PUBLIC LAW IN A MULTI-LAYERED CONSTITUTION

Edited by

Nicholas Bamforth
Fellow in Law,
The Queen's College, Oxford

and

Peter Leyland
Senior Lecturer in Law
London Metropolitan University

HART PUBLISHING
OXFORD AND PORTLAND, OREGON
2003

5

Devolution and England: What is on Offer?

RICHARD CORNES*

INTRODUCTION

IN MAY 2002, John Prescott, Deputy Prime Minister and Stephen Byers, then Secretary of State for Transport, Local Government and the Regions, set out the Government's proposals for a new level of regional government within England in a white paper entitled *Your Region Your Choice: Revitalising the English Regions* ('the White Paper').[1] The next indication of the Government's plans for England came in the speech from the throne on 13 November 2002, in which a Bill allowing for referendums in the English regions on establishing regional assemblies, was promised. That Bill, the Regional Assemblies (Preparations) Bill 2002, was passed in 2003. It empowers the Secretary of State, having assessed the level of regional interest in a regional assembly, to call one or more regional referendums.[2] The Act contains no further detail as to the precise structure and organisation of the proposed assemblies; that detail will only be forthcoming once at least one region has voted for a regional assembly. At that point the:

> Government [will] ... introduce a second Bill, when Parliamentary time allows, to enable regional assemblies to be set up where people have voted for them. Elections for those assemblies would be held within months of the second Bill becoming law. This should allow the first regional assembly to be up and running early in the next Parliament.[3]

Until that Bill is introduced the only detail available about the proposed regional assemblies is contained in the White Paper; and an analysis of that document from the perspective of constitutional law is at the heart of this chapter.

* My thanks to the editors and other contributors to this volume for their comments on an early outline of the chapter discussed at a weekend seminar in Oxford at Easter 2002. I am also particularly grateful to Leigh Oakes and my colleagues Meris Amos and Deidre Fottrell for reviewing a draft of this chapter.

[1] *Your Region Your Choice: Revitalising the English Regions* (Cm 5511, 2002).

[2] Regional Assemblies (Preparations) Act 2003, s 1.

[3] 'Bill Paves the Way for England's First Directly Elected Regional Assemblies' (News Release 122, Office of the Deputy Prime Minister, 14 Nov 2002). On 16 June 2003 referenda were announced for three northern regions during 2004. 'Prescott go-ahead to devolve regions', *The Guardian*, 16 June 2003.

In the preface to the White Paper, the Prime Minister promises that it will, 'build on the success of devolution elsewhere in the UK,' while the Deputy Prime Minister and Secretary of State, state that, 'by devolving power and revitalising the regions we bring decision-making closer to the people and make government more efficient, more effective and more accountable.'[4] However, what the White Paper offers England is a series of weak regionally-based assemblies, certainly not comparable to the new Parliament in Scotland or the new Assembly in Northern Ireland, of even more limited scope than the National Assembly for Wales; and not, it will be argued, worthy of the title 'devolution.'

By purporting to extend the devolution process to the English regions, a further development of multi-layered governance within the United Kingdom, the government also implicitly seeks to answer what has become known as the 'English Question.'[5] The question refers to the fact that now power has been devolved to other parts of the United Kingdom, with the consequence that Members of Parliament at Westminster may no longer discuss devolved issues, Members of Parliament elected from Scotland, Wales and Northern Ireland are still entitled to take part in decision-making on matters concerning only England.[6] This chapter will argue, based on a definition of devolution arising from an examination of its history to date, that the White Paper's proposals do not amount to devolution. It will end with the suggestion that the answer to the English Question may not be one which can be answered by proposing new levels of government for England. Rather, it will be suggested, the question the United Kingdom needs to address is that of the Union itself between England, Scotland, Wales and Northern Ireland; and that only by dealing with the future, and nature, of that Union, in the context of continuing European integration, can the anomaly highlighted by the devolution process to date be adequately addressed.[7]

[4] *Ibid.*

[5] Relevant to this book's concern with multi-layered government is Noreen Burrows' comment that in the absence of regional government within England, 'the United Kingdom, taken as a whole, is not characterised as having multi-layered government—that description only applies at the moment to Scotland, Northern Ireland and Wales. However, even where devolution has occurred ...[it] is a differentiated process. Thus the United Kingdom as a whole may be said to have *multi-textured* government in the sense that the layers of government are uneven throughout': Noreen Burrows, *Devolution* (London, Sweet & Maxwell, 2000), 189–90, (emphasis added and footnote omitted).

[6] See discussion of the English Question in O Hood Phillips and P Jackson, *Constitutional and Administrative Law* (London, Sweet & Maxwell, 2001) paras 5–042 and 5–046; Selina Chen and Tony Wright (eds) *The English Question* (London, Fabian Society, 2000); and *An Unstable Union: Devolution and the English Question* (London, Constitution Unit, 2000), in which Robert Hazell characterises England as, 'the gaping hole in the devolution settlement' (at 7).

[7] I acknowledge that reform of the Union itself is not on the agendas of the three major pan-United Kingdom political parties (Labour, Liberal Democrat and Conservative). However, one of the purposes of academic discourse is to raise issues for debate which might otherwise not be discussed. Furthermore, the issue of the Union could quite conceivably *have* to be addressed if, for instance, the Scottish National Party (the second largest party in the Scottish Parliament, and committed to an independent Scotland within the European Union) won power north of the border. The Northern Ireland Act 1998 also contains provisions contemplating the end of the Union's inclusion of Northern Ireland if the required majorities there voted to leave the Union and form a united Ireland. In some respects the only inhabitants of the United Kingdom who do not think about the issue of the Union are the English. Compare Krishnan Kumar, *The Making of English National Identity* (Cambridge, Cambridge University Press, 2003).

The argument will proceed as follows: first a brief introduction to the Blair Government's devolution programme will be set out; then, drawing on this brief history and the accepted sources of constitutional law and principles in the United Kingdom, a set of defining characteristics for devolution will be proposed; following this, the defining characteristics will then be used to assess the White Paper's proposals and the relevant provisions of the Regional Assemblies (Preparations) Act 2003, leading to the conclusion that they do not amount to devolution, but merely decentralisation (unless the definition of devolution is so altered as to rob it of all significance);[8] finally, the chapter's conclusion will argue that the proposals for English regional assemblies fails to answer the English Question, and that the solution to that question should be sought in the possibility of reformulating the Union between England, Scotland, Wales and Northern Ireland so that they become co-operating (here we may look to the members of the Nordic Council for inspiration)[9] but distinct and individual members of what the Scottish constitutional lawyer, Neil McCormick, has referred to as 'the European Commonwealth.'[10]

DEVOLUTION AND NEW LABOUR[11]

The Labour Government elected in May 1997 moved rapidly on its manifesto promises on devolution. Within three months of the election, White Papers were published outlining elected assemblies for Scotland and Wales.[12] By July 1997, the Referendums (Scotland and Wales) Act 1997 had received Royal Assent and by September, the referendums had been held. Both Scotland and Wales voted for devolution (and, in Scotland, a minor tax varying power), though in Wales the majority was slight, a meagre 1 per cent. The following year the Scotland, Government of Wales, and Northern Ireland Acts were all passed. Northern Ireland was then the first to elect its new legislature with polls held on 25 June 1998.[13] On 6 May 1999, Scotland and Wales followed; with elections to the first Scottish Parliament in 300 years,[14] and the first elected national assembly for Wales ever.[15]

[8] For a definition of the difference between 'devolution' and 'decentralisation' see below n 50 and accompanying text.

[9] The Nordic countries (Denmark, the Faroe Islands, Greenland, Finland, the Åland Islands, Iceland, Norway and Sweden) co-operate at both parliamentary and ministerial levels. The co-operation allows inter alia a common Nordic position to be put forward to the European Union; this is especially significant given that not all the Nordic countries are members of the European Union See Mads Qvortup and Robert Hazell *The British-Irish Council: Nordic Lessons for the Council of the Isles* (London, Constitution Unit, 1998).

[10] See Neil MacCormick, *Questioning Sovereignty: Law, State, and Practical Reason in the European Commonwealth* (Oxford University Press, 1999), especially chs 8, 9, 11 and 12.

[11] For a history of devolution in the United Kingdom see Vernon Bogdanor, *Devolution in the United Kingdom* (Oxford University Press, 1999).

[12] *Scotland's Parliament* (Cm 3658, 1997); *A Voice for Wales* Cm 3719 (1997).

[13] As a result of the Belfast Agreement (also referred to as the 'Good Friday Agreement') of Easter 1998; see *The Agreement Reached in Multi-Party Negotiations* (Cm 4292, 1998).

[14] The Parliament has 129 members elected on a proportional electoral system. The executive is led by a First Minister who is elected by the Parliament, appointed by the Queen, and who in turn nominates other ministers for endorsement by the Parliament prior to being appointed by the Queen.

[15] The Assembly has 60 members elected on a proportional electoral system. Those 60 elect one of

Of the three devolved institutions so far established, the new Scottish Parliament has the greatest degree of power. The Scotland Act 1998 grants the new Parliament the power to pass what it calls 'Acts of the Scottish Parliament', terminology which suggests that, in some way at least, the instruments are to be viewed as 'primary'.[16] A similar general grant of power is also made to the Scottish Executive.[17] Both general grants are then subject to specific restrictions.[18] The restrictions are the classic set of functions retained in federal systems: eg foreign affairs and defence. These 'big ticket' exclusions are supplemented by a very detailed set of more specific exceptions—it is in relation to these that Craig and Walters raised an early alarm about the potential for conflict over the boundaries of the Parliament's powers.[19]

The Northern Ireland Act 1998 creates a legislative body along the lines of the Scottish Parliament with general legislative authority subject to certain reservations.[20] The 108-member Assembly is elected on a proportional basis. The most intriguing feature of the Northern Ireland scheme is the form of the executive. It is in effect a forced coalition, with the executive departments being distributed between the Assembly parties based on the number of seats held in the Assembly. Furthermore, the First and Deputy First Ministers are in effect equal in authority. Currently, the First Minster is drawn from the moderate unionist party and the Deputy from the moderate nationalist party.[21] The entire scheme requires equal power-sharing at all levels. It is well known that the devolution process in Northern Ireland has regularly been thrown into turmoil by difficulties in the peace process, an issue which will not be addressed here.[22]

The devolution settlement in Wales can justly be described as extraordinarily complex.[23] Not only is it that, it is also significantly less generous than the Scottish

their number as First Secretary; the First Secretary then appoints up to eight other Assembly Secretaries and to them is delegated power by the Assembly. The Government of Wales Act 1998 used the term 'Secretaries'. However, in perhaps an early example of the 'ratchet up' effect of devolution, the term First Minister and Minister is now being used in Wales, mirroring the terminology in Scotland and Northern Ireland. There has been no amendment to the Act to reflect the changed usage.

[16] Scotland Act 1998, s 28. The nature of 'devolved power' and the meaning of 'primary legislation' in the context of the Scottish Parliament is discussed in greater detail, below n 55 and accompanying text.

[17] Scotland Act 1998, s 53.

[18] See Burrows, above n 5, 65–68.

[19] Paul Craig and Mark Walters 'The Courts, Devolution, and Judicial Review' [1999] *Public Law* 274.

[20] Northern Ireland Act 1998, s 5. See also Brigid Hadfield, 'The Nature of Devolution in Scotland and Northern Ireland: Key Issues of Responsibility and Control' (1999) 3 *Edinburgh Law Review* 3.

[21] Although at the time of writing (June 2003) the devolved government in Northern Ireland was once again in suspension, see also below, n 58.

[22] For further detail, see eg, Rick Wilford and Robin Wilson, 'A Bare Knuckle Ride: Northern Ireland' in Robert Hazell (ed), *The State and the Nations: The First Years of Devolution in the United Kingdom* (London, Academic Imprint, 2000). See also discussion, below n 66 and accompanying text; and see Brigid Hadfield, chapter 6 below.

[23] The Law Society, making submissions to the National Assembly's operational review in 2001 made the startling comment that it was becoming increasingly difficult for lawyers to provide advice to clients as to exactly what the Assembly's powers are. For the full report of the operational review see www.wales.gov.uk/subiassemblybusiness/procedures/assemblyreview.htm For discussion of the Welsh scheme, see Richard Rawlings, 'The New Model Wales' (1998) 25 *Journal of Law and Society* 461.

and Northern Irish schemes. Unlike Scotland, Wales does not enjoy a general delegation of legislative power subject only to specific exceptions. The Assembly has been delegated executive decision-making authority in specific subject areas—there are no 'Acts of the Welsh Assembly.' Powers previously exercised by the Secretary of State for Wales under a range of statutes are now exercised by the Assembly. Where Scotland has general power, the Assembly has power only in those specific areas delegated to it by statutes, past and future. The initial transfer of powers was accomplished by the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1 1999/672 (UK), a huge and detailed document. A significant weakness of the Welsh scheme, and one likely to lead to tension, is the Assembly's lack of general primary legislative authority. If it wants to act in a novel area, it has to persuade Westminster to pass a statute empowering it.[24] That concludes our review of the Government's devolution programme to date. We now move on to develop a definition of devolution based upon established constitutional principles, and the history of devolution to date.

DEFINING DEVOLUTION

The United Kingdom's Uncodified Constitution

Most states can look to a written constitution for the rules which define the nature of their constitutional arrangements. Even in, for example, asymmetrical, non-federal, regionalised polities such as Spain, there is greater clarity about the nature of the sub-national bodies, and the process by which new devolved governments are established. In Spain the fact of asymmetry does not mean that the constitutional nature of the 17 Autonomous Communities is uncertain. They were established after a nationwide constitution-making process in which Spain, as a state, set out a set of constitutional principles and rules for the development of regional government. [25] In the United Kingdom, to identify the underlying principles and rules of the constitution we have to look to: statutes, common law sources (including for example, judicial precedents), constitutional conventions, the law and customs of Parliament, parliamentary debates themselves, European Community law, European Convention on Human Rights law, and authoritative academic works.[26]

[24] Something which the Assembly has so far not had much luck in achieving. In 2001 the Assembly passed a resolution seeking four Bills in the coming Westminster session: power to improve collaborative working and responsibility in the National Health Service in Wales; providing greater cohesion in the education, training and careers systems in Wales; giving the Assembly authority to approve census forms for use in Wales; and making St David's Day a holiday in Wales (National Assembly for Wales *Record*, 13 March 2001). In the event only one of the Assembly's wishes was included in the Queen's Speech (concerning the NHS in Wales), and even that was subsequently subsumed in an English NHS Bill.

[25] Though the settlement in Spain, like that in the United Kingdom, remains subject to the continuing pressure for further autonomy—see eg 'Independence? Let's have a vote', reporting on plans by the nationalist government of the Basque region to hold a referendum on greater autonomy from Spain, *Economist*, 5 Oct 2002, 38.

[26] Given the uncodified nature of the UK constitution, there is of course no magic to this list of

In contrast then to, for example, the Spanish system of Autonomous Communities, but in keeping with the historic flexibility of British constitution-making, devolution has proceeded in an ad hoc manner, driven by the specific desires and interests of the respective majorities in Scotland, Wales and Northern Ireland. While, thus far, incrementalism has been an accepted characteristic of constitutional development in the United Kingdom, the lack of any serious and detailed attempt (beyond the mantras of 'modernisation' and 'pragmatism') to set out a coherent guiding set of principles, or core characteristics, of devolution is nevertheless unfortunate, and increasingly beginning to attract adverse comment.[27] The fact that 'pragmatism rather than principle [has] long been a dominant theme of British governance ... and [that] the system of government is a mix of structures and institutions inherited from the past, adopted and adapted in seemingly haphazard fashion to meet the needs of contemporary society' is no longer (certainly not in the context of deciding upon the future structure of the state) a sufficient excuse for this traditionally informal, British approach to constitutional change.[28]

Earlier on in the debate about devolution, political scientists Michael Keating and Howard Elcock opened a special edition of the journal *Regional and Federal Studies* devoted to devolution with the comment that the Labour Government's programme of constitutional reform could be described as, 'piecemeal, with little regard to an overall plan, or even consistency.'[29] Indeed, the degree of incrementalism and pragmatism has led one leading constitutional lawyer, Professor Noreen Burrows, to characterise the devolution process as 'haphazard,' rather than merely asymmetrical.[30] Burrows goes further:

> underlying the current devolution process, there is no clear constitutional model... there has been no attempt to provide a legal framework within which the regional governments will operate. ...What appears to be lacking at present is the recognition of the need for constitutional principles within which the various devolution settlements can operate. It is here that New Labour's modernisation process is weakest. There is an absence of constitutional rules and principles to be applied to the United Kingdom's constitutional structure as a whole.[31]

potential sources: see eg S de Smith and R Brazier *Constitutional and Administrative Law* (8th edn, London, Penguin, 1998), 21–27; O Hood Phillips and P Jackson, above n 6, at 18–21; Hilaire Barnett, *Britain Unwrapped: Government and Constitution Explained* (London, Penguin, 2002), 3–24; from a Scottish perspective, Ashton and Finch, *Constitutional Law in Scotland* (Edinburgh, Green, 2000), 26–48; and more discursively, Barendt, *An Introduction to Constitutional Law* (Oxford University Press, 1998), 26–50.

[27] See Polly Toynbee and David Walker's audit of the first term of the Blair Government, *Did Things Get Better? An Audit of Labour's Successes and Failures* (London, Penguin, 2001). Toynbee and Walker evaluate the Government's progress in devolution under the heading, 'Modernisation', 207–11.

[28] Barnett, above n 26, Preface. For further discussion on the nature of constitutional change in the United Kingdom, see Michael Foley *The Politics of the British Constitution* (Manchester, Manchester University Press, 1999) and the fourth report of the House of Lords Committee on the Constitution, *Changing the Constitution: the Process of Constitutional Change* (HL 69, 2002).

[29] Michael Keating and Howard Elcock, 'Introduction: Devolution and the UK State' in *Remaking the Union: Devolution and British Politics in the 1990s* (1998) 8 *Regional and Federal Studies.*

[30] Burrows, above n 5, at 27.

[31] *Ibid.*

Alan Ward entitles his discussion of devolution in *The Changing Constitution*, 'Devolution: Labour's Strange Constitutional "Design"',[32] while Bradley and Ewing, writing in 2002, still felt able to note that 'devolution is not a term of art in constitutional law.'[33]

In this section I am going to suggest that a set of defining principles, or characteristics, of devolution can be derived from an examination of what it has entailed in practice in each of Scotland, Wales and Northern Ireland;[34] Thus, the defining characteristics proposed below will have their origins in description. This has the advantage of the precision gained from resting the definition upon what devolution actually is, rather than potentially obscuring its characteristics by way of definition by analogy—consider, for example, use of the tag 'quasi-federalism' to describe devolution.[35]

Once we have elaborated a set of defining characteristics of devolution we can then use them as a base line against which the White Paper's proposals can be considered. I do not entirely, or necessarily, suggest that such progressive incremental change should no longer play *any* role in constitutional reform in the United Kingdom. Rather, what I hope the defining principles can do, used as a prescriptive benchmark, is to force policy makers to adopt a more programmatic and principled approach to constitutional change. Deviation from the established benchmarks must be justified, rather than simply being assumed and allowed. The aim, as it were, is to encourage some 'method to this madness.'

What is devolution?

The very essence of devolution is the transfer of power from Westminster to governing institutions responsible for distinct geographical areas within the United Kingdom, in such a way that the devolved decision-makers are primarily answerable to their local electorate. That statement suggests the following five questions: 1. What geographical areas? 2. What type of institutions? 3. With what kind of power? 4. Controlled in what ways? 5. Established in what way? By answering these questions, which we can do by reference to the history of devolution to date, and the

[32] Alan J Ward, 'Devolution: Labour's Strange Constitutional "Design"', in Jowell and Oliver (eds), *The Changing Constitution* (Oxford University Press, 2000).

[33] AW Bradley and KD Ewing, *Constitutional and Administrative Law* (13th edn, Harlow, Longman, 2002), 42; though in fact Bradley and Ewing then go on to provide a succinct definition of devolution.

[34] Following Burrows (above n 5, at 189 at Burrows n 5) I do not treat the Greater London Assembly and the Regional Development Agencies established under the Regional Development Agencies Act 1998 as coming within the term 'devolution'. The reason for this, and for their more appropriate characterisation as examples of local government, and decentralisation, respectively, will become clearer during the discussion later in this section.

[35] To which the author pleads guilty to using and recants: see Richard Cornes, 'Intergovernmental Relations in a Devolved United Kingdom: Making Devolution Work' in Robert Hazell (ed), *Constitutional Futures: A History of the Next Ten Years* (Oxford University Press, 1999), 156. The danger that the federal analogy would obscure more than it illuminates about devolution was discussed by Brigid Hadfield in her *Current Legal Problems* lecture 'Towards an English Constitution', 7 March 2002, University College London.

sources for constitutional principles noted above, I suggest we can arrive at a set of more detailed defining characteristics for devolution. In respect of each question the issue will be what, in respect of the issue the question raises, is necessary in order to achieve the basic goal, or the essence, of devolution. For each question there will be a general discussion, referring to accepted sources of constitutional law noted above (the *descriptive element*), which will lead an answer which will be presented as a defining statement of principle (the *prescriptive element*).

What Geographical Areas?

Historically, the geographical units to which the devolution of power has been contemplated have been the constituent nations of the United Kingdom; the nineteenth century idea of 'Home Rule all round' entailed establishing institutions in each of England, Ireland, Wales and Scotland. Home Rule all round of course never eventuated; however, the principle of devolving power to the nations which constitute the United Kingdom survived, and so in 1997 the first devolution statutes concerned Scotland, Wales and Northern Ireland.[36]

The predominant view in the academic literature is that the basis of devolution is the transfer of power to the sub-UK nations. De Smith and Brazier in their 1998 text, presumably written prior to the Belfast Agreement of that year, implicitly speak of devolution with specific reference only to Scotland and Wales.[37] Likewise, Eric Barendt in his *Introduction to Constitutional Law*, in which he implicitly contrasts devolved power, the power transferred to local government, and federalism.[38] Bogdanor notes that 'the setting-up of the Scottish Parliament and the Welsh Assembly ... imply that the United Kingdom is becoming a *union of nations*, each with its own identity and institutions.'[39] In 2002, Bradley and Ewing write, 'In the United Kingdom, devolution has come to mean the vesting of legislative and executive powers in elected bodies in *Scotland, Wales and Northern Ireland*.'[40] They end their chapter on devolution by noting the anomalies arising as a result of devolution (ie the English Question), and saying that, 'a possible response to the challenge [presented by these anomalies] would be to create devolved forms of government at a regional level in England.'[41] The authors of Hood Phillips and Jackson simply define devolution as the 'delegation of central government powers'

[36] While the status of Northern Ireland as a constituent part of the Union may be a highly contested point, its existence as a thing with which all its people identify with is not. Protestants will couple their Northern Irish identity with a British one; while nationalists, even if they reject the Union with Great Britain and seek reunification with the South, must still have an identity as inhabitants of one of the northern counties which make up Northern Ireland, and their support of the Belfast Agreement in the referendum subsequent to it may be taken as evidence of an endorsement of the North as an entity, even if for the contingent purpose of moving towards an eventual reunion with the rest of Ireland. For analysis of the constitutional implications of the Belfast Agreement for the Union, see Brigid Hadfield, 'The Belfast Agreement, Sovereignty and the State of the Union' [1998] *Public Law* 599.

[37] de Smith and Brazier, above n 26, 63.

[38] See Barendt, above n 26, at ch 3, 'Federalism and Devolution'.

[39] Above n 11, at 287.

[40] Above n 33, at 42. We will return to their comments concerning the type of power vested below.

[41] *Ibid* at 48.

without specifying to what entity those powers are delegated; though in subsequent discussion they deal only with Scotland, Wales, Northern Ireland and note that the Regional Development Agencies Act 1998 could be viewed as a 'first step towards regional devolution in England.'[42] The Scottish constitutional lawyer, Professor Noreen Burrows, in her book *Devolution*, states:

> Devolution is the recognition in law of the national identities and national boundaries that exist inside the nation state that happens to be called the United Kingdom, but which could easily fall into a definition of a union kingdom.[43]

In a footnote shortly after this quote Burrows notes that:

> The creation of a mayor and Assembly in London does not fall into the definition of devolution used in this book. It is however another element in the process of decentralisation and modernisation.[44]

Similarly, Hood Phillips and Jackson deal with the new institutions in London in their chapter on local government. In contrast, Hilaire Barnett opens her discussion of regional and local government with the observation 'historically, the oldest form of devolved power has been to local government'. However she then goes on to discuss devolution to Scotland, Wales and Northern Ireland as distinct from the organisation of local government.[45] Barnett does, however, appear to treat the establishment of the Greater London Authority, and proposals for similar structures in other major cities, as well as possible regional bodies within England, as part of what may be called the 'devolution agenda,' rather than simply as a matter of local government development.

I suggest that the common relevant factor, for the purposes of answering the first question posed 'what geographical area?' concerns *identity*: what matters is that there is a geographical entity with which its inhabitants identify.[46] Such identities in the devolution process have historically been based on being Scottish, Welsh or Northern Irish (whichever side of the sectarian divide). However, in drawing a conclusion for the purposes of the definition of devolution it seems appropriate to allow that the 'identity factor' should be drawn widely enough to take into account the point of view of those living within England. A recent poll for the BBC revealed that more people identified with their local community or region (36 per cent) than England (with which 27 per cent identified), Britain (with which 22 per cent identified), or Europe/the world, which the BBC termed 'cosmopolitan' (which attracted just 13 per cent).[47] The answer therefore should be that, when devolving power in England, it should be transferred to geographical regions with which

[42] See O Hood Phillips and P Jackson, above n 6, at 83 and 105.

[43] Above n 5, at 189.

[44] *Ibid* at Burrows n 5.

[45] See Barnett, above n 26, at 216–63.

[46] See MacCormick, who argues 'there is a new diffusion of power [within the United Kingdom] that answers to the growth, all over the world, of what can justly be called the politics of identity'. above n 10, at 193.

[47] 'English want regional assemblies', BBC News, 21 March 2002, http://news.bbc.co.uk.hi.english/uk_politics/newsid_1883000/1883944.stm

people identify. In this context the requirement of a referendum prior to establishing a new devolved entity, fulfilling as it does the requirement for consent, which Burrows identifies as a 'fundamental principle underlying the entire process of devolution' is a useful check that the geographical area identified for devolution is the correct one.[48]

What Type of Institution?

The next relevant issue is the nature of the institution to which power is transferred. This raises three related sub-issues: how the devolved body is constituted; secondly, the existence of a legislative/executive division within the devolved body; and thirdly, the ability of the legislative element to scrutinise the executive element and, preferably, also play a role in initiating policy-making.

Each of the devolved institutions established to date have been formed by local elections using some kind of proportional electoral system.[49] The requirement for local election clearly differentiates the devolved institutions from mere decentralisation—the delegation of central government power to officials, or agencies, appointed by central government, and answerable primarily to central government.[50] The local election of the devolved administrations ensures that they do effect a transfer of power from central government decision-makers to local decision-makers, answerable directly to their electorate.

The Government Offices for the Regions, established in 1994 to co-ordinate central government activities in the English regions, and now strengthened by the establishment, in April 2000, of the Regional Co-ordination Unit, are clearly on this test an example of decentralisation, rather than devolution. It is also argued that while the regional development agencies do work in conjunction with a voluntary regional chamber, where one has been designated as 'suitable' by the Secretary of State (under section 8 of the Regional Development Agencies Act 1998), that the lack of election to the voluntary chamber, and the continuing strong role of the Secretary of State, also mean that the regional development agencies are more appropriately classified as examples of decentralisation. They may be a step on the path to devolution, but they do not yet amount to it.

We now move to the second issue, the existence of a legislative/executive division within the devolved bodies. All three devolved bodies established so far may be said to be composed of distinct legislative and executive components. Beneath that common truth there lies differentiation in the detailed structure of each entity. Scotland has the system most like that of a classic Parliament on the Westminster model, ie an elected Parliament with the executive drawn from it (though its operation is of course modified by the presence of coalition government which

[48] Burrows, above n 5, at 24. See also the discussion below in relation to question 5 concerning how the devolution scheme is given effect to.

[49] See above nn 14 and 15 and accompanying text.

[50] See also O Hood Phillips and P Jackson, above n 6, at 83: '[devolution] should be distinguished from "decentralisation", which is a method whereby some central government powers of decision-making are exercised by officials of the central government located in the regions.'

tends to be the result of the proportional electoral systems chosen); Northern Ireland has its distinct 'forced coalition' of nationalist/republican and unionist/loyalist ministers based on their respective parties' strengths in the Assembly; while in Wales the process of devolution to date has resulted in a greater differentiation between the executive and other members of the Assembly, with the two developing more distinct identities, than was perhaps originally envisaged.[51]

The final issue under this heading concerns the role of the 'legislative' element of the assembly, specifically, the requirement that it be able to scrutinise the work of the executive (again, ensuring that devolution does in fact produce greater local democratic accountability), and, desirably, be able to play a role in policy-making. Turning first to scrutiny, all of the devolution statutes make clear that the 'executive' arms of the new devolved institutions must be accountable, via the legislative element of the institution, to their local electorate. Similarly, all in varying degrees play a role in developing policy, either at their members' own initiatives, or by providing a conduit for their electorates' ideas to be transmitted to the executive. As with much of devolution, how these two functions are carried out varies significantly between each devolved system. For the purposes of this chapter it will not be necessary to go into the operation of the established institutions further.[52]

The answer proposed to the second question is that devolution entails the transfer of power to: (a) a locally elected body in which; (b) there is a legislative/executive distinction, and in which: (c) the legislative element has the ability to scrutinise the activities of the executive element, as well as, desirably, playing a role in policy development.

What Type of Power is Transferred?

In this section I will argue that the transfer of power to a devolved institution is qualitatively different from the transfer of power to local government. There are three issues to deal with under this heading. First, internally, what is the nature of power to be transferred to a devolved entity? Broadly, the answer will be that either legislative competence, executive authority, or both types of power (or some variant on them) are transferred. Secondly, externally to the devolved entity, what is the nature of its power vis-à-vis Westminster? Here the issue will be the degree of autonomy the entity possesses, with a local authority being at the lowest end of the

[51] This is of course a gloss on the complexities of each system, provided for the purpose of illustrating the underlying similarity of a legislative/executive division in each. For detail, see Burrows, above n 5. In Wales, the problematic nature of the relationship between the Assembly and the executive was the subject of a letter from the First Minister to the Presiding Officer (on 5 July 2001); a greater distinction is progressively being drawn between the executive and Assembly in Wales than was perhaps originally envisaged in the Government of Wales Act 1998.

[52] Again, see Burrows, above n 5, particularly at chs. 2, 4 and 5. Analysis of the operation of the Northern Irish Assembly and Scottish Parliament can be found in Rick Wilford and Robin Wilson, *A Democratic Design?: The Political Style of the Northern Ireland Assembly* (London, Constitution Unit, 2001), and Barry K Winetrobe, *Realising the Vision: A Parliament with a Purpose: An Audit of the First Year of the Scottish Parliament* (London, Constitution Unit, 2001). No similar audit of the National Assembly for Wales has yet been published.

scale, and the Scottish Parliament being at the highest. Thirdly, a devolved entity must enjoy fiscal autonomy. Lack of, at the very least, discretion over what money is spent on would interfere with the basic notion of devolution—that power to decide is as a matter of political reality (legal sovereignty aside) *transferred.*

In relation to the first issue, whatever the nature of the power transferred (whether legislative, executive, both, or some variation on them) the key is that the devolved institution must have the capacity to act, to play a meaningful role in relation to the governance of the subject areas it is supposed to have power over.[53] Scotland and Northern Ireland are relatively uncomplicated in this respect, given that both have primary as well as secondary legislative power (the meaning of those terms in the context of devolution will be discussed shortly), as well as executive power, vested in their executives. The Welsh scheme is, however, problematic. As has been noted above, only secondary legislative authority has been delegated to Wales. Judging the Assembly by its activity to date, however, it has certainly shown that it has the capacity to act (it has so far passed some thousands of instruments). However, as was noted in the brief introduction above, the Assembly's continuing dependence on Westminster for primary legislation is proving to be an irritant.[54]

The second issue is the nature of the devolved entities' power vis-à-vis Westminster. On the strict, Diceyan view of the constitution (in which the Westminster Parliament is sovereign) it is clear, as Bogdanor puts it that 'constitutionally, devolution is a mere delegation of power from a superior body to an inferior' and that, 'devolution involves the creation of an elected body, *subordinate* to Parliament.'[55] The position is, in relation to Scotland, for example, made clear by section 28(7) of the Scotland Act 1998 which stipulates that, 'This section [which sets out the Parliament's scope of authority] does not affect the power of the Parliament of the United Kingdom to make laws for Scotland.' In the first cases concerning the devolution settlements, the judges have emphasised this aspect. Lord Rodgers, now a Lord of Appeal in Ordinary, at the time the most senior Scottish judge, said in an early case concerning the new Parliament, '[it] is a body which, *like any other statutory body*, must work within the scope of [its] powers. If it does not do so, then in an appropriate case the court may be

[53] It is assumed, for the purposes of this chapter, that from the point of view of constitutional law the issue of the range of subjects transferred to a devolved institution is neutral to the issue of whether a scheme amounts to devolution as a matter of legal principle (unless of course so little was being transferred as to make the exercise meaningless). The range of subject areas to be transferred is relevant from a public policy/political science point of view. However, such an analysis will not be offered here. In relation to the mix of subject headings proposed for transfer to the English regions in the White Paper, Mark Sandford, from a political science perspective, comments 'there does not appear to be any guiding logic to the range of subject areas assemblies are to play a role in, or the type of power (strategy making, executive functions or influencing role) they have to play their role. ... It is quite apparent that the range of functions to be offered to elected regional assemblies owes everything to political bargaining and little to rational analysis': Mark Sandford *A Commentary on the Regional Government White Paper, Your Region, Your Choice: Revitalising the English Regions Cm 5511, May 2002* (Constitution Unit, 2002), para 23, p 11.

[54] Instruments promulgated to date by the National Assembly for Wales can be viewed at: http://www.hmso.gov.uk/legislation/wales/w-stat.htm. The downgrading of the position of Secretary of State for Wales in the 12 June 2003 cabinet re-shuffle may also exacerbate the weaknesses of the Welsh scheme.

[55] Above n 11, at 287–88.

asked to intervene and will require to do so.'[56] The mark of a federal system, in which each of the governments enjoys a constitutionally entrenched sovereign scope of authority, is completely lacking in devolution.

However, quite apart from this view not accounting for the cogent arguments concerning the binding nature of the Treaty and Acts of Union put forward by Scottish constitutional lawyers, a bare statement of Westminster's continuing legal sovereignty without qualification would be a misleading description of the constitutional nature of the contemporary devolution settlement.[57] This is so because the technical *legal* retention of sovereignty is only half of the picture. Arguably the more important part of the picture, because it is the operational part, is the *political reality* that power to make decisions in certain areas has in effect been transferred to the new devolved institution. Westminster no longer has more than a residual, perhaps at times partnership, role to play in those areas which have been devolved. As Bogdanor points out, 'politically... devolution places a powerful weapon in the hands of the Scots and the Welsh.' While 'constitutionally, the Scottish Parliament will clearly be subordinate ... politically, ... it will be anything but ... The Scotland Act creates a new locus of political power.' Westminster in effect could not take power back from Scotland without an invitation from Scotland to do so. While legally it retains the power to do so, it is inconceivable that it would exercise it without Scotland's consent except in extraordinary circumstances: 'power devolved, far from being power retained, will be power transferred; and it will not be possible to recover that power except under "pathological circumstances."'[58]

How, though, may we reckon whether the transfer of power to a devolved institution, while not transferring *legal* sovereignty, has transferred *political* sovereignty in such a way to count as an example of devolution? One way to differentiate between the level of autonomy enjoyed by devolved institutions versus that enjoyed by local government is by recourse to judicial decisions—in particular, how the courts approach challenges to the exercise of power transferred by Westminster. All bodies exercising power delegated to them by a Westminster statute are subject to the supervisory jurisdiction of the higher courts, exercising their power of judicial review, to ensure that the delegate remains within the bounds of the authority delegated—a point made with perhaps over-zealous clarity by Lord President Rodger in

[56] *Whaley v Watson* [2000] SC 340; [2000] SCLR 279, emphasis added. For further discussion see Barry Winetrobe, 'Scottish Devolved Legislation and the Courts' [2002] *Public Law* 31, 37. Winetrobe's analysis concerns the first case to reach the Judicial Committee of the Privy Council in which an Act of the Scottish Parliament was challenged for vires (an alleged breach of Article 5(1)(e) of the European Convention on Human Rights by the Mental Health (Public Safety and Appeals) (Scotland) Act 1999). The case was *Anderson, Reid and Doherty v Scottish Ministers* (2002) HRLR 6; (2002) UKHRR 1.

[57] See discussion of the constitutional nature of the union between Scotland and England in O Hood Phillips and P Jackson, above n 6, at paras 4–006 to 4–009; and Neil MacCormick 'Does the United Kingdom have a Constitution? Reflections on *MacCormick v Lord Advocate*' (1978) 29 *Northern Ireland Law Quarterly* 1.

[58] See V Bogdanor, above n 11, at 291. Such 'pathological circumstances' have unfortunately been seen in Northern Ireland where, in order to preserve the peace process, devolved government has been suspended by two Secretaries of State for Northern Ireland, exercising their powers under the Northern Ireland Act 2000, three times now.

the quote from *Whaley v Watson*, set out above. However, the grounds upon which a local authority may be judicially reviewed (the classic set of illegality, procedural unfairness, irrationality and now breach of section 6 of the Human Rights Act 1998) are arguably different from those upon which a true devolved authority may be reviewed.[59] A body which is subject to review both for acting outside of the scope of its empowering statute *as well as* being open to challenge on the traditional common law grounds for review, is more likely to be an example of local government, than of devolution. The distinction will become clearer by considering some of the cases which have arisen to date concerning the new institutions.

The Judicial Committee of the Privy Council has so far had one opportunity to consider a challenge to the vires of an Act of the Scottish Parliament. In *Anderson, Reid and Doherty v Scottish Ministers*, the petitioners sought to argue that the first Act of the Scottish Parliament, the Mental Health (Public Safety and Appeals) (Scotland) Act 1999, was incompatible with Article 5(1)(e) of the European Convention on Human Rights and therefore outside of the Parliament's competence.[60] Opening his analysis of the case, Winetrobe addressed the issue of whether Acts of the Scottish Parliament should be reviewable on the ordinary common law grounds (for example, illegality and procedural unfairness), or whether a more narrow approach is appropriate. Under the narrow approach the only ground upon which an Act could be reviewed would be if it contravened one of the specific limitations set out in section 29 of the Scotland Act.[61] Commenting on the decision upholding the impugned Act, Winetrobe notes that 'the Judicial Committee's approach to the reviewability of Scottish legislation appeared implicitly to be tending towards a narrow rather than broad form of scrutiny.'[62]

On 31 July 2002, Lord Nimmo Smith in the Outer House of the Scottish Court of Session decided the most recent case involving a challenge to the vires of an Act of the Scottish Parliament. In *Trevor Adams and others v Advocate General for Scotland and the Scottish Executive*, the petitioners challenged the legality of the Protection of Wild Mammals (Scotland) Act 2002 and its corresponding commencement order.[63] The challenge to the Act (which makes it a criminal offence to hunt foxes on horseback and with dogs) was based both on the ground that it was outside the competence of the Parliament because it interfered with Convention rights, *as well as* on traditional common law grounds that the Act was ultra vires for procedural impropriety and unreasonableness.[64] The case thus pre-

[59] The issue is also discussed by Craig and Walters, above n 19, and by Brigid Hadfield, 'The Foundations of Review, Devolved Power and Delegated Power' in Christopher Forsyth (ed), *Judicial Review and the Constitution* (Oxford, Hart, 2000), 194.

[60] Above n 56. A summary of the facts of the case, and analysis, may be found in Barry Winetrobe, 'Scottish Devolved Legislation and the Courts' [2002] *Public Law* 31.

[61] Section 29(1) provides that 'An Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament' and then goes on to stipulate the circumstances in which a provision would be outside of competence, which include contravening one of the rights provided in the European Convention on Human Rights.

[62] Above n 60, at 36. The case is on appeal to the Inner House.

[63] [2003] SLT 366 (OH).

[64] *Ibid* at para 4.

sented directly the issue of the range of grounds upon which the Scottish Parliament could be challenged. Tellingly, for our purposes, Lord Nimmo Smith's approach was one which, on Winetrobe's analysis, may be characterised as 'narrow'. He said:

> What appears to me to be of significance is that the Scotland Act is clearly intended to provide a comprehensive scheme, not only for the Parliament itself, but also for the relationship between the courts and the Parliament. ... Sections 28, 29, 100, 101, 102 and Schedule 6 [which set out the scope of the Parliament's competence] are definitive of the extent of the court's jurisdiction and of the procedure to be followed when a devolution issue is raised. It *necessarily follows that traditional common law grounds of judicial review are excluded*, and that there is no room for the implication of common law concepts in considering the competence of the Parliament.[65]

Though not a devolution issue in terms of the Northern Ireland Act, we also have the benefit of comments by the Law Lords sitting in the Appellate Committee as to the nature of the Northern Irish devolution scheme in the Northern Irish case of *Robinson v Secretary of State for Northern Ireland*.[66] What is of interest for the purposes of this chapter is not the specific issues in dispute in the case but comments by the Senior Law Lord, Lord Bingham, about how the courts should characterise the Northern Ireland Act, and accordingly, the interpretive approach they should take to it. Lord Bingham indicated that a generous and purposive approach should be adopted, the Northern Ireland Act being 'in effect a constitution,'[67] while Lord Hoffmann characterised the Act as 'a constitution for Northern Ireland framed to create a continuing form of government against the background of the history of the territory and of the principles [of the Belfast Agreement].'[68] These comments illustrate that while the Northern Ireland Act may technically be an ordinary statute, the courts will take note of the political reality that a devolution statute is of a special significance. It is notable that, at least with regard to Northern Ireland and Scotland, there is a common theme developing of regarding Acts establishing the new devolved bodies as of special, constitutional, significance. This approach sets the new institutions apart from traditional local government institutions which remain open to review on all the traditional common law grounds.[69]

The approach of the Administrative Court to an Order of the National Assembly for Wales provides, however, a contrast. It is unnecessary to recite the facts of *R (on the application of South Wales Sea Fisheries Committee) v National Assembly for Wales;*[70] what is significant is that the judge considered the challenge to the Order

[65] *Ibid* at para 63, emphasis added.

[66] [2002] UKHL 32, 25 July 2002. The facts in *Robinson*, and an analysis of it are contained in Brigid Hadfield, chapter 6 below.

[67] [2002] UKHL 32, para 11. See also Hadfield in chapter 6, n 51.

[68] *Ibid* at para 25.

[69] While *Kruse v Johnson* [1898] 2 QB 91 did indicate that local government is entitled to some deference in the making of by-laws, it nevertheless indicated that a by-law could still be held invalid for unreasonableness.

[70] [2001] EWHC 1162, QBD; Admin. Ct, 21 Dec 2001.

not just on the basis that the Assembly had acted outside of the scope of its authority under the relevant statute but also whether the Order was invalid on ordinary common law grounds (including for example, failure to take into account relevant considerations when making the Order). It may be of some consequence that the Order in question was adopted rapidly using the 'executive procedure' which allows for:

> The normal requirements of notification or consultation, submission of a draft Order to the Business Committee, consideration of a report from the Legislation Committee, the laying of a draft Order before the Assembly and its approval by a resolution of the Assembly [all to be] disapplied on the basis that they were not 'reasonably practicable.'[71]

In other words, the Order had followed a more 'executive' route, than a 'legislative' one. This is unlikely to be the end of the debate with respect to the Welsh system, and will possibly further encourage the campaign for the Welsh Assembly to have powers more akin to those enjoyed by its Scottish and Northern Irish counterparts.

Also relevant, by way of contrast, are two recent cases involving the Greater London Authority and its Mayor. Both cases involved the application of the ordinary common law grounds of judicial review. The first, *R (on the application of Transport for London) v London Underground Ltd*, involved the Mayor's challenge, via Transport for London, to the public/private partnership (PPP) scheme proposed by central government for the London Underground on the basis that it was directly in conflict with the Mayor's transport strategy; a strategy which the court, in the course of judgment, held was lawful.[72] The case is significant for our purposes for two reasons. First, the entire matter, including consideration of whether the Mayor's transport strategy was lawful, was dealt with on ordinary judicial review principles; there was no suggestion that special weight should be given to the lawfully adopted policy of the elected Mayor. Secondly, from the point of view of devolution it illustrated that while the rhetoric was that the Mayor would have power to decide transport strategy, the manifesto upon which he was elected could not prevail over (lawful) Whitehall policy concerning the London Underground.[73]

The second case involved a direct challenge to a Greater London Authority policy: the congestion charge on vehicles entering designated areas in the heart of London. In *R v Mayor of London, ex parte Westminster City Council and others*, the claimants sought judicial review of the Greater London (Central Zone) Congestion Charging Order 2001.[74] Again, it is not necessary to recite the facts for the

[71] *Ibid* at para 36.

[72] The PPP scheme will entail the leasing off of track and other infrastructure of the Underground, for periods of approximately 30 years, to three private companies. Operation of the Underground, and underlying title in the infrastructure, will remain with London Underground Ltd (and in due course Transport for London, which is to be the successor public body). See discussion in Ben Pimlott and Nirmala Rao, *Governing London* (Oxford University Press, 2002), ch 7.

[73] Contrast the position in Scotland, where there has been no question of Westminster or Whitehall seeking to interfere in Scotland's more generous policies on tuition fees for university students, or provision of free long-term care for the elderly.

[74] [2002] EWHC 2440, QBD; Admin Ct; 31 July 2002. See also Pimlott and Rao, above n 72.