPs. If the bill passed through these stages an English Grand Committee comprising all English MPs would then vote on a legislative consent motion. This motion would give English MPs the opportunity to consent to the bill, or veto the bill, or relevant parts of it. Assuming the legislation survives the legislative consent motion it would then proceed to a vote at third reading which would be taken as normal by all MPs. The McKay Commission took the view that decisions should normally be taken only with the consent of a majority of representatives for that part of the United Kingdom. As Elliott points out this is based on a principle of reciprocity. It assumes that the wishes of devolved legislatures with respect to incursions by Westminster are normally respected through legislative consent motions but are not necessarily respected because the Westminster Parliament ultimately retains sovereignty⁹⁵. The McKay Commission recommended that only English MPs should be able to participate in the final amending of bills at report stage while all MPs including Scottish, Welsh and NI MPs would retain the right to vote at the third reading stage⁹⁶. The advantage of options 2 and 3 is that only English MPs would have responsibility for determining the content of English legislation but at the same time it avoids undermining the position of the House of Commons as part of the national legislature for the United Kingdom.

Finally, it is worth noting that the leader of the Labour opposition currently favours reforming the House of Lords to correct aspects of the constitutional and democratic imbalance created by devolution. But in contrast to the government Mr Miliband advocates linking the change at Westminster to the abolition of the House of Lords as presently constituted and replacing it with a directly elected UK Senate representing towns, cities and regions⁹⁷. In order to achieve this change it is recognised that other reforms

They have not functioned during the current Parliament but could be revived to deal with English legislation on a regional basis.

(95) M. ELLIOTT, 'Devolution, the West Lothian question, and the nature of constitutional reform in the United Kingdom', *UK Const L Blog* (26 March 2013).

(96) Report of the Commission on the Consequences of Devolution for the House of Commons, The McKay Commission, March 2013, para 184.

(97) 'Miliband calls for second chamber to represent all UK's cities and regions', *The Guardian*, 31 October 2014.

will be necessary. The Labour Peers working group proposed that a full constitutional convention should be established to consider devolution matters in their wider context, as well as examining new ideas for wider representation in England. This presumably would include sketching out the form and composition of any new Senate of the Nations and Regions. The idea of replacing the House of Lords with a Senate has limited support at present, but, in the current climate with a great deal of uncertainty over so many institutional modifications which are in the offing a Constitutional Convention favoured by the Labour Party would be an appropriate forum for evaluating procedural and institutional reform and, most important, the overall constitutional impact of such changes⁹⁸.

9. Conclusion

This article is intended as a report on the Scottish referendum and its impact. It will be apparent by now that although there was a decisive “No” vote in the Scottish referendum it was a crucial constitutional event which will have constitutional implications for many years to come. The prospects for the reform of the Westminster Parliament, as well as the latest proposals relating to the extension of tax raising powers in Scotland, and fiscal devolution to local government in England, have been discussed in some detail. It has been argued that any constitutional modifications will have to weather a formidable economic storm of expenditure cuts which is gathering on the horizon. Another consequence of the referendum was the resignation of the charismatic Alex Salmond as Scottish First Minister. This was after he led a skilful and combative campaign in favour of independence on behalf of the Scottish National Party which came close to victory. The subsequent announcement of his intention to contest a seat at Westminster in the May 2015 General Election should alert us to an imminent shift of focus. This is because the debate is set to be resumed at Westminster by a newly elected Parliament as the shape and the detail of the proposed changes are cast into legislative form.

(98) J. HAND and D. COFFEY, ‘Miliband’s senate of the regions and a constitutional convention conundrum’, UK Const L Blog, 23 November 2014.