

DEVOLUTION WITHIN THE UNITED KINGDOM

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It is a paradox that the United Kingdom, which on the one hand has recently joined the larger European Community,¹ is on the other hand in some danger of breaking up into its constituent units. The Report of the Royal Commission on the Constitution (the Kilbrandon Report²), and the recent government White Paper on proposals for devolution to Scotland and Wales,³ merit examination by anyone who is interested in British public affairs.

Following Stone Age and Bronze Age man, Celtic peoples from the continent of Europe settled in what we now call the British Isles during the second half of the first millenium B.C. By the time the Romans began their armed occupation of the less mountainous parts of the larger island in the first century A.D., the Celtic farmers were organised in tribal kingdoms. The withdrawal of the Romans at the end of the fifth century, which left virtually no traceable remains of law or language, was followed by successive invasions of Angles, Saxons and Jutes, who settled first in the south and south-east of the country and then along the east coast. Then came the Danish conquest of England under Canute. By the time of the Norman conquest, England was a political entity and the most populous and powerful kingdom in the islands. The integration of the predominantly celtic kingdom of Scotland was complete by the fifteenth century. Celtic Wales continued to be a collection of unstable principalities until it was conquered in the thirteenth century by Edward I. In 1536 the English Parliament passed an Act annexing Wales to the realm of England.

The Union in 1707 between England (including Wales) and Scotland – which countries since 1603 had enjoyed a personal union of Crowns – was based on a treaty negotiated by commissioners on behalf of the two Parliaments and confirmed by mutual statutes of each Parliament, providing for one Parliament and government of Great Britain, but preserving Scots private law and judicial system. The similar Union between Great Britain and Ireland in 1800 was

¹ European Communities Act 1972.

²(1973) Cmnd. 5460; Memorandum of Dissent, Cmnd. 5460 – I.

³(1975) Cmnd. 6348.

not negotiated by treaty, but was enacted by the Parliaments of both Britain and Ireland, though there was an element of duress as the large Catholic majority in Ireland was not represented in its Parliament. The greater part of Ireland ceased to form part of the United Kingdom in 1922, and after a period of 'Dominion status' it became in 1949 an independent republic outside the Commonwealth. Northern Ireland, consisting of six of the counties of Ulster, remained within the United Kingdom, and for half a century, from 1920, considerable legislative and executive powers were devolved to it, so that it had its own subordinate Parliament and administration in Belfast.

The United Kingdom of Great Britain and Northern Ireland is a unitary state in terms of economics as well as government. It has a single currency and central bank. There is freedom of settlement and establishment, and of movement of trade, labour and capital within the United Kingdom, with minor exceptions in relation to Northern Ireland. Differences between the parts include the separate system of Scots law, especially private law and judicature, and the survival of the Welsh language among about one fifth of the people of Wales.

England is the largest of the four countries, having an area of 50,000 square miles. More densely populated than any other European country except the Netherlands, it has a population of nearly 46,000,000, constituting about 83 per cent. of the United Kingdom total, one-fifth of that total living in London and the South East. England has also a corresponding dominance in economic wealth. Scotland, with an area of 30,000 square miles, has a population of about 5,250,000, most of whom live in the central belt that includes Glasgow and Edinburgh. The area of Wales is 8,000 square miles and its population about 2,750,000, two-thirds of whom live in the industrial south around Cardiff. Northern Ireland has an area of 5,000 square miles and a population of about 1,500,000, more than a third living in the area of Belfast. The kings of England had assumed control of Ireland since the invasion of Henry II in the twelfth century; but the constitutional relationship between England (or Great Britain) and Ireland in the centuries before the Irish Union is very confusing. Generally, Ireland seems to have been regarded as a subordinate kingdom of the English (or British) Crown, though how far it was subordinate to the English (or British) Parliament was doubtful. One prime factor in their troubled relations since the early seventeenth century has been the matter of religion, for, under the early Stuarts, Ulster was 'planted' by many Scottish settlers who were Presbyterians and a lesser number of English settlers who were Anglicans. In the process of time Northern Ire-

land, as it now is, came to possess a Protestant majority of about two to one over the Catholics, and that majority became relatively more prosperous. The devolved institutions of Northern Ireland have at present been suspended, and the Province is being governed directly from Westminster, so that its problems are being considered by the British Government separately from the question of devolution in the rest of the United Kingdom. Northern Ireland therefore will not be considered further in this article, except to say that it was not the system of devolution to Belfast that failed: indeed that system in itself had considerable merits, and does not provide a warning signal against the idea of devolution elsewhere in the United Kingdom.

The concept of 'devolution' is used to mean the delegation of central government powers without the relinquishment of 'sovereignty'. Devolution, which may be legislative or administrative or both, in its more advanced forms involves the exercise of powers by persons or bodies who, although acting on authority delegated by Parliament, are not directly answerable to it or to the central government.⁴ 'Decentralisation' is a method whereby some of the decision-making powers of the central government are exercised by officials of the central government located in various regions.⁵ It should be distinguished from devolution on the one hand and from local government on the other. Decentralisation of certain governmental functions has taken place to an increasing extent since the last war, especially in England, which in the last ten or twelve years has been divided into eight Regions for the purposes of economic planning. Of these the South East Region, including Greater London, is by far the most populous. The degree of decentralisation in Scotland and Wales has been less because the local administrative offices of their Secretaries of State have fulfilled a similar purpose.

A Secretary (later, Secretary of State) for Scotland was created in 1885, and the present system of decentralisation centred on Edinburgh dates from 1939. The Secretary of State is a member of the Cabinet, and his functions include most of those that in England are the responsibility of the Home Office, the Department of Education and Science, the Department of the Environment, the Ministry of Agriculture, Fisheries and Food, and some of the functions of the Departments of Health and Social Security and of Industry. The Lord Advocate as a Minister has wide functions in the field of law. The office of Minister for Welsh Affairs was created in 1951 and

⁴ Cmnd. 5460, page 165.

⁵ Cmnd. 6348, pages 55-56.

was allocated to the Home Secretary, and in 1964 the first Secretary of State for Wales was appointed and he is in the Cabinet. The work of his Welsh Office covers such matters as housing and local government, some industrial development, town and country planning, highways, health, personal social services, and primary and secondary education, and the Secretary of State shares responsibility for agriculture. There is no separate legal system.

Before the first world war the Liberal Government seriously considered devolution – apart from Irish ‘Home Rule’ – as an item of policy. Thus Winston Churchill, Home Secretary, put to the Cabinet in 1911 a plan for elected legislative and administrative bodies for Ireland, Scotland and Wales and seven areas of England, though he saw that an English Parliament alongside the Imperial Parliament, as it was called, was impracticable. Asquith, the Prime Minister, speaking in the House of Commons on the Government of Ireland Bill, 1922, said that the Imperial Parliament needed to be relieved of many local responsibilities, and that similar Bills needed to be made for England, Scotland and Wales. After the first war the Commons approved a broad scheme for subordinate legislatures for England, Scotland and Wales, leaving open the question of subdividing England, but nothing came of it.

Nationalism in Scotland and Wales first became a serious electoral factor at the general election of 1966, when the Nationalist parties received the votes of 20 per cent. of the electorate in those countries. Neither the Labour nor the Conservative party really wanted devolution, but as a matter of political expediency they had to take Nationalist aspirations seriously. The Conservative party set up a committee in 1968 to consider the matter. While the Kilbrandon Commission was at work between 1969 and 1973, Scottish nationalism was quiescent, but it revived on the discovery of North Sea oil, most of which is located nearer to Scotland than to England, and its land installations will be mainly in Scotland. The Liberal party has long favoured a federal system, though it is far from clear how one could have a federation in which the central legislature is subject to no legal limitations and is unable to limit itself, and one unit (England) has four fifths of the population, whose representatives would always be able to outvote those of all the other units in the federal legislature.

A Royal Commission on the Constitution was set up by the Labour Government in 1969 ‘to examine the present functions of the central legislature and government in relation to the several countries, nations and regions of the United Kingdom; and to consider ... whether any changes are desirable ... in the present constitutional and economic relationships ...’ Although the terms of refer-

ence were wide enough to cover almost any aspect of the constitution, the Commission limited its review almost entirely to the question of national feelings and devolution. There were 13 members of the Commission, under the chairmanship first of Lord Crowther and then (on his death) of Lord Kilbrandon, a Scottish judge, formerly chairman of the Scottish Law Commission and later a Lord of Appeal. The terms of reference insisted on the preservation of the political and economic unity of the United Kingdom. 'Political unity' meant that the Queen in Parliament, representing all the people, must remain 'sovereign' over their affairs; and that the Government must bear the main responsibility to Parliament for protecting and furthering the interests of all. In particular, the Government must retain the powers and responsibilities relating to national security; international relations, including membership of the European Community; law and order; and the basic rights of citizens. 'Economic unity' meant that the Government must manage the nation's external economic relations, and must be able to manage demand in the economy as a whole (taxation, total public expenditure, and supply of money and credit).⁶

The Report found that there is a feeling that government is remote and insufficiently sensitive to the views and feelings of the people. In Scotland and Wales dissatisfaction with government has an additional dimension of national feeling. In Scotland the emphasis is largely an economic considerations. In Wales, while the economic factor is important, it is closely associated with the desire to preserve the Welsh language and culture. In neither country had the nationalist cause attracted support anything like sufficient to constitute a general vote for independence. The concept of 'separatism' is taken to mean the separation of Scotland and Wales from the rest of the United Kingdom, and their conversion into fully independent sovereign states with complete control over all their internal and external affairs, presumably remaining under the Crown as self-governing members of the Commonwealth.⁷ As a matter of economics neither Scotland nor Wales is unsuitable for independence: both countries could be economically viable if they were prepared to accept some fall in their standard of living. The Commission found very little support for federalism in Scotland and Wales, and practically none at all in England. In a federal system 'sovereignty' is divided between the federal legislature and government and the legislatures and governments of the constituent units, federal functions usually including those in which it is

⁶ Cmnd. 6348, pages 5-6.

⁷ Cmnd. 5460, page 133.

necessary for the country to act as one in relation to the rest of the world, such as defence and foreign affairs. The basic terms of a federal constitution are 'entrenched' so that they cannot be amended at the sole discretion of the federation or of any province or combination of provinces.⁸ Experience abroad, says the Report, shows that in modern conditions the federal idea of divided 'sovereignty' is becoming difficult to sustain. It presents great financial problems, and slows down desirable change. Further, there is no satisfactory way of fitting England into a federal system.

Eight members of the Commission favoured a scheme of legislative devolution for Scotland, which would transfer to a directly-elected Scottish Assembly a wide range of powers concerning most domestic functions. Six members favoured a similar legislative devolution for Wales. The Scottish and Welsh legislative Assemblies would consist of about 100 members, elected for a fixed term of 4 years by the single transferable vote system of proportional representation. Scottish and Welsh representation in the House of Commons would be in the same proportion to the population as that of England, so that the number of Scottish M.P.'s at Westminster would be reduced from 71 to about 57, and the number of Welsh M.P.'s from 36 to about 31. The Scottish and Welsh executives would be composed of Ministers drawn from their respective Assemblies, and would operate the traditional Cabinet system of government. Entry into the European Community does not stand in the way of substantial devolution, though it does place substantial limitations on the range of functions that can appropriately be devolved. Two members who signed the majority Report favoured executive devolution to Scotland, Wales and each of 8 English Regions. They would have elected Assemblies to execute and administer legislation and policies of the United Kingdom Parliament and government. For England, a majority were in favour of Regional Councils, which would be mainly advisory, but would also have a co-ordinating function in the local government field, including responsibility for formulating long-term plans. The Regional Councils would be composed of 4/5 local authority elected representatives and 1/5 nominated members chosen by the Minister of central government responsible for regional affairs. The English Regions would be the 8 Regions at present established for economic planning purposes, modified to make regional boundaries conform to those of the new Counties defined by the Local Government Act 1972. Devolution of legislative powers would not be appropriate for England as a whole or for individual Regions of England.

⁸ *Ibid.*, pages 152-154.

Two members (including Lord Crowther-Hunt, who became constitutional adviser to Mr. Wilson) signed a Minority Report recommending a scheme of intermediate level governments for Scotland, Wales and 5 English Regions. The United Kingdom Parliament would remain responsible for the framework of legislation and major policy, but directly elected Assemblies for Scotland, Wales and the English Regions would be responsible for adjusting United Kingdom policies to the special needs of their areas and putting them into effect. The seven intermediate governments would be run on the local government pattern with a functional committee structure, and not on the Cabinet model as in the majority scheme for devolution. The intermediate level governments would not be limited to the specific functions or duties conferred on them by Parliament; they would have a general residual competence to act for the welfare and good government of the people in their areas. Each Assembly would consist of about 100 members, elected by the single transferable vote system of proportional representation for a fixed term of 4 years.

The Government White Paper (1975) points out that there are few parallels anywhere for dividing between two levels of government the powers and functions long exercised centrally in a unitary state, and that after devolution to Scotland and Wales each part of the United Kingdom will have a different form of government. To this we may add the system of local government on one hand and European Community secondary legislation on the other. Parliament will remain 'sovereign' in all matters, whether devolved or not, and will continue to include the present compliment of Scottish and Welsh members. The 1974 White Paper⁹ said that the setting up of Scottish and Welsh Assemblies did not detract from the overriding interest of all the peoples of the United Kingdom in the determination of United Kingdom policies as a whole, and that for this reason the Government regarded it as 'essential' that Scotland and Wales should retain their existing number of M.P.'s. The real reason is more likely to be a vote-catching one.

The Government proposes that there shall be a single-chamber Scottish Assembly, initially with 142 members (2 for each of the 71 Parliamentary constituencies in Scotland). For later elections the Boundary Commission will divide Parliamentary constituencies into single-member Assembly constituencies. Everyone entitled to vote in Parliamentary elections, and also peers, will be able to vote in Assembly elections. The Assembly will be elected for a normal fixed term of 4 years. There will not be proportional representation.

⁹ Cmnd. 5732.

Members of the Assembly may also be members of Parliament. The Assembly will elect from among its members a presiding officer like the Speaker. Executive powers in Scotland in the devolved fields (including the power to make delegated legislation) will be exercised by a Scottish Executive. The head of the Executive ('Chief Executive') will allocate responsibilities to members of the Executive. After an election the Secretary of State will invite a prospective Chief Executive to form an Executive which will command the support of the Assembly. The Chief Executive will submit the names of his proposed Executive to the Assembly, who will approve or reject them as a whole. Changes in the Executive (including dismissals) will be made formally by the Secretary of State. The Scottish Assembly will become responsible for legislation in devolved subjects. Primary legislation will be in the form of Scottish Assembly Acts, and secondary legislation in the form of Scottish statutory instruments. Bills passed by the Assembly will be submitted for assent by the Queen in Council through the Secretary of State.

Resources are distributed, not according to where they come from, but according to where they are needed, and this applies between geographical areas as well as among individuals. Reserve powers are therefore built into the proposals to enable the central Government to intervene, subject to the approval of Parliament, in actions by the devolved administrations which the Government judge seriously harmful. The presiding officer of the Assembly, on the advice of his counsel, will report to the Assembly on the *vires* of a Bill, i.e., whether it falls within the devolved powers, first when it is introduced and again before the final Assembly stage. An adverse report would not stop the Bill, but it would serve as a warning. When a Bill has reached its final stage in the Assembly it will be forwarded to the Secretary of State. The Government will then consider, with advice from the Law Officers, whether any part of the Bill is *ultra vires*. It will also consider whether the Bill is acceptable on general policy grounds. If the Bill contains *ultra vires* provisions, or is unacceptable on policy grounds, the Secretary of State will send it back with a statement of reasons. If a Bill referred back as *ultra vires* is re-submitted in terms still adjudged *ultra vires*, the Bill will not go forward for assent. If a Bill referred back on policy grounds is re-submitted in terms that the Government are still not prepared to accept, the Bill must be laid before Parliament with a notice of motion praying for its rejection. If Parliament affirms this motion (to reject the Bill) the Bill will not go forward for assent, but if

Parliament rejects that motion the Bill will go forward. The Government does not favour judicial review of Scottish Assembly Acts after enactment for various reasons, notably the argument that exclusion of judicial review 'would have the merits of simplicity and finality and would therefore reduce doubt and room for argument, which might otherwise hamper good government', although it admits that judicial review 'is a normal and natural accompaniment of the operation of a legislature whose powers are limited by law'. This is one of the most controversial proposals in the White Paper, and the Government may well be willing to give way on it. Executive acts of the Scottish administration, however, will be open to challenge in the courts in the same way as the central Government's executive acts: indeed, Scottish ministers and officials will have to keep within both the general law and the powers devolved to them by Parliament. The Scottish Executive will be able to make delegated legislation under enabling powers contained either in Assembly Acts or in United Kingdom Acts still in force in the devolved areas.

On grounds of general policy the Government will have three kinds of reserve powers: (1) to give directions, subject to affirmative resolution of Parliament; (2) to make an annulment Order following an affirmative resolution in Parliament, in relation to Scottish delegated legislation already made; (3) as a last resort, to resume responsibility for the devolved subject by Order, subject to affirmative resolution of Parliament.

There will be a system of Assembly Committees to advise the Scottish Executive and to investigate its activities. Committees will correspond to the main subjects devolved, e.g., education and health. They must be consulted by the Executive before new policies or Bills are introduced. Members of the Scottish Executive will hold office under the Crown, and their officials will therefore be civil servants; but the Government consider that (contrary to the recommendation of the Kilbrandon Report) the United Kingdom civil service should remain unified. Complaints against Departments can be made to the Scottish Parliamentary Commissioner ('Ombudsman'), who will report to the Assembly.

A block grant will be allocated by Parliament for the devolved Scottish administration, taking account of local needs and the desirability of uniform standards and contributions in all parts of the United Kingdom. Within that amount the Assembly will decide priorities. Accountability for expenditure will be to the Scottish Assembly, not to Parliament. Since national resources are distributed according to need, public expenditure for Scotland will not be based on revenues arising there. Control of oil revenues by those

parts of the United Kingdom off whose shores oil is found, say the Government, would mean the break-up of the United Kingdom. The same argument applies conversely to the large coal deposits recently found in England and to natural gas off the shores of England. Public expenditure on devolved services in Scotland was about £2,000 million in 1974-75. The Assembly will have a general power to levy a surcharge on local authority taxation, whether on rates or any new system that may be introduced by Parliament. This power will not need to be used unless there is a deficit or a higher level of expenditure. There will be Scottish counterparts of the Consolidated Fund, Comptroller and Auditor-General and Public Accounts Committee.

Devolution to Scotland will be of responsibility in various fields which the Government now carry: the functions and powers of local authorities will not be reduced. The more important subjects to be devolved, mostly with exceptions and limitations, are the following: Local Government (the Assembly will later have power to alter the structure and functions of local authorities); Personal Social Services; Education, Science and the Arts (except Universities); Housing; Planning and the Environment; Roads and Transport; Development and Industry (but not nationalised industries); and Natural Resources other than agriculture and sea-fisheries. The devolution of Law and the Legal System is subject to a number of important exceptions, in wider aspects of company law, industrial relations and consumer protection. Excepted also are State security, police and prosecutions, explosives, firearms and dangerous drugs. Responsibility for the Courts and related matters is still under consideration.

There will be a Welsh Assembly with substantial policy-making and executive, but not legislative, powers, and wide responsibility for supervising the administration. It will be a single-chamber Assembly, initially with 72 members (2 for each of the 36 Parliamentary constituencies), but later the Boundary Commission will divide Parliamentary constituencies into single-member Assembly constituencies. The Assembly will be elected for a normal fixed term of 4 years. The franchise, elections and presiding officer will be as for Scotland. The Assembly will decide whether to use the Welsh language. Executive powers in devolved matters in Wales will be vested in the Welsh Assembly as a corporate (and Crown) body. Most of its work will be done through Standing Committees dealing with particular devolved subjects, such as health and education. The Assembly may delegate its functions to committees. A committee will have an impartial chairman, and a leader ('Executive Member') who will take the initiative on policy and administration.

A Co-ordinating Committee ('Executive Committee') will allocate resources. The Assembly will appoint the chairman of the Executive Committee ('Chief Executive'). A block grant will be allocated by Parliament for the devolved administration in Wales, as for Scotland. Public expenditure on devolved services in Wales was about £850 million in 1974-75.

Parliament will continue to legislate for Wales in devolved subjects as well as in others. The Welsh Assembly may debate White Papers, its officials will be consulted about proposed legislation on devolved subjects, and the Assembly may debate Bills when published. Since Parliament cannot bind its successors, however, there can be no commitment for the future to alter Bills to suit Wales. In devolved matters the Welsh Assembly may pass delegated legislation under powers conferred by Act of Parliament. The United Kingdom retains reserve powers on grounds of policy in relation to the Welsh Assembly and Executive, similar to those in relation to Scotland. As the Welsh Assembly will be a Crown body, its officials will be civil servants and part of the United Kingdom civil service. There will be a Welsh Parliamentary Commissioner to receive complaints of maladministration, who will report to the Welsh Assembly. The subjects to be devolved to Wales, some with limitations and exceptions, include: Local Government; Health; Personal Social Services; Education, Science and the Arts (except Universities); Housing; Planning and Resources. Existing Water Authorities, some of which overlap England and Wales, will not be altered. This will be a great relief to cities like Birmingham, which derive their water from Wales.

A separate document relating to England is expected. The whole devolution issue has taken the English somewhat by surprise. One hears complaints about 'interference by Whitehall' from the North East, the North West and the Midlands, but it is doubtful whether there is any strong regional feeling. Divisions in the country run more on lines of socio-economic attitudes (formerly 'classes'), represented by the main political parties. Scottish and Welsh nationalism is seen by the English as a threat to the integrity of the United Kingdom. If an English national reaction could be aroused, it would probably be directed against the over-representation of Scotland and Wales in the House of Commons.

Reaction in Scotland to the Government's proposals for legislative and administrative devolution in certain fields, notably among the Scottish Nationalist Party, is that they do not go far enough. More control over industry and industrial development, and especially 'Scottish' oil, is demanded. Conservative M.P.'s and many Labour M.P.'s think the proposals go too far, though this view has

to be expressed with caution in order not to lose votes in that country. In Wales enthusiasm for devolution appears to be diminishing. There devolution, even if only administrative, is coming to be regarded as a topheavy structure to impose on the present system of local authorities. Greater control over the existing non-elected administrative bodies might well satisfy the Welsh people. A piquant situation is created by the Government's rejection of the recommendation that some form of proportional representation should be adopted for election to the national Assemblies, because it is not unlikely that under the traditional British electoral system of single-member constituencies and 'first past the post', the Scottish Nationalists will win a majority of seats in the Scottish Assembly and perhaps go on to press for independence for Scotland. Incidentally, it is possible under this system that after the next general election in the United Kingdom the Scottish Nationalists will hold the balance of power in the House of Commons.

POSTSCRIPT

The England and Wales Bill was introduced into the House of Commons in November 1976, and is now (February 1977) in the committee stage in that House. The Bill incorporates the Government's revised proposals contained in Cmnd. 6585 (August 1976). The main changes in the previous proposals outlined in this article are:

There is to be a referendum in Scotland and Wales separately before the appropriate part of the Act will come into force.

The *vires* of a Bill of the Scottish Assembly (if challenged by the UK Government) will be decided by the Judicial Committee of the Privy Council, not by the Secretary of State. The powers of the UK Government to object to Assembly Bills on policy grounds will be available only if the Government considers the Bill to have unacceptable repercussions on matters for which they remain responsible, and subject to affirmative resolution of both Houses. The *vires* of an Assembly Act may be reviewed by the courts, though there is no indication yet what courts will have jurisdiction in this matter.

The Scottish Chief Executive will be chosen by the Assembly, not by the Secretary of State, who will merely make the formal appointment. The reserve powers of the UK Government in executive matters are reduced. The Scottish Assembly will not have any revenue raising power. The whole of Scots Private Law will be devolved, as well as the administration of the courts; but not the basic structure of the court system or the appointment and tenure of the higher judiciary.

In Wales there will be a similar reduction of the UK reserve powers in executive matters.

A guillotine motion was defeated in the House of Commons on 22 February 1977, and so it is unlikely that a Devolution Bill in any form will be enacted during the present Parliamentary session.