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Devolution in the United Kingdom

‘The introduction of devolution to the United Kingdom has resulted in a constitutional mess: the scheme now in place is incoherent, inconsistent and has conspicuously failed to solve the “West Lothian” question.’ *Discuss.*

A number of clear constitutional issues were raised by the process of devolution, all of which may have contributed to the alleged incoherency and inconsistency: Parliamentary sovereignty has been further limited by the allocation of previously centralised powers, there is an arguably increased asymmetry between the various states of the UK, and the future of the union has again been put into question. Finally, the West Lothian question has become relevant, along with the issues resulting from any meaningful solution. This essay will attempt to examine the magnitude and significance of these issues.

The devolution of power to Scotland, Northern Ireland and Wales has undoubtedly limited the sovereignty of Parliament. Indeed, this effect was essential for the purpose of the respective acts; the growing lack of ease with the existence of an all powerful central body, as will be discussed below, was a significant impetus for Labour's agenda in creating the aforementioned devolved legislatures. As with the Human Rights Act¹ and the European Communities Act,² devolution has introduced no absolute legal limit on the power of Parliament: not only can the acts devolving powers technically be repealed, they each

1 Human Rights Act 1998

2 European Communities Act 1972

contain clauses to re-affirm Parliament's supremacy.³ Section 28 of The Scotland Act, for example, devolves significant legislative competence; however under subsection 7 this 'does not affect the power of the Parliament of the United Kingdom to make laws for Scotland'.⁴

The impact on sovereignty can most accurately be gauged by speculating upon both the probability of future repeal, and how readily will Parliament will legislate on devolved matters. It is submitted that the first scenario is unlikely: it would be wholly politically infeasible to entirely remove devolved powers,⁵ especially in Scotland, where their implementation has been largely stable; repeal of the Scotland Act would arguably result in a retaliative push for complete independence. Moreover, there is little incentive to reverse devolution, considering its relative success thus far; consequently, the more time which passes, the more established the respective legislatures become. The second question is perhaps more contentious. In the case of Scotland, the Sewel convention ensures that the UK Parliament does not legislate on Scottish issues without the permission of the Scottish Parliament; however as has been argued by Hazell and Rawlings, this has been abused as a mechanism for introducing acts into the Scottish legal system, which the Scottish Parliament have failed to give sufficient scrutiny.⁶ It is submitted that, as a relatively new institution, it would be imprudent for the Scottish legislature to act in a markedly antagonistic manner with relation to Parliament; perhaps over time the Sewel convention will become more concrete, as Scotland becomes more autonomous in exercising its legislative powers. Conversely, the devolved Northern Ireland Assembly has not seen a similarly stable decade, having been suspended for more than half of its life; a fact which

3 Hadfield, B. 'Devolution, Westminster and the English question' [2005] PL 286-305, 289

4 Scotland Act 1998 s28(7)

5 Hazell, R. 'Reinventing the constitution: can the state survive?' [1999] PL 84-103, 86

6 Hazell, R. and Rawlings, R. *Devolution, Law Making and the Constitution* (1st edn Imprint Academic, Michigan, 2005), 41

has gone some way to reaffirming the continuing sovereignty of Parliament.

There is a definite asymmetry throughout the United Kingdom at present,⁷ enabled by its top-down power structure,⁸ although this is mitigated by a number of important factors. First, it might be argued that asymmetry itself was a significant driving factor towards devolution. A centralised sovereign body might initially appear to embody democratic equality, however this ultimately proved not to hold true. The shortcomings of the centralised Westminster Parliament became most apparent during the 1980s, when the Conservative government, despite having a majority in England, became increasingly unpopular in Scotland, leading to a clear democratic deficit between the two countries; Lord Hope argues that '[t]he case for [devolution] became almost unanswerable when all the Conservative candidates in Scotland were defeated'.⁹ The disdain for the prior system largely resulted from the lack of regard for non-English interests ensuing from the aforementioned deficit; a significant example of this was the introduction of the Community Charge (popularly known as the 'Poll Tax') in Scotland a year in advance of the remainder of the UK. Accordingly, while devolution did not result in an entirely symmetric union, the divide in power is arguably less pronounced than it was prior to 1998.

Ultimately, it is submitted that any asymmetry resulting from devolution is largely irrelevant, since essentially, the allocation of powers was in line with the exigencies of the states in question. Scotland, for example, has pushed for further independence for a number of years, the Scottish Constitutional Convention asserting its desires in 1988 with its claim of right, and subsequent report in 1995, *Scotland's Parliament, Scotland's Right*,

⁷ Tierney, S. 'Giving with one hand: Scottish devolution within a unitary state' [2007] 5(4) IJCL 730-753,

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⁸ O'Connor, S. D. 'Altered states: federalism and devolution at the "real" turn of the millennium.' [2001]

60(3) CLJ 493-510, 503

⁹ Lord Hope of Craighead, 'Devolution and human rights' [1998] 4 EHRLR 367-379

in which it stated its 'practical intent' to form its own parliament. Wales, on the other hand, has had no such vocal desire for further independence, and indeed it is arguable that the devolved powers it did receive were largely for the purposes of keeping it on equal ground with Scotland.

Another positive result of devolution has been reformed systems of democracy; in establishing the devolved legislatures, a system of proportional representation was implemented for the respective assemblies; Hadfield argues that 'consensual politics are more appropriate for a devolved legislature than the more confrontational or adversarial effects usually produced by the Westminster first-past-the-post system',¹⁰ however it is submitted that this choice has gone some way to solving the problems created by a central legislature, as demonstrated by one arguable inadequacy of Parliament; the first past the post system has often resulted in a simple voting majority holding disproportionate power, rather than representing the true spectrum of interests throughout the nation.

Finally, it is advantageous to highlight the resemblance of the union in its present state to a quasi-federal system: as has already been discussed, while there is no strict divide in powers, and there are no exclusive competences other than those of the UK Parliament, devolution has virtually resulted in the practical reverse of these norms; O'Connor describes the current system as the potential 'coexistence of coordinate sovereignties in a federal system'.¹¹ While there is no written UK constitution *per se*, the notion of constitutional statutes brought to light in *Thoburn*¹² has given the respective acts of devolution an added degree of entrenchment. The semblance of devolution with federalism would also be given further effect by the introduction of an English parliament, should

¹⁰ Hadfield, B. 'The nature of devolution in Scotland and Northern Ireland: key issues of responsibility and control' [1999] 3(1) ELR 3-31, 10

¹¹ 'Altered states: federalism and devolution at the "real" turn of the millennium.' (n 8 above) 505

¹² *Thoburn v Sunderland City Council* [2002] 3 WLR 247

popular opinion ever sway in that direction. The relevance of this likeness in demonstrating the potential stability of such a system: degrees of asymmetric federalism have proven to be wholly workable in Canada, Quebec and Russia.¹³

The future of the union has been an issue from the initiation of devolution, primarily for the Conservative party. The original conjectures were notably dramatic; those in favour of centralised power predicted an ultimate dissolution of the union, in a vicious cycle through which decentralized power would fuel further desire for independent states and regions. Such notions have not stood the test of time; indeed, the desire for further independence seems to have been largely quelled by the establishment of local legislatures. The Royal Commission on the Constitution posited that should true independence ever be gained, the resulting nations would be overshadowed by the political importance of England;¹⁴ this holds true to an extent – from a financial perspective, it might be argued that Scotland ultimately depends on the UK, and owing to the current economic climate, further pushes for independence in the short term seem increasingly unlikely. Devolution itself, however, has not yielded such an effect.

The West Lothian question is one of the most interesting issues to arise from the semi-devolved union; that being the capability for Scottish MPs to vote on English matters in the Westminster Parliament, while in contrast, English MPs may only vote on devolved Scottish issues when the issue arises in Parliament, and then only when permitted by Scotland through the Sewel convention. There are a number of reasons why this question might not be as important as it is made out to be – and indeed why Lord Irvine may have been correct in positing that “the best thing to do about the West Lothian question is to

13 Choudhry, S. 'Does the world need more Canada? The politics of the Canadian model in constitutional politics and political theory' [2007] 5(4) IJCL 606-638

14 *Report of the Royal Commission on the Constitution*, vol 1, Cmnd 5460/1973 [531]

stop asking it".¹⁵

One important consideration is the status of Parliament after devolution. Its influence has been largely reduced, enough to speculate that it has indeed become distinctly more of an 'English Parliament' – more so, undoubtedly, than prior to 1998. If the residual power it has over Scotland and the other devolved states is then borne in mind, the issues created by the West Lothian question might seem minor in comparison; as has been posited, the Sewel convention has not been wholly effective in restricting legislative power over Scotland; as already discussed, it has become something of a positive mechanism; Batey and Page posit that 'such legislation has been a far more common occurrence' than was initially expected.¹⁶ Hence, if the issue is a question of fairness, it would seem that one inadequacy is counterbalanced by the other.

Moreover, it is conceivable that the populace of England as a whole do not see the question as having a great amount of importance: the referendum in the North East of England arguably proved that English devolution, at least as presented by the government, is largely an unpopular course of action, despite being the first step in solving the issue. This position is tentative, however; there are far more convincing reasons why the proposition for elected regional assemblies was quashed, such as an overarching apathy for increased expenditure and bureaucracy, along with a lack of identification with the artificial regions proposed.¹⁷

Aside from the introduction of an English Parliament, there are two further potential

¹⁵ Hansard HL col 1201 (June 25 1999)

¹⁶ Batey, A. and Page, A. 'Scotland's other Parliament: Westminster legislation about devolved matters in Scotland since devolution' [2002] PL 501-523, 502

¹⁷ BBC 'North East votes no to assembly' <http://news.bbc.co.uk/1/hi/uk_politics/3984387.stm> (Accessed 8 March 2009)

solutions to the West Lothian question, neither of which appears to hold true under scrutiny. The first is embodied by one conservative tag line, *English Votes on English Issues*. Since 1998, there has been talk of excluding Scottish MPs from matters purely affecting England; those being the equivalent matters as were devolved as Scottish competences. Speculation has included the concept of a grand committee, which would legislate exclusively on English matters. At any rate, this approach, or any other ultimately preventing Scottish MPs from voting, would be practically analogous to English devolution, simply under a different name; Russel and Lodge argue that this approach would simply act as a proxy for an English Parliament.¹⁸ Curiously, despite the radical constitution change Labour began at the end of the previous century, the impetus now seems to be with the Conservative party; despite their prior protests that devolution for Scotland, Northern Ireland and Wales would go some way to breaking up the union, it is now Labour which purportedly fears such an outcome. Obviously, the opposition cited must be considered in light of the Labour majority in Scotland over the conservatives; the West Lothian question itself is perhaps one which is not advantageous for the current executive branch to solve.

Ultimately, it is submitted that devolution has been a success story. Furthermore, the inconsistencies and issues which have presented themselves thus far are notably less dramatic than might have been predicted prior to 1998. While the union does currently exist in a state of tenuous equilibrium, the allocation of powers is not yet normalised, and a solution the English problem will undoubtedly need to be elucidated. The ideal approach to this issue would undoubtedly be the introduction of an English parliament, and owing to the continuing success and stability of Scotland's new legislature, it seems that popular opinion in England may eventually sway in this direction, leading to a coherent and

¹⁸ Russel, M. and Lodge, G. 'The Government of England by Westminster' in Hazell, R. *The English Question* (1st edn Manchester University Press, Manchester, 2006)

symmetrical union of devolved states.