

# Navigating the constitutional path to English Devolution: How not to crack an old chestnut in a disunited Kingdom?\*

*Peter Leyland*\*\*

## *Introduction*

This article offers a critical discussion of current aspects of constitutional reform relating to sub-national government as part of the UK's multi-layered constitution<sup>1</sup>. In order to identify the dynamics of the contemporary constitution the opening paragraphs provide a brief contextual account of the territorial constitution both following the impact of the devolution arrangements in Scotland, Wales and Northern Ireland, and in the wake of the decision to leave the European Union after the referendum held in 2016. It will be argued that the policies establishing English devolution of the present government not only fall a long way short of providing a new form of governance which is comparable to the type of devolved government introduced in Scotland, Wales and Northern Ireland, but that the Westminster government has so far retained the initiative in both determining the shape of any reforms, and in setting the funding parameters. The second half of the article, by way of contrast, provides a critical assessment of Labour's proposals to tackle the disparities caused by the weakness of regional governance, in particular the effect of establishing an elected Senate for the Regions in place of the House of Lords. While acknowledging the need to provide territorial representation in Parliament, it will be argued that an entirely elected Senate for the Regions would be difficult to establish without introducing a fundamental rebalancing of the entire constitution.

\* I would like to thank Professor Andrew Harding, Professor Justin Frosini, Michael Bartlett and an anonymous reviewer for their insightful comments on an earlier draft of this paper.

\*\* Senior Teaching Fellow and Visiting Professor of Public Law at the School of Oriental and African Studies and emeritus Professor of Public Law, London Metropolitan University.

<sup>1</sup> See e.g. *Introduction* in N. BAMFORTH, P. LEYLAND (eds), *Public Law in a Multi-Layered Constitution*, Oxford, Hart Publishing, 2003.

### *What is the 'English Question'?*

Devolution as introduced in 1999 meant that the UK was transformed from having a unitary constitution to having an asymmetrical quasi-federal constitution.<sup>2</sup> However, this radical constitutional change granting an elected level of government to Scotland, Wales and Northern Ireland potentially impacts on England which as a result lacked an equivalent layer of democratically elected sub-national government.<sup>3</sup> Moreover, devolution was introduced without adjusting the representation in the Westminster Parliament.<sup>4</sup> An obvious anomaly is that MPs at Westminster representing Scottish constituencies can vote on English legislation while MPs representing English Constituencies no longer vote on devolved matters. Also, the workload of Westminster MPs representing constituencies in Scotland, Wales and NI is greatly reduced as constituents are represented locally in the Scottish and Welsh Parliaments and NI Assembly.<sup>5</sup> The representational deficit and the constitutional implications it causes have since been referred to as the West Lothian Question<sup>6</sup> or 'The English Question'<sup>7</sup>.

There have been attempts to correct the asymmetry relating to England set up by devolution. In 2002 the then Labour government itself experimented with what was promoted as the progressive introduction of a limited form of regional governance<sup>8</sup> but the entire scheme was dropped after the first phase intended for the North East was soundly rejected

<sup>2</sup> A. KING, *The British Constitution*, Oxford, Oxford University Press, 2007, 47ff. at 212. King refers to UK devolution as 'fractured federalism' others have used the term quasi-federalism.

<sup>3</sup> P. LEYLAND, *L'esperimento della devolution nel Regno Unito: uno sconvolgimento dell'assetto costituzionale?*, in *Le Regioni*, 2, 2000, 341-389 at 387ff.

<sup>4</sup> See e.g., R. JOHNSTON, D. ROSSITER *Inequality of Representation in the United Kingdom: A Constitutional Mess?*, *Political Quarterly*, 2002, 158-171; R HAZELL, R RAWLINGS (eds), *Devolution, Law Making and the Constitution* Imprint Academic, 2005.

<sup>5</sup> A. KING, *The British Constitution*, Oxford, Oxford University Press, 2007, 200.

<sup>6</sup> The 'West Lothian Question' was so named because the issue of representative asymmetry was raised as a parliamentary question by the MP for West Lothian during devolution debates in the House of Commons.

<sup>7</sup> See M. RUSSELL, G. LODGE, *The government of England by Westminster*, in R. HAZELL (ed), *The English Question* Manchester, Manchester University Press, 2006, 82ff.

<sup>8</sup> See 'Your Region, Your Choice: Revitalising the English Regions' (2002), Cm 5511 (White Paper).

by the electorate in a local referendum.<sup>9</sup> A decade later the Conservative government modified voting procedure in the House of Commons under the English Votes for English Laws (EVEL) procedure. These rules addressed the English question from a different angle (parliamentary procedure) and were introduced to prevent MPs from Scotland, Wales and NI from fully participating in the passage of English legislation<sup>10</sup>. Over the same period, the importance of addressing inequalities in wealth distribution and political representation across England have been recognised as a constant factor by economists, political scientists and politicians from all major parties, but over the last 25 years the underlying inequalities have become more pronounced. For instance, in evidence before the Constitution Committee Professor Kenny<sup>11</sup> stated that the UK has the most centralised governance system of any OECD country with some of the greatest regional economic inequalities.<sup>12</sup> Put simply, devolution in Scotland, Wales and NI drew stark attention to the so called English Question<sup>13</sup> but the fact that devolution provided a layer of democratically elected government for these nations has still not been adequately reflected in the governance of England. The Constitution Committee of the House of Lords recognises that: ‘England is highly centralised, with greater regional economic inequalities, compared to most other Western European countries’ ... and the committee stresses that ‘... Greater decentralisation will help to strengthen the governance of England more

<sup>9</sup> P. LEYLAND, *Post Devolution: Crystallising the Future for Regional Government in England, in Northern Ireland Quarterly*, Vol. 56, No. 4, Winter 2005, 435–462.

<sup>10</sup> Under Standing Order 83J and 83X adopted in October 2015 but abandoned in 2021. See B. GUASTAFERRO, “Visible” and “invisible” second chambers in unitary States: *Territorializing national legislatures in Italy and the United Kingdom*, in R. ALBERT, A. BARRAGIA, C. FASONE (eds), *Constitutional Reform of National Legislatures: Bicameralism under Pressure*, Cheltenham, Elgar, 2019, 52ff.

<sup>11</sup> Director of the Bennett Institute for Public Policy. See e.g. M. KENNY, *The Politics of English Nationhood*, Oxford, Oxford University Press, 2014.

<sup>12</sup> Respect and Co-operation: Building a Stronger Union for the 21<sup>st</sup> Century’, *HL Select Committee on the Constitution*, 10<sup>th</sup> Report of Session 2021–22, January 2022, HL Paper 142, 70–73

<sup>13</sup> E.g. see R. HAZELL (ed), *The English Question*, Manchester, Manchester University Press 2006 (see Introduction).

generally and achieve a better overall balance of powers between the centre and the other parts of the United Kingdom'<sup>14</sup>.

### *Brexit and Devolution: a return to sovereignty?*

The next preliminary point draws attention to the fact that Brexit impacts profoundly on regional policy at local government level and it has soured the relationship between the Westminster government and the devolved administrations.<sup>15</sup> Advocates of Brexit celebrated the return to sovereignty as giving powers back to the people, but many critics argued<sup>16</sup> that it would result in an intensification of centralisation as the executive branch predominates in managing the repatriation of laws with limited scope for parliamentary scrutiny.<sup>17</sup> In the specific domain of regional government, the mechanism for regional funding disappeared with the termination of regional support provided under the EU Regional Development fund.<sup>18</sup> The Subsidy Control Act 2022 was introduced to fill a void caused by Brexit and it has been drafted to set a legal framework for public authorities.<sup>19</sup> This covers regional mayors (MCAs) created as a key part of English devolution to deal, among other responsibilities, with subsidies for local businesses. Indeed, it will be apparent from the discussion below that central government in the guise of the Secretary of State must approve the details of each of the English 'Devolution Deals' so that the minister has ultimate control over the allocation of funding. The management of

<sup>14</sup> 'Respect and Co-operation: Building a Stronger Union for the 21<sup>st</sup> Century', *HL Select Committee on the Constitution*, 10<sup>th</sup> Report of Session 2021-22, January 2022, HL Paper 142, 6.

<sup>15</sup> See P. LEYLAND, *Devolution Post Brexit: The Perplexity of Multi-Levelled Governance in a Disunited Kingdom*, in *Istituzioni del Federalismo* 3, 2021, 740ff.

<sup>16</sup> See e.g. M. ELLIOTT, S. TIERNEY, *Political pragmatism and constitutional principle: the European Union (Withdrawal) Act 2018*, *Public Law*, 2019, 37-60 at 47ff.; D. MABBETT, *Parliamentary Sovereignty and Brexit*, in *The Political Quarterly*, Vol. 88, No. 2, April-June 2017, 167-169 at 168.

<sup>17</sup> The most recent example is *The retained EU law (Revocation and Reform) Act 2023* which is designed to revoke retained EU law and gives powers to relevant national authorities to make regulations in accordance with the objectives set out under the legislation.

<sup>18</sup> See P. BRIEN, *EU Funding in the UK*, in *House of Commons Library Briefing Paper* 7847, September 2020.

<sup>19</sup> See Subsidy Control Act 2022, section 12.

the UK shared prosperity fund which replaces EU structural funds is, in this sense, included as part of the (English) ‘devolution deals’.<sup>20</sup> Equally, the United Kingdom Internal Markets Act 2020 (UKIM) exemplifies the same centralising tendency pursued by the Westminster government. In order to replace the uniformity of standards under the single EU market UKIM is designed to establish uniform conditions across the UK, notwithstanding existing devolution provisions for Scotland, Wales and Northern Ireland.<sup>21</sup> The 2020 Act empowers ministers of the Westminster government to dis-apply parts of the EU-UK withdrawal agreement and other EU regulations<sup>22</sup> which, in turn, potentially limits the scope for regulatory divergence within the UK. In other words, these regulatory fields covered by UKIM supersede the authority of the devolved administrations on some devolved matters.<sup>23</sup> The rules set at Westminster for goods and for services predominate and this overrides devolved regulatory competence.<sup>24</sup> The UKIM legislation was enacted without (Sewel) Legislative consent motions and has been regarded by SNP politicians<sup>25</sup> in particular as a ‘power grab’ amounting to fragrant assertion of sovereignty by Westminster, but also, this approach demonstrates the inadequacy of consultation between Westminster and the devolved administrations in Edinburgh, Cardiff and Belfast.<sup>26</sup>

<sup>20</sup> M. SANDFORD, *Devolution to local government in England*, in *House of Commons Library*, Research Briefing 07029, 16 January 2023, 17.

<sup>21</sup> For example, the principle of ‘Mutual Recognition’ starts from the premise that any goods lawfully sold in one part of the UK are automatically acceptable for sale in the others. The legislation is drafted so that the UK Government can exercise unilateral control over the UK replacement to ESF (the Shared Prosperity Fund, or SPF).

<sup>22</sup> See e.g. United Kingdom Internal Markets Act 2020, Section 6(5).

<sup>23</sup> In *Allister* [2023] UKSC 5 the UK Supreme Court rejected the argument that regulations made under the UK Withdrawal Act were invalid because they were incompatible with the cross community support provisions set out in the Northern Ireland Act 1998. Devolution statutes despite their constitutional significance do not trump sovereign acts of Parliament and thus have prospective effect.

<sup>24</sup> The United Kingdom Internal Market Act 2020, Parts 1 and 2.

<sup>25</sup> SNP refers to the Scottish National Party.

<sup>26</sup> See D. TORRANCE, *Internal Markets Bill: Reactions from Scottish and Welsh Governments*, 1 October 2020, House of Commons Library: <https://commonslibrary.parliament.uk/internal-market-bill-reactions-from-scottish-and-welsh-governments/>; P. LEYLAND, *Devolution Post Brexit*

The coordination of devolution between the Westminster government and the devolved administrations since its inception has been managed by a series of subject specific mainly bi-lateral concordats adopted behind the scenes to facilitate the process of administration.<sup>27</sup> But with the implementation of Brexit there has been increasing evidence that the system was failing as intergovernmental relations have become increasingly fractious and tended to be dominated by central government.<sup>28</sup> It is significant that the Labour opposition recognises the disempowerment of sub-national government. It has proposals to address the problem by establishing a Council of the Nations and Regions to bring together the devolved nations together with a Council of England to represent English local government. It will also be given a dispute handling function but its full remit is yet to be elaborated.<sup>29</sup>

### *Centralisation and Local Government*

The Levelling Up/Northern Powerhouse/English Devolution reforms of recent years (2014-23) need to be considered in the light of policies imposing financial constraint on local government pursued by successive governments at Westminster which have strongly inhibited the scope of local democracy. The nation experienced a deliberate imposition of centralisation by the Westminster Government established by PMs Thatcher and Major, and at local government level, this policy was continued by Labour under PMs Blair and Brown. From the 1980s central government began to use the system of central government finance of local government as an instrument for imposing expenditure restraint. This policy also meant that 'much of the new legislation (under Thatcher/Major) affecting local government was more directive in nature. Extensive

*it: The Perplexity of Multi-Levelled Governance in a Disunited Kingdom*, in *Istituzioni del Federalismo*, 3, 2021, 742.

<sup>27</sup> R. RAWLINGS, *Inter-governmental relations in the United Kingdom*, in *House of Lords*, Select Committee on the Constitution, 11<sup>th</sup> Report of Session 2014-15, HL Paper 146.

<sup>28</sup> P. LEYLAND, *The Constitution of the United Kingdom*, 4<sup>th</sup> edn, Oxford, Hart Publishing, 2021, 234.

<sup>29</sup> *A New Britain: Renewing our Democracy and Rebuilding our Economy* (Commission on the UK's Future, Labour, 2022), Chaired by former PM Gordon Brown and hereafter referred to as the Brown Report, 119, 120.

powers were vested in ministers and officials to oversee the conduct of local government so that precise duties have been imposed on local authorities to undertake particular tasks'.<sup>30</sup> After it was elected in 1997, Labour kept in place the restraints on local government and on local government spending.

Fast forward to the present, and we find a recent report (2022) dealing with the current state of the governance of England by the *Public Administration and Constitutional Affairs Select Committee* sounding the same warnings with a particular emphasis on the lack of budgetary autonomy: «It is clear from our evidence that the current funding structures for local government and combined authorities reflects the instinct in Whitehall to maintain control of the levers of power and the purse strings». <sup>31</sup> In Part II it will be pointed out that by way of contrast the Barnett formula in setting the financial parameters for UK devolution and executive federalism in Germany systemically provide a relatively high degree of autonomy in the domain of territorial governance (see discussion in Part II below).

### *Part I: Devolution for England: the current policy*

This phase of local government reform for England was first announced in 2014 with the intention of launching the Manchester Combined Authority. The initiative was pioneered by an unlikely combination of a Conservative Chancellor of the Exchequer of the then coalition government and mainly Labour Party politicians and elected councillors, and it was referred to as the 'Northern Powerhouse'. The aim was to provide a boost to economic growth outside London starting with Greater Manchester. More recently, it has been repackaged as 'English Devolution' and it has blossomed into a more general regional economic policy associated with 'Levelling Up'.<sup>32</sup> In the localities where it applies, it establishes an additional layer of governance sandwiched between central government

<sup>30</sup> M. LOUGHLIN, *Legality and Locality: The Role of Law in Central-Local Government Relations*, Oxford, Oxford University Press, 1996, 7, 390.

<sup>31</sup> 'Governing England' *House of Commons Public Administration and Constitutional Affairs Committee* (CPACAC) Third Report of Session 2022-23, 31 October 2022, HC 463, 42.

<sup>32</sup> 'Levelling Up the United Kingdom' 2 February 2022, CP 604, (White paper).

and local government. In their most complete form ‘devolution deals’ have resulted in a Mayoral Combined Authority (MCA). These authorities have characteristics partly shared with the devolved nations and with London. The MCA operates at an intermediate level between central and local government for the entire city region headed by a directly elected mayor. This model comprises a separately elected regional Mayor (MCA) working in tandem with neighbouring local authorities represented by a selection of councillors.<sup>33</sup> However, London uniquely has a directly elected Mayor who is answerable to a separately elected Greater London Assembly.<sup>34</sup> In common with the Mayor of Greater London the elected city region mayors are paid an annual salary.<sup>35</sup>

The intensity of any devolution deal depends on the stage reached in the negotiations with central government. There are three stages reflecting the extent to which powers and functions are devolved. At Level One, in its most limited guise, the devolution framework consists only of informal joint working between authorities. Level Two is where there is a single institution without an elected mayor. For the third level there is a single institution with a directly elected mayor but only Level Three deals gives potential access to a wider range of powers, such as consolidated transport budget, key route network roads, brownfield funding and access to an investment fund.<sup>36</sup>

The identification of the powers that need to be devolved as part of such deals is based on arriving at a consensus among the elected councils and the separately elected regional Mayor on policies, and then following a protracted and bureaucratised approval procedure. There has been a relatively narrow range of competences that might form part of a deal.

<sup>33</sup> City regions include: Greater Manchester, Liverpool City Region, West Midlands, Tees Valley, Cambridgeshire, West of England (2017), Sheffield City Region (2018), North of Tyne (2019), West Yorkshire (2021).

<sup>34</sup> See Greater London Authority Act 1999; P. LEYLAND, *The Constitution of the United Kingdom: A Contextual Analysis*, 4<sup>th</sup> edn, Oxford, Hart Publishing, 2021, 258ff. (Local government in London is also provided by elected inner and outer London borough councils with a different set of functions).

<sup>35</sup> For example, Greater Manchester £110,000, Liverpool £80,000, West Yorkshire £105,000, West Midlands £79,000.

<sup>36</sup> M. SANDFORD, *Devolution to local government in England*, *House of Commons Library*, Research Briefing 07029, 16 January 2022, 11.



These include responsibility for the harmonisation and coordination of transport policy across the region; a role encouraging local investment priorities and the introduction of skills strategies.<sup>37</sup> The level of budgeting is not only much less than the funding available to the devolved bodies in Scotland, Wales and NI but there is very limited budgetary autonomy and the main policy areas, reflecting the degree of policy centralisation at Whitehall, are narrowly defined.<sup>38</sup>

To what extent is such an approach based on reaching individual deals capable of delivering a comprehensive form of decentralisation? In common with previous local government reform going back to the nineteenth century the general principle for the introduction of elected mayors of city/regions and combined authorities has been recognised legally under the Cities and Local Government Devolution Act 2016 (CLGDA). But unlike many previous statutes the legislation itself does not establish the framework of governance for each city/region as was the case for the Metropolitan Counties introduced at this level for the major English conurbations in the 1970's.<sup>39</sup> Rather, the Secretary of State<sup>40</sup> (with the support of officials in Whitehall) is granted powers to negotiate these devolution deals.<sup>41</sup> The CLGDA grants the minister wide powers to not only introduce mayors (for city regions) and combined authorities<sup>42</sup>, but also to determine the competences and funding.<sup>43</sup> By way of contrast, the

<sup>37</sup> A. PAUN, D. HENDERSON, P. HOURSTON, *The art of the devolution deal: How England's counties and cities can make a success of devolution*, in *Institute for Government*, July 2023, 13.

<sup>38</sup> J. NEWMAN, M. KENNY, *Devolving English Government*, in *Institute for Government*, April 2023, 24ff.

<sup>39</sup> See Local Government Act 1972, Schedule 1.

<sup>40</sup> Secretary of State for Levelling Up, Housing and Communities. This is the Cabinet minister with responsibility for local government.

<sup>41</sup> Under the CLGDA the Secretary of State is empowered to issue an order to provide for there to be a mayor. See s.107A.

<sup>42</sup> *Ibidem*, Section 4 & 6 (refers to functions), Section 5 (refers to finance).

<sup>43</sup> The Levelling Up and Regeneration bill before Parliament 2022-23, unopposed by the opposition Labour Party, would amend existing legislation to allow the creation of Combined County Authorities (chapter 1) and support the establishment of combined authorities and the conferral of powers relating to them (chapter 2).

legislation proposed by Labour will, if enacted, allow localities to request new powers and benefit from special local legislation to affect delivery.<sup>44</sup>

### *'Good deals', 'Bad deals' and 'No deals'?*

These English devolution deals have the virtue of reshaping the relationship between public players at local government level in a number of prime English regions, mainly in the North and in the Midlands. Some of the achievements of these authorities are briefly listed to illustrate this trend: Greater Manchester was able to set the trend with its history of stakeholder cooperation.<sup>45</sup> The West Midlands (WM) has redesigned its skills system to tackle levels of qualifications of the workforce. Bus services in the Liverpool City Region have been brought under public control to encourage the introduction a system of integrated and stable transport.<sup>46</sup> The sum of £500 million attracted by the Sheffield city region demonstrates the potential for attracting private investment. The scope of the devolution deals in some cases is set to increase: in Greater Manchester more collaboration between the MCA and local NHS trusts offers the prospect of the rectification of health inequality issues. The West Midlands deeper devolution deal reached in March 2023 is intended to allow greater control over local spending with a government commitment to £1.5 billion in funding as part of a fiscal devolution package while a regeneration package of up to £160 million will grant local control over transport, regeneration, skills and culture. In this instance the widening of powers is linked to improved oversight, requiring the Mayor of WM to face quarterly panels of MPs.<sup>47</sup>

<sup>44</sup> See the Brown Report (*supra* n. 28), 95ff. This new form of legislation promoted by local authorities is not the same as having locally elected bodies with law making powers and it is far from clear how this new type of legislation might be enacted but the recognition of the need for such powers is nevertheless significant.

<sup>45</sup> 'Progress on devolution in England' Fourth Report of Session 2021-22, *House of Commons, Housing, Communities and Local Government Select Committee*, 1 October 2021, HC 36, 11.

<sup>46</sup> A. PAUN, D. HENDERSON, P. HOURSTON, *The art of the devolution deal: How England's counties and cities can make a success of devolution*, in *Institute for Government*, 2023, 6.

<sup>47</sup> See West Midlands Combined Authority: "Trailblazer" deeper devolution deal, *Department of Levelling Up, Housing and Communities*, March 2023.

The ‘English Devolution’ initiative has, however, been recognised as having profound shortcomings.<sup>48</sup> The most fundamental criticism is that there has been an absence of any overall coherence from the standpoint of constitutional design in creating anything approximating to devolution covering the whole of England. This applies to the legislation and its application. It has been observed that the entire initiative is ad hoc, piecemeal and only covers less than half of the population (less than 41%). The House of Lords Constitution Committee observes that: ‘The beginning of English devolution ... resulted in huge complexities and inequalities in the various powers of different places.’<sup>49</sup>

These devolution deals can be reached, in principle, for any ‘Functional Economic Areas’ of at least 500,000 citizens, but a key contrasting factor to Scottish, Welsh and Northern Irish devolution is the difficulty in obtaining an agreement on boundaries.<sup>50</sup> A central question that arises where there is no obvious regional history and tradition is how to arrive at a suitable alignment between geographical boundaries and administrative units needed to work at a functional level to form the basis of any new governance arrangements. The language adopted in the Levelling Up (LU) White Paper identifies the objective of creating new business clusters, focused around universities and research institutions in priority sectors of digital and tech, life sciences, advanced manufacturing, green creative industries.<sup>51</sup> As part of these ‘deals’ the outcome depends on competing for funding, but the fact is that some areas, often the more rural and sparsely populated localities, may be in desperate need of financial support, but badly placed to attract funding from government schemes and investment from private industry. At the same time, there has been little or no allowance for the impact of the devolution deals arrived at on areas neighbouring localities without deals. To take one

<sup>48</sup> See ‘Governing England’ *House of Commons Public Administration and Constitutional Affairs Committee* (CPACAC) Third Report of Session 2022-23, 31 October 2022, HC 463.

<sup>49</sup> ‘Respect and Co-operation: Building a Stronger Union for the 21<sup>st</sup> Century’, *House of Lords Select Committee on the Constitution*, 10<sup>th</sup> Report of Session 2021-22, January 2022, HL Paper, 73.

<sup>50</sup> A. PAUN, D. HENDERSON, P. HOURSTON, *The art of the devolution deal: How England’s counties and cities can make a success of devolution*, in *Institute for Government*, 2023, 14-16.

<sup>51</sup> ‘Levelling Up the United Kingdom’, 2 February 2022, CP 604 (White Paper), 39.

example, the impact on Sunderland attracted this criticism from the departmental select committee.<sup>52</sup> The LU white paper attempts to argue that wholesale institutional reform for England would have distracted from the implementation of improved local government services and outcomes and delay the agreement and application of devolution deals.<sup>53</sup> But the procedure for reaching individual deals is already highly bureaucratic and hugely time consuming for local government officers and civil servants. Once again, the white paper envisages an on-going process and commits only to a devolution deal for every region that wants one. Overall, as the Public Administration Constitutional Reform Select Committee observed, these governance arrangements ‘lack a clear framework and direction of travel’.<sup>54</sup>

In practice, we discover that each deal is a reactive process dependent on relatively open ended negotiations with the Secretary of State and officials working under the limits set by the Act. This policy has been developed in isolation from the wider consequences related to devolution in Scotland, Wales and NI and the ongoing impact of Brexit. Moreover, as will be apparent in the second part II of this article, the empowerment of regional governance has implications related to the reform of Parliament in order to provide regional representation on a national basis. Each English devolution deal is unique and there has been a conspicuous absence of any rationalisation of sub-national governance to deal with asymmetry and incoherence of the current format. As a result, the English devolution deals reached to date simply add to the bewildering complexity of sub-national governance in the UK. Quite apart from the devolved systems in Scotland, Wales and NI this includes many types of local authorities,<sup>55</sup> local enterprise partnerships, police and crime commissioners, NHS clinical commissioning groups, ten combined authorities

<sup>52</sup> ‘Progress on devolution in England’ Fourth Report of Session 2021-22, *House of Commons, Housing, Communities and Local Government Committee*, 1 October 2021, HC 36, 11.

<sup>53</sup> ‘Levelling Up the United Kingdom’ 2 February 2022, CP 604, (White paper), 143.

<sup>54</sup> ‘Governing England’ *House of Commons Public Administration and Constitutional Affairs Committee (CPACAC)* Third Report of Session 2022-23, 31 October 2022, HC 463, 31.

<sup>55</sup> A total of 333 local authorities, including county councils, district councils, unitary authorities, Inner and Outer London boroughs.

covering metropolitan areas, ten elected metro mayor, seven pan-regional transport bodies. In fact, there is an inevitable trend towards asymmetry between regions caused by an approach dependent on individual devolution deals. The range of functions under these devolution deals vary with each MCA, but, as already indicated, the functions granted are limited compared to the type of devolution in Scotland, Wales and NI. The upshot is that this amounts to an incoherent system for policy delivery. In England Whitehall retains control in many key policy areas while some territorial governance is delivered by a plethora of diverse bodies operating at different levels each with limited autonomy.<sup>56</sup> The hit or miss aspect of the process (of reaching deals) is evidenced by the uncertain outcomes in negotiations. By January 2023 devolution deals had been agreed for fourteen areas of England. In some areas talks did not proceed beyond the exploratory stages while, in others, the devolution negotiations failed to reach a successful conclusion. (Cornwall rejected a Mayor and intends to obtain additional powers without changing the governance structure).<sup>57</sup> It has been reported that: 'Disputes among local leaders and governance weaknesses have undermined the effectiveness of combined authorities in Cambridgeshire and Peterborough and West of England. An independent review has been established following allegations of mismanagement and weak scrutiny in Tees Valley. Devolution to both South and West Yorkshire was delayed for several years by disagreement over the appropriate geography for the proposed deals.'<sup>58</sup>

### *A Top Down Approach: Where is Public Participation?*

Over many years there has been a perception among voters that local as opposed to national politics is of much less relevance to their everyday experience.<sup>59</sup> This perception has been reflected in the low turnout at

<sup>56</sup> J. NEWMAN, M. KENNY, *Devolving English government*, in Bennett Institute for Public Policy, Cambridge, Institute for Government, April 2023, 36ff. This report develops a critique around how England is governed centrally from Whitehall.

<sup>57</sup> A. PAUN, D. HENDERSON, P. HOURSTON, *The art of the devolution deal: How England's counties and cities can make a success of devolution*, in *Institute for Government*, 2023, 11.

<sup>58</sup> *Ibidem*, 6.

<sup>59</sup> See J. STANTON, *Law, Localism, and the Constitution*, London, Routledge, 2023, 162ff.

local elections.<sup>60</sup> Local government and mayoral elections have consistently attracted the support of only around a third of those registered to vote.<sup>61</sup> The chronically low turnout for local government elections nationally has reflected limited popular public engagement with local government.<sup>62</sup> Instead of tackling this issue at the ‘grassroots’ by building upon the concept of the ‘Big Society’ and the recognition of ‘community rights’ discernible in the Localism Act 2011,<sup>63</sup> we have observed from the outset that ‘devolution deals’ in England have been reached as part of a centralised procedure, dominated by the Westminster government, with the implementation of deals achieved through powers available under the Cities and Local Government Devolution Act 2016.<sup>64</sup> Under this statutory framework the Secretary of State occupies a pivotal role in his or her capacity to both initiate and/or approve deals. The Housing Communities and Local Government Select Committee stresses the importance of the involvement of the people in the area where the devolution takes place and that financial devolution is necessary on a block grant basis to ensure the success of devolution.<sup>65</sup> The deals themselves are forged between existing local political leaders and local stakeholders.<sup>66</sup> The franchising procedure might have included wider local consultation involving individuals and organisations from the outset, and followed up

<sup>60</sup> Local turnout figures for 2021 in city region elections ranged between 29.5% Liverpool to 36.4% Cambridge and Peterborough. See E. UBEROI, *Combined authority mayoral elections in May 2021*, in *House of Commons Library Briefing Paper*, 9237, 25 May 2021, 15.

<sup>61</sup> A. PAUN, D. HENDERSON, P. HOURSTON, *The art of the devolution deal: How England’s counties and cities can make a success of devolution*, in *Institute for Government*, 2023, 51.

<sup>62</sup> See I. LEIGH, *The Changing Nature of the Local State*, in J. JOWELL, D. OLIVER, C. O’CINNEIDE (eds) *The Changing Constitution*, 8<sup>th</sup> edn, Oxford, Oxford University Press, 295. See also the Localism Act 2011.

<sup>63</sup> See P. LEYLAND, *The Localism Act 2011: Local Government Encounters the “Big Society”*, in *Istituzioni del Federalismo*, 4, 2012, 767-789.

<sup>64</sup> See e.g. Cities and Local Government Devolution Act 2016, section 2.

<sup>65</sup> ‘Progress on devolution in England’ Fourth Report of Session 2021-22, House of Commons, *Housing, Communities and Local Government Committee*, 1 October 2021, HC 36, 3.

<sup>66</sup> Stakeholders include organisations and businesses often with existing contractual ties to local authorities.

by confirmation through a local referendum.<sup>67</sup> English devolution has been a top down exercise with the negotiations placed in the hands of existing political operators.<sup>68</sup> A related concern about the procedure has been the absence of transparency, as the deals have been negotiated in private between the government and local authority leaders.

Moreover, it appears that the task of gaining broad electoral support for the MCAs may have been further undermined by the government's controversial decision to change the electoral system for mayoral elections.<sup>69</sup> The adoption of first-past-the-post favours the major parties and raises the prospect of mayors coming into office with the support of less than half of voters.<sup>70</sup> Under the previous supplementary vote system, voters were able to select first and second preference candidates. The second preference votes of unsuccessful candidates were reallocated to the top two. In consequence, candidates were encouraged to appeal to opposition voters for second preferences and therefore to build a wider coalition of support from across the region.<sup>71</sup>

### *Accountability and Oversight*

Once the Mayor and Combined Authority (MCA) is established democratic accountability is provided indirectly. This is because the Combined Authority is formed from an elected mayor for the region and nominated councillors of the cities and towns comprising the region (not directly elected councillors as for London). Critics maintain there has been a failure to fully integrate good governance practices to provide oversight

<sup>67</sup> In 2013 referendums were held in 12 of England's biggest cities (as opposed to city regions MCAs) to decide whether to change from Local Councils to an executive Mayor with only 3 voting in favour.

<sup>68</sup> 'Governing England' *House of Commons Public Administration and Constitutional Affairs Committee (CPACAC) Third Report of Session 2022-23*, 31 October 2022, HC 463.

<sup>69</sup> Elections Act 2022, section 13.

<sup>70</sup> <https://www.electoral-reform.org.uk/new-rules-see-mayors-elected-without-majority-support/>

<sup>71</sup> A. PAUN, D. HENDERSON, P. HOURSTON, *The art of the devolution deal: How England's counties and cities can make a success of devolution*, in *Institute for Government*, 2023, 51.

commensurate with the initiative.<sup>72</sup> The legislation requires the establishment of an Overview and Scrutiny Committee comprised of councillors from cities and towns<sup>73</sup> but the status and effectiveness (poor attendance record of local councillors) of such committees has been identified as a recurring problem.<sup>74</sup> Another important element might have been the incorporation of routine consultation and wider community involvement, but the goal behind Levelling Up (LU) is identified as empowering local leaders with the resources needed while supporting private sector partnerships. The follow up LU white paper does not refer to the establishment of democratic processes that are directly accountable to the electorate. It views accountability in general terms of having local leaders and institutions that are transparent and accountable and who work closely with local businesses seeking the best value for taxpayer's money.<sup>75</sup> Despite multiple references to internal accountability as part of the framework 'Accountability and scrutiny functions are too often under-resourced and side-lined'.<sup>76</sup>

### *'English Devolution' – a misnomer?*

From a constitutional standpoint it is questioned whether the term *devolution* ought to be used in any meaningful sense to describe the English Devolution policy adopted by the current Conservative government. Indeed, the government elected in 2019 appeared to downgrade its own commitment to what it has termed 'English devolution' with the cancellation of its promised devolution white paper. In May 2021 it announced that this white paper would be abandoned in favour of the Levelling Up white paper.<sup>77</sup> Nevertheless, the rhetoric of 'Levelling Up' (LU) and

<sup>72</sup> 'Governing England' *House of Commons Public Administration and Constitutional Affairs Committee* (CPACAC) Third Report of Session 2022-23, 31 October 2022, HC 463, 16.

<sup>73</sup> 2016 Act, Schedule 3

<sup>74</sup> A. PAUN, D. HENDERSON, P. HOURSTON, *The art of the devolution deal: How England's counties and cities can make a success of devolution*, Institute for Government, 2023, 49.

<sup>75</sup> 'Levelling Up the United Kingdom' 2 February 2022, CP 604 (White Paper), 138.

<sup>76</sup> A. PAUN, D. HENDERSON, P. HOURSTON, *The art of the devolution deal: How England's counties and cities can make a success of devolution*, Institute for Government, 2023, 49.

<sup>77</sup> 'Levelling Up the United Kingdom' 2 February 2022, CP 604 (White Paper).



‘English Devolution’ remains a key part of the Conservative government’s political mantra. The Public Administration and Constitutional Affairs Select Committee draws attention to this very point: ‘... while we remain open to the possibility that combined authorities could develop into a tier of devolved government, in their current form they are not able to carry out the functions or have the characteristics of devolved institutions in other parts of the UK.’<sup>78</sup> The LU white paper employs a trendy ‘sound bite’ vocabulary to describe the thrust of the policy but from a constitutional standpoint, as already noted, the range of powers available under the legislation and the financial commitment to support it is limited.<sup>79</sup> The critique by the Select Committee goes even further by identifying what is viewed as a misleading description:

‘While we accept that the plain use of the word devolution can be used somewhat interchangeably with decentralisation, in the context of UK political and constitutional arrangements we suggest that the government would be better off retaining the term ‘devolution’ for the kind of transfer of powers that has been given to the devolved nations’ institutions, and using the language of decentralisation for rebalancing of powers between central and local government.’<sup>80</sup>

The extent of the commitment from the government in terms of not only constitutional change but also economic resources allocated to deliver English Devolution as part of LU has been relatively inconsequential. For example, in the 2023 spring budget statement the Chancellor of the Exchequer repeated the aim of giving ‘More control for local communities over their economic destiny’ but the additional amounts allocated in tax incentives and investment grants was marginal and mainly targeted at Greater Manchester and West Midlands as authorities with multi-year single settlements.<sup>81</sup> The figure set was a modest £80 million in flexible

<sup>78</sup> ‘Governing England’ *House of Commons Public Administration and Constitutional Affairs Committee* (CPACAC) Third Report of Session 2022-23, 31 October 2022, HC 463, 8.

<sup>79</sup> For example, the Levelling Up white papers’ vibrant language envisages ‘clusters’, ‘innovation accelerators’, ‘Fourth industrial revolution foundries’, ‘local enterprise partnership’ etc. See further ‘Levelling Up the United Kingdom’ 2 February 2022, CP 604.

<sup>80</sup> ‘Governing England’ *House of Commons Public Administration and Constitutional Affairs Committee* (CPACAC) Third Report of Session 2022-23, 31 October 2022, HC 463 40.

<sup>81</sup> <https://www.gov.uk/government/speeches/spring-budget-2023-speech>.

support over 5 years split between tax incentives and investment grants. The policy involved identifying low tax investment zones across the UK. Eight places outside SE earmarked as new areas (Liverpool, Greater Manchester, South Yorkshire, West Yorkshire, Tees Valley, West Midlands) with specific tax and regulatory rules to drive growth with a further four in Scotland, Wales, NI. In comparison to devolution in Scotland, Wales and NI and the London Mayor and Assembly the pots of money made available have been limited. In the field of bus franchising the City Region Sustainable Transport Settlement invites authorities to bid for a fund of £4-6 billion. The purpose is to promote cycling, walking and the use of buses.<sup>82</sup>

At the same time, the much heralded transformation of national infrastructure to assist in the delivery of Levelling Up has failed to materialise. The prohibitively expensive HS2 project was conceived to provide ultra modern high speed rail links between London and the North of England. Indeed, the politicians who promoted this flagship initiative argued their intention was to 'bring Britain closer together' by creating a more balanced economy while strengthening the north. The cancellation of the second phase of HS2 in 2023 abandons this objective entirely before the first phase is complete. In consequence, the line will only extend to Birmingham and may not be connected to Euston Station in central London.<sup>83</sup> In addition, the West to East trans-pennine rail link upgrade across the North of England has been repeatedly delayed and been given a completion date of 2032.<sup>84</sup>

The critical discussion of the substance of the (English) devolution deals negotiated to date that has been presented here vividly draws out this substantive distinction with devolution to the nations. By way of contrast, it is worth noting that in providing an authoritative discussion of

<sup>82</sup> <https://www.gov.uk/government/publications/city-region-sustainable-transport-settlements-confirmed-delivery-plans-and-funding-allocations>. Published 29 July 2022.

<sup>83</sup> 'The Guardian View on 'HS2 cancellation: mind the north-south gap' *The Guardian* 5 October 2023. <https://www.hansardsociety.org.uk/blog/hs2-fiasco-what-does-it-mean-for-parliament>. See also 'Why Britain's government would be wrong to cut HS2' *The Economist*, Sep 23 2023.

<sup>84</sup> See 'The Transpennine Route Upgrade Programme' *National Audit Office*, Session 2022-23, 20 July 2022, HC 572; R. PRESTON, *Transpennine upgrade still at risk of delay and cost increases*, in *International Railway Journal*, July 20, 2022.

the schemes of devolution for Scotland, Wales and NI introduced under the Labour government in 1999 Professor Vernon Bogdanor regarded the initiative as ‘the most radical constitutional change [the] country had seen since the Great Reform Act of 1832’.<sup>85</sup> In the absence of a codified constitution requiring amendment, it was introduced by flagship legislation that provides the template for each form of devolved governance, which meant that each bill was considered by a committee of the whole house and each statute required approval by a popular referendum.<sup>86</sup> According to the study of Professor Noreen Burrows who considers the initiative from the standpoint of constitutional law: ‘Devolution essentially means the transfer and subsequent sharing of powers between institutions of government within a framework set out in legislation’.<sup>87</sup> This has meant that in Scotland, Wales and Northern Ireland not only has political authority been granted to elected bodies, but that there has been to varying degrees the decentralisation of legislative and fiscal authority. This has been achieved by assigning constitutionally a list of enumerated powers to one level and providing the other level with residual powers.<sup>88</sup> Professor Robert Schütze emphasises that since devolution three of the four nations within the UK are governed by two parliaments (and in the case of NI an assembly).<sup>89</sup> While not underestimating the significance of devolution as constitutional innovation Professor Robert Hazell recognised from the outset that Labour’s devolution project had triggered a process inviting follow up rather than merely being an event, and he predicted correctly that devolution would still be unfolding ten years or more following its introduction.<sup>90</sup> For example, it was anticipated that the English regions would need to catch up to emulate Scotland, Wales

<sup>85</sup> V. BOGDANOR, *Devolution in the United Kingdom*, Oxford, Oxford University Press, 1999, 1.

<sup>86</sup> The Scotland Act 1998, Government of Wales Act 1998 and Northern Ireland Act 1998.

<sup>87</sup> N. BURROWS, *Devolution*, London, Sweet & Maxwell, 2000, 1.

<sup>88</sup> M. GUDERJAN, *Intergovernmental Relations in the UK: Cooperation and Conflict in a Devolved Unitary State*, London, Routledge 2023, 55.

<sup>89</sup> R. SCHÜTZE, S. TIERNEY (eds), *The United Kingdom and the Federal Idea*, Oxford Hart Publishing, 2018, 8.

<sup>90</sup> R. HAZELL, *The New Constitutional Settlement*, in R. HAZELL (ed), *Constitutional Futures: A History of the Next Ten Years*, Oxford, Oxford University Press, 1999, 8-9.

and NI<sup>91</sup> while, at the same time, more radical nationalist aspirations for greater autonomy would not be satisfied by it.<sup>92</sup>

To put this argument slightly differently in summary, the main thread of the critique of the English Devolution policy might be reduced to identifying a conflation of two concepts seeking quite different outcomes. On the one hand, there is 'Levelling Up', which is a policy directed at tackling the geographical disparities of wealth in England and the UK<sup>93</sup> and, on the other, a policy of what the Government (2019-2023) have termed 'English Devolution'. In some parts of England the Levelling Up packages have given rise to a series of English devolution deals granting a tailored set of modest functions to a Mayor and Combined Authority (MCA) in order to co-ordinate a regional approach to transport, investment and supporting private sector partnerships. While the delivery of LU might benefit from such a modified framework of governance in these specific areas, the changes have been introduced in a sporadic incomplete fashion, with an apparent disregard for the overall constitutional consequences across England.

## *Part II: Parliamentary and Regional Government Constitutional Reform under Labour*

The second part of this article contrasts Labour's plans in light of the critique of the current Levelling Up and English Devolution programmes pursued under recent Conservative governments. The indications are that (if elected) Labour will be more committed to develop policies with a regional focus and with a concern also to re-invigorate the devolution arrangements in Scotland, Wales and NI.<sup>94</sup> With an election on the horizon (in 2024) the Labour Party released a widely publicised report: 'A New Britain: Renewing our Democracy and Rebuilding our Economy'

<sup>91</sup> See A. TRENCH, *Scotland and Wales: The Evolution of Devolution*, in R. HAZELL (ed), *Constitutional Futures Revisited: Britain's Constitution to 2020*, Palgrave, Macmillan, 2008.

<sup>92</sup> The referendum for Scottish independence was held in October 2014.

<sup>93</sup> 'Leveling Up the United Kingdom' CP 606, 2 February 2022 (White Paper). The stated objective is to ensure that by 2030 the pay, employment and productivity will have risen in every area of the UK while closing the gap between top performing and other areas.

<sup>94</sup> 'Governing England' *House of Commons Public Administration and Constitutional Affairs Committee (CPACAC)* Third Report of Session 2022-23, 31 October 2022, HC 463, 31.

aka The Brown Report which was published in December 2022. The declared intention is to make a ‘fresh start’ in order to address the scourge of regional inequalities.<sup>95</sup> Of course, the Labour Party programme would inevitably overlap to some extent with aspects of the ‘English Devolution’ and ‘Levelling Up’ initiatives already launched under the Conservatives (as discussed earlier). In comparison, the stated aim of Labour’s draft policy is to introduce root and branch reform at the centre of government while at the same time including a commitment to ‘treat all parts of the UK fairly, to guarantee rights and ensure a minimum level of living standards, while ‘respecting the decisions made by local and devolved authorities’.<sup>96</sup> In addition, the objective is to entrench the constitutional status of self-government across the nations of the UK. Much of this document develops a detailed critique of the deleterious effects of over centralisation on the nation’s overall economic performance. The areas listed which need to be covered by the policies adopted include: powers over skills and further education to address the skills trap; powers to deliver full employment based on a local approach; powers over transport and infrastructure; powers over energy and the environment. The document sets out the need to deliver greater economic equality by rebalancing the economy by giving ‘the right powers to the right places’. Key areas are identified for devolving powers to local authorities but apart from A Senate for the Regions, there is a reluctance to recommend detailed prescriptive reforms of the system as a whole.<sup>97</sup>

### *Senate of the Regions*

Crucially, the Brown Report is more ambitious in seeking solutions as it attempts to address fundamental governance issues in order to rebalance the constitution. The document stresses the importance of representative democratic institutions at every level, starting with Parliament itself. Rather than considering any type of English Parliament the unelected

<sup>95</sup> In part 1 The Brown Report charts in detail the poor economic performance of the English regions.

<sup>96</sup> ‘The Brown Report’, 11.

<sup>97</sup> ‘The Brown Report’, 75.

House of Lords is targeted for abolition.<sup>98</sup> The intention is to replace this unrepresentative body<sup>99</sup> with a new fully elected second chamber which is conceived as an Assembly for the Nations and the Regions. The reformed second chamber would be geographically representative, but as discussed below, there is little indication on how such a radical transformation of the House of Lords might be achieved without profoundly impacting on the House of Commons. Abolition or radical reform of the House of Lords would raise a series of related questions of great sensitivity which would need to be addressed at the same time in regard to the powers and procedures of the House of Commons and the way the Commons is elected. The Brown report itself alerts us broadly to a pivotal issue: ‘... one of the blockages to Lords reform is a fear that an elected second chamber, more legitimate than the present Lords, would challenge the authority of the House of Commons and carry the risk of “gridlock”, and of making the government of the country impossible.’<sup>100</sup> However, a fundamental reason for having a second chamber is to contest the decisions of the first chamber acting at times as a restraint on unbridled democracy.<sup>101</sup> The resolution of this problem lies (according to the report) in resetting the functions and powers of the new body.<sup>102</sup> It seems that the avoidance of direct gridlock over the routine passage of legislation would be achieved by emasculating the replacement body in its law making capacity, in particular, by depriving it of the one year delaying power over ordinary legislation, and perhaps thereby undermining a pivotal function in providing the effective scrutiny of ordinary

<sup>98</sup> For a summary of recent reform proposals see R. KELLY, ‘House of Lords Reform in the 2019 Parliament’ Research Briefing, CBP 9700, 6 January 2023.

<sup>99</sup> The House of Lords comprising approximately 800 members is currently composed of life peers, hereditary peers, archbishops and bishops but no single political party has an overall majority in the Lords.

<sup>100</sup> ‘The Brown Report, 138.

<sup>101</sup> M. RUSSELL, *Rethinking Bicameral Strength: A Three Dimensional Approach*, in *The Journal of Legislative Studies*, 2013, Vol. 19, No. 3, 370-391, at 374.

<sup>102</sup> R. GREALLY, *The Brown Report: Political Legitimacy and the Power of Assembly*, UK Const L Blog, 26 January 2023.

bills.<sup>103</sup> Further, the Senate of the Regions would not have any role in the formation of the government, nor would the proposed body have any capacity to deal with national economic policy but members of the elected Senate would be eligible to serve as ministers.<sup>104</sup>

On the other hand, the Senate would have new responsibilities, one such would be to protect the constitution by having an absolute veto allowing it to reject a narrow list of constitutional statutes.<sup>105</sup> Whether or not this new power could be exercised effectively by a New Senate<sup>106</sup> as envisaged, there is a repeated concern to protect the erosion of fundamental constitutional values. The concern is undoubtedly justified given the high degree of political instability and the scant regard for established constitutional conventions under the Johnson government (2019-2022).<sup>107</sup>

### *Parliamentary Reform: Comparative Perspectives*

The Brown report states that the elected Senate would have a greatly reduced membership of around 200 members, but how would the trimmed down membership match up with the image of a regional Senate designed to address the democratic deficit identified in the earlier parts of the published document? As we noted in the first part of this article, these issues were only sporadically and inadequately addressed by English devolution and Levelling Up. Moreover, these questions are left mainly unanswered from a constitutional standpoint. For example, this includes the vexed and complex issues: of the type of electoral system to be adopted, the frequency of elections and whether the respective elections for each house should be scheduled asynchronously, the

<sup>103</sup> Parliament Acts 1911 and 1949 left the House of Lords with the residual power to delay legislation for one year. A power which is rarely exercised but the threat of doing so is often sufficient to extract concessions from the government.

<sup>104</sup> 'The Brown Report', 143.

<sup>105</sup> 'The Brown Report' 140. See also M. GORDON, *A New Britain, A New Constitution? Labour's Proposal for Constitutional Entrenchment*, *UK Const L Blog* (16 December 2022). Under the Parliament Act 1911 the House of Lords retains an absolute veto over any legislation which would extend the life of a Parliament without election beyond 5 years.

<sup>106</sup> A. MCHARG, *The Future of the Territorial Constitution under Labour?*, in *The Report of the Commission on the UK's Future*, *UK Const L Blog*, 8 Dec 2022.

<sup>107</sup> See T. KHAITAN, *A Fourth Branch of the State? On Constitutional Guarantors in the UK*, *UK Const L Blog* 30 March 2023.

respective distribution of electoral boundaries for each house, and the precise number of members for the new Senate.<sup>108</sup>

The UK is famous for not having a formal codified constitution,<sup>109</sup> nonetheless in the last 30 years, there has been radical constitutional change in many different areas for example, devolution, human rights protection, the introduction of a UK Supreme Court and the regulation of freedom of information/data protection (to name but a few of these). In consequence, there has been a clear path towards codification in these fields as Parliament has enacted dedicated legislation setting out the outline, and sometimes the details, of the constitutional changes. It is important to observe that rather than having a general objective or conforming to any particular constitutional model, the changes have been in response to particular demands and the changes have been introduced on an incremental basis.<sup>110</sup> As a result, the outcome may have been inadequately conceived or ill-coordinated, requiring a follow up dose of legislation, reflecting this evolutionary make do and mend style.<sup>111</sup> However, in light of this relatively cautious approach the outright abolition of the House of Lords and its replacement with a 100% elected Senate has already attracted vigorous criticism from eminent parliamentarians.<sup>112</sup> Although its current membership is much too large and the majority of peers are from London and the South East of England, the House of Lords if abolished outright could threaten constitutional stability. This is not to defend the indefensible, namely, its present composition and size, but because in the sense explained by Walter Bagehot in the mid nineteenth century the upper house still is for all its faults a ‘dignified’ part of the traditional

<sup>108</sup> See T. KHAITAN, *An Elected Second Chamber? Some thoughts on the Brown Report*, *UK Const L Blog*, 25 January 2023.

<sup>109</sup> See e.g. V. BOGDANOR, *Beyond Brexit: Towards a British Constitution*, IB Tauris, 2019.

<sup>110</sup> P. LEYLAND *The Constitution of the United Kingdom: A Contextual Analysis*, 4<sup>th</sup> edn, Oxford, Hart Publishing, see e.g. chapter 10 ‘The Way Ahead’.

<sup>111</sup> See e.g. Government of Wales Act 2006 (this introduced law making powers for Wales), Scotland Act 2016 (Devolution max for Scotland was introduced following 2014 referendum, the Smith Commission recommendations and increased tax raising powers).

<sup>112</sup> For example, David Blunkett former Home Secretary and Lindsay Hoyle, *Commons speaker disagrees with Labour plan to replace Lords*, in *The Guardian*, 20 December 2022.



constitution which works as a respected institution.<sup>113</sup> The Lords has a unique blend of experience and expertise which is applied to the task of revising legislation, calling the executive to account and acting as a forum for national debate.<sup>114</sup> Another of the virtues of the House of Lords in the eyes of many commentators is that it no longer contains a natural majority for any one party,<sup>115</sup> and the fact that the party whips do not predominate allows it to provide more reflective judgment when considering legislation and providing executive oversight than the Commons, its elected counterpart. As Professor Brazier persuasively argues: 'the question which should be addressed is not whether the House of Lords is unusual among world legislatures but whether it is an effective and appropriate part of the Parliament of a democratic country in the twenty-first century'.<sup>116</sup>

For the above reasons, there is a much stronger case for less drastic reform of the House of Lords. It could retain at least some of its current strengths as a revising chamber, while at the same time addressing the urgent need to correct the representational deficit in Parliament for the regions. A transition towards an elected and partly appointed regional Senate might well attract wide support from the largest political parties and therefore such a proposal would be much more likely to succeed. In order to prevent a return to partisanship which might result from having a fully elected Senate a significant appointed element might be retained. The method of appointment would need to change to ensure nominees from the regions. Recent parliamentary reform in Canada serves as a noteworthy example. In respect to its powers over legislation the Canadian Senate duplicates the Canadian House of Commons, but as regards its composition, the Senate in Canada is entirely appointed rather than elected and consists of 105 seats apportioned roughly among four

<sup>113</sup> W. BAGEHOT, *The English Constitution*, London, Fontana, 1968, 121ff.

<sup>114</sup> W. JENNINGS, *The British Constitution*, Cambridge University Press, 1966, at 102ff. See also A. HANSON, M. WALLS, *Governing Britain*, 5<sup>th</sup> edn, London, Fontana, 1990, 101ff.

<sup>115</sup> M. RUSSELL, *The Contemporary House of Lords: Westminster Bicameralism Revisited*, Oxford, Oxford University Press, 2013, 131ff.

<sup>116</sup> R. BRAZIER, *Constitutional Reform: Reshaping the British Political System*, Oxford, Oxford University Press 2007, 66ff.

regions. In order to avoid partisanship there has been experimentation in recent years with an Independent Advisory Board for Senate Appointments resulting in the emergence of non-partisan Senator groups.<sup>117</sup> In principle, the House of Lords transitioning towards a Senate of the Regions might introduce a framework present in other codified constitutions designed to establish a balance between various layers of government through regional representation in the national parliament.<sup>118</sup> As already pointed out it follows that a reformed second chamber must be fashioned to provide greatly enhanced territorial representation but glancing back to the extreme asymmetry of sub-national government in the UK (discussed above), and England in particular, the question arises whether a Senate of the Regions would be viable in the absence of the creation of a coherent system of regional government covering the United Kingdom as a whole.<sup>119</sup> Once again, for the reasons explained in Part I of this discussion the ad hoc approach reliant on individual ‘devolution deals’ for England under the Cities and Local Government (Devolution) Act 2016 fails to provide a blueprint for the delivery of regional government across the whole of England. Unfortunately, the Brown proposals contain no detailed plans to tackle this asymmetry by establishing English sub-national local authorities at regional level in their own right on a nationwide basis with equivalent legislative and executive powers to the devolved systems in Scotland, Wales and NI. Nor do the Labour proposals detail how to incorporate representation and input in the Senate for politicians elected or nominated at the regional and/or devolved level.<sup>120</sup> The study of codified constitutional systems offers some guidance in the fashioning of a replacement body for the House of Lords. Of course any reference to second chambers with regard to precise composition, pow-

<sup>117</sup> J. WEBBER, *The Constitution of Canada: A Contextual Analysis*, 2<sup>nd</sup> edn, Oxford, Hart Publishing, 2021, 61.

<sup>118</sup> For instance, the case for ‘moderated parliamentarism’ which marries institutional design ideas with insights on ‘what makes a party system healthy for democracy’ is assessed by T. KHAITAN, *An Elected Second Chamber? Some thoughts on the Brown Report*, *Const Law Blog*, 25 January 2023.

<sup>119</sup> S. TIERNEY, *Drifting Towards Federalism*, in R. SCHÜTZE, S. TIERNEY (eds) *The United Kingdom and the Federal Idea*, Oxford, Hart Publishing, 2018, 116.

<sup>120</sup> ‘The Brown Report’, chapter 11.

ers and functions has to allow for the fact that individual constitutions were usually drafted to consolidate a particular relationship between the centre and any federal or regional component.<sup>121</sup> In Germany the Länder or States were predominantly pre-existing states granted constitutional autonomy and the constitution, notwithstanding amendment, serves to regulate the balance of powers and functions.<sup>122</sup> The German Bundesrat (upper house) as the second chamber has a much smaller composition of 69 members than the proposed Senate (200 members) and it is not directly elected, rather, it is comprised of representatives appointed by and subject to recall by the state governments, the number varying between 3 and 6 according to population size (regressive proportionality) and there are strict voting rules determining how the delegates vote (another German characteristic is that each state casts its vote as a single block). To overcome the problem of handing powers back down to the local level Labour proposes to invent a new form of legislation. This is intended to streamline the empowerment of regional/local government and it also brings to mind the involvement of the Länder and the Bundesrat in the law making process. The Bundesrat is explicitly granted powers to legislate and while having a subordinate role in comparison to the Bundestag the Bundesrat (Federal Council) has to approve all legislation affecting policy areas over which the Basic Law grants the Länder concurrent powers. According to Labour the Senate of the regions would have a special role scrutinising this form of local legislation designed to allow local leaders to draw powers from the centre.<sup>123</sup> But, there is no attempt to explain what, if any, role the House of Commons would have in respect to the passage of this new type of legislation. The transformation of the House of Lords suddenly or gradually into a senate representative of the regions with special law making powers potentially addresses the representational deficit at the heart of the English

<sup>121</sup> In making a comparison with the UK it is worth reminding ourselves that codified constitutions perform the task of constitutional statutes. The UK devolution statutes in their original and amended versions delineate the powers and functions of the Scottish and Welsh Parliaments and the NI Assembly.

<sup>122</sup> W. HEUN, *The Constitution of Germany: A Contextual Analysis*, Oxford Hart Publishing, 2011, 58.

<sup>123</sup> 'The Brown Report', 96.

question, but this change would not deliver a decentralised model across England which legally protects the financial and executive autonomy of all the English regions (and the devolved nations).<sup>124</sup> In comparison, we find that the German Constitution distributes financial and executive functions amongst the levels of government. This means that the federal states are granted a relatively high degree of autonomy. On the one hand, a needs based fiscal constitution is a fundamental pillar of the federal system as: 'The financial means and principle of financial sovereignty belong to the core of the Länder autonomy'.<sup>125</sup> On the other, in theory as well as in practice, German Executive Federalism places executive as well as legislative powers in the hands of the Länder.<sup>126</sup> This is evident because the execution of a great deal of federal law is granted to the Länder.<sup>127</sup> Returning to the UK with its various constitutional layerings, it will be remembered that devolution as established in Scotland, Wales and Northern Ireland in 1999, was achieved by enacting what amount to constitutional statutes, setting up the institutions of devolved governance, but also allowing the apparently permanent transfer of executive functions from the Scottish, Welsh and NI offices at Westminster to the devolved administrations based in Edinburgh, Cardiff and Belfast.<sup>128</sup> At the outset the Barnett block grant formula, based on spending levels in England, provided secure financial underpinning for financing the executives in Scotland, Wales and NI.<sup>129</sup> In view of its perceived shortcomings, the demise of the Barnett formula has been frequently predicted. For example, it has been suggested that the equalisation of funding should be achieved

<sup>124</sup> See A. TOMKINS, *Shared Rule: What the UK Could Learn from Federalism* in R. SCHÜTZE, S. TIERNEY (eds), *The United Kingdom and the Federal Idea*, Oxford, Hart Publishing, 2018.

<sup>125</sup> W. HEUN, *The Constitution of Germany: A Contextual Analysis*, Oxford, Hart Publishing, 2011, 65.

<sup>126</sup> *Ibidem*, 62.

<sup>127</sup> M. NIEDOBITEK, *The German Bundesrat and Executive Federalism*, in *Perspectives on Federalism*, Vol. 10, Issue 2, 198-214, 209/210.

<sup>128</sup> Scotland Act 1998, section 53. This transfer of executive power is one of the reasons devolution was regarded as quasi-federalism.

<sup>129</sup> 'The Barnett formula works by allocating to the devolved territories their population share of increases agreed with Whitehall departments on comparable programmes'. See D. BELL, 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, 164ff.

by a needs based system rather than a calculation related to population based on equivalent departmental spending levels in England.<sup>130</sup> Latterly, the Scottish Parliament has received powers to control many aspects of the revenue raising and spending of the Scottish executive and this has resulted in the adjustment of Barnett to allow for this change.<sup>131</sup> However, the Brown Report avoids proposing structural change in the method of financing for territorial governance, but it acknowledges that devolution and local government must involve the conferral of increased fiscal powers and increased control over spending decisions in order to achieve greater certainty in funding allocations.<sup>132</sup> The comparison with Germany in this section is not included as a model for close replication, but the German Constitutional approach shows the importance of thoroughly integrating the system to include formal mechanisms for law-making, financial allocation, establishing an appropriate degree of executive autonomy and including the provision of accountability and oversight mechanisms.<sup>133</sup> In sum, the proposals for a Senate of the Regions contained in Labour's Brown Report fail to establish sufficient constitutional alignment between the reform of elected territorial governance at regional and local level in England, with its proposals to resolve the question of parliamentary representation.

### *Conclusion*

In the first part of this article the deficiencies of the policy of English Devolution/Levelling Up have been approached from the perspective of constitutional design. Currently, so called 'English Devolution' is a highly centralised and an almost random policy extending to less than half of

<sup>130</sup> See e.g. D. BELL, D. EISER, *The Economic Case for Further Fiscal Decentralisation in Scotland: Theoretical and Empirical Perspectives*, in *National Institute Economic Review*, Vol. 233, Issue 1, 27-36. A. MIDWINTER, *The Barnett Formula and its critics revisited: Evidence from the post-devolution period*, in *Scottish Affairs*, 55, 2006, 64-86; R. MACDONALD, P. HALLWOOD, *The Economic Case for Fiscal Federalism in Scotland*, in the *Allender Series, Fiscal Federalism*, 2004.

<sup>131</sup> See Part 2, Scotland Act 2016.

<sup>132</sup> For example, according to the Brown Report this greater security would be realised by block grant funding and 3 year financial settlements. 'The Brown Report', 93.

<sup>133</sup> See W. HEUN, *The Constitution of Germany: A Contextual Analysis*, Oxford, Hart Publishing, 2011.

England's population, and the level 3 deals approving MCAs apply to a narrow selection of policy areas. From a different standpoint, the competitive bidding for resources in forging these deals with the Secretary of State places localities in competition with each other, and many areas suffering from economic deprivation are by their very nature excluded or put at an unfair disadvantage under such a system.<sup>134</sup> Part II of the discussion glances ahead to a future Labour government. The Brown Report appears to recognise that the objective of an 'equal opportunity economy' depends on extending democracy to the grassroots while correcting the representational deficit at the pinnacle within Parliament itself by establishing a Senate of the Regions. However, as Tierney points out: 'It is a long way from local government reform in England to a second chamber designed to represent a multi-national and regionalised UK ...'<sup>135</sup> A Senate of the Regions while offering certain benefits outlined by Labour would be a radical departure, with a range of further and sometimes unintended consequences which could easily disturb the equilibrium of the entire constitution (as explained earlier). To proceed successfully with second chamber reform a broad consensus around a set of proposals, or an overwhelming majority at a general election for a specific manifesto commitment would be needed. Otherwise, the likely prospect would be further stalemate after the next election, with yet another Royal Commission formed to investigate possible reform options. A less ambitious but achievable plan of Lords reform for the next Parliament should be formulated. This proposal would aim mainly to reduce the size of the present House of Lords, while introducing a significant element of regional representation across the United Kingdom, including all of England, Scotland, Wales and Northern Ireland. In sum, there is a powerful case for the phased introduction of much slimmed down reformed second chamber with roughly equivalent powers to the

<sup>134</sup> The Public Administration and Constitutional Affairs Select Committee recommends relaxing controls on finance by reforming the funding structure and ending the wasteful process of bidding for pots of money. See Governing England' *House of Commons Public Administration and Constitutional Affairs Committee (CPACAC) Third Report of Session 2022-23*, 31 October 2022, HC 463, 42

<sup>135</sup> S. TIERNEY, *Drifting towards Federalism*, in *The United Kingdom and the Federal Idea*, Oxford, Hart Publishing, 2018, 117.

Lords and a regionally based membership. In seeking to avoid direct competition with the House of Commons a crucial question to resolve would be whether the reformed body is entirely elected by a proportional system<sup>136</sup>, entirely appointed by an independent commission, or formed from a combination of selection methods.

Abstract: Questo articolo offre una valutazione della recente riforma del governo locale inglese da una prospettiva costituzionale. Il contesto è delineato con particolare riferimento al grado di centralizzazione che caratterizza il Regno Unito, alle implicazioni costituzionali della *devolution* scozzese, gallese e nordirlandese nel sollevare la cosiddetta *English Question* e all'ulteriore centralizzazione indotta dalla Brexit. La prima parte dell'articolo illustra come la politica di "devolution per l'Inghilterra" basata su sindaci eletti e *combined authorities*, perseguita dagli ultimi governi britannici, sia stata applicata in diverse regioni inglesi. La critica della politica di devolution per l'Inghilterra e Level up intende valutare se gli "accordi di devolution" e la politica stessa siano comparabili in termini costituzionali agli accordi di devolution conclusi con le altre tre nazioni che compongono il Regno Unito. La seconda parte dell'articolo si concentra principalmente, con alcuni riferimenti comparativi, sul deficit di rappresentanza in Parlamento e guarda avanti per considerare le proposte di un futuro governo laburista nel rapporto Brown. In particolare, si tratta di considerare la fattibilità di un Senato delle Regioni come seconda camera alternativa alla Camera dei Lord.

Abstract: This article offers an appraisal of recent local government reform from a constitutional perspective. The context is set out with particular reference to the degree of centralisation characteristic of the UK, the constitutional implications of Scottish, Welsh and Northern Irish devolution in raising the so called English Question and the additional centralisation prompted by the Brexit process. The first part of the article explains how the policy of 'English devolution' based on elected mayors and combined authorities pursued by recent governments has been

<sup>136</sup> As well as the method of election other issues that would need to be addressed would be the timing of elections and the terms of office served by members whether elected or appointed.

applied in a number of English regions. The critique of the English Devolution/Levelling Up policy that follows assesses whether the ‘devolution deals’ and the policy itself is comparable in constitutional terms to the devolution arrangements in the other nations that make up the United Kingdom. The second part of the article focuses mainly, with some comparative references, on the representational deficit in Parliament and gazes ahead to consider the proposals of a prospective Labour government in the Brown Report. The particular concern is to consider the feasibility of a Senate of the Regions as an alternative second chamber to the House of Lords.

Parole chiave: governo locale; devolution per l’Inghilterra; *Brexit* e sovranità; riforma del parlamento; Senato per le regioni; prospettive comparate

Keywords: Local Government; English Devolution; Brexit and Sovereignty; Regional Mayor and Combined Authority; Parliamentary Reform; Senate for the Regions; Comparative Perspectives