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

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purposes of this argument; what is of significance is that the grounds for challenge advanced once again included traditional common law grounds such as an allegation that the respondent had failed to take into account relevant considerations. The claimants failed, but the case nevertheless illustrates the difference in judicial approach when dealing with local government, as opposed to devolved, power.

The third issue relating to the type of power devolved concerns the issue of fiscal autonomy. Finance is obviously of direct relevance to the amount of autonomy a devolved body will have. A power to make policy will be meaningless if a devolved entity either does not have the funds to implement its policies, or receives funds from central government on the condition that they be spent on priorities stipulated by central government. With the exception of the Scottish Parliament's power to vary income tax in Scotland by +/- 3 per cent, all three devolved administrations are dependent on block transfers from the central UK government for their funds. The devolved administrations do, though, have discretion as to how they spend the money they receive. However, as the sum of money they receive is linked to changes in central government spending in relation to England, the amount of the block grant can go up as well as down as central government reassess its spending priorities in England.[75] There is the potential therefore, not yet realised, for central government to use its control over finance to interfere with desired policy choices of a devolved administration. This would clearly interfere with the basic purpose of transferring decision-making over certain matters, which is at the heart of devolution.

The answer proposed to the third question is that devolution entails the transfer of the ability to act, whether by way of legislative or executive competence (or some combination or variation thereof). Secondly, ideally the devolved institution will be reviewable only on the grounds set out in the statute in which the power is delegated (and not on the general grounds available in judicial review). Finally, the transfer should be accompanied with sufficient fiscal autonomy so that the devolved entity has the freedom to choose between different policies in the subject areas it has responsibility for.

Controlled in What Ways?

Devolved power must, like all power, be to subject to control. We have seen one method of control in the preceding discussion of judicial review of devolved bodies. In addition to judicial review there are three other avenues by which devolved power may be monitored: local democratic accountability; supervision by the UK executive, via the roles provided for the respective Secretaries of State for each of Scotland, Wales and Northern Ireland, and the respective UK law officers, in each

[75] Discussion of the operation of the Barnett formula, under which changes in the block grants are calculated, and its potential to restrict the policy autonomy of the devolved administrations can be found in Richard Cornes and Robert Hazell, 'Financing Devolution: the Centre Retains Control' in Robert Hazell (ed), *Constitutional Futures: A History of the Next Ten Years* (Oxford University Press, 1999).

devolution statute;[76] and finally, Westminster, which retains the potential to legislate for each of the devolved areas.

In order for the basic rationale of devolution to be given effect it follows that the dominant method for controlling, or holding devolved power to account, should in the first case be the local democratic process. If a devolved assembly pursues a policy (within its scope of authority as set out in its establishing statute) which its electorate disapprove of then it should be for that electorate to vote the disapproved-of devolved administration out of power. Next comes the potential for judicial review. As this has been discussed above the only comment that needs to be made here is that the possibility of judicial review on traditional common law grounds in addition to exceeding the competence provisions in the establishing statute, would be an indication (though not a definitive one) that an institution is better described as an example of local government than devolution.

If the rationale of devolution is not to be thwarted, the other two methods for control, the continued roles of the Secretaries of State (or lower level Ministers within the Department of Constitutional Affairs) and UK law officers, and Westminster's continuing ability to legislate, should necessarily be used sparingly, if at all. The role of the UK executive officers must, of course, be considered discretely, taking into account the particular circumstances of each devolution settlement. At one end of a scale of involvement would be the Minister responsible for Scotland who, except, for example, in the (hopefully) exceptionally rare occasion where she might have to exercise her power under section 35 of the Scotland Act to prevent a Bill receiving Royal Assent, functions for the most part as London's emissary to the Scottish administration (and vice versa).[77] In contrast the Minister responsible for Wales has a continuing role as the primary link to Westminster for the Assembly; a link of particular importance because of the Assembly's need to obtain primary enabling legislation from Westminster if it wants to make policy in an area not already covered by a primary enabling Act.[78] At the other end of the scale, and for reasons which will be obvious, the Secretary of State for Northern Ireland retains a crucial role in the governance of that province, overseeing as he does the implementation of the Belfast Agreement and during periods of suspension of devolved government, resuming direct responsibility for governing the province.[79] In respect of all three, however, it is clear that their position is not one of playing a central role in relation to the matters which have been devolved.

[76] On the role of the Secretary of State and the courts in relation to Northern Ireland see Brigid Hadfield, ch 6 below. The apparent transfer of the positions of Secretary of State for Scotland and Wales respectively to a new Department of Constitutional Affairs, as a result of a Cabinet reshuffle on 12 June 2003, has created some confusion in this area.

[77] Section 35 of the Scotland Act 1998 empowers the Secretary of State for Scotland to prohibit the Presiding Officer of the Scottish Parliament from presenting a Bill for Royal Assent if she believes its provisions are incompatible with any international obligation, would raise issues of national defence or security, or would adversely affect the law as it applies to reserve matters. To date of course we have only witnessed the interaction of Scottish administrations and Secretaries of State from the same political party. It will be interesting to observe how, for example, a Conservative government in London relates to a Labour, or perhaps even Scottish National Party, administration in Scotland.

[78] As noted above (n 24) this is not something the Assembly has, as yet, been particularly successful in doing.

[79] See discussion in Hadfield, above n 20.

Finally, there is Westminster's continuing power to make legislation in relation to all matters, including devolved subjects. Clearly, this is a power which should not ordinarily be used, for 'to do so would frustrate the purposes of devolution.'[80] A convention has already been established in relation to Scotland that Westminster will not legislate for Scotland without the prior consent of the Scottish Parliament.[81] While Westminster obviously retains a role in relation to Wales, a requirement for consultation by the UK government (via the Minister responsible for Wales), with the Assembly has been elaborated.[82] Northern Ireland, with the exceptions arising from the interaction between devolution and the ongoing peace process, is in a situation similar to Scotland. In relation to all three, however, there is a common thread; Westminster may legislate, except in extraordinary circumstances, only in consultation with the devolved administration.

The answer proposed for question 4 then is that a devolved institution is one which is primarily held to account by its local electorate, with judicial review available preferably on what Winetrobe would characterise as the 'narrow approach,' while the UK executive and Westminster retain only a residual guardian role.

How Established?

This question is straightforward and can be answered briefly. First, as Burrows notes, 'the fundamental principle underlying the entire process of devolution is one of consent.'[83] Accordingly, prior to the adoption of all the schemes to date the consent of the people within the area to receive devolved power has been sought in a referendum. Secondly, matching the consent of the devolved area is the consent of the Westminster Parliament which gives effect to the devolution scheme by passing the necessary statute. The answer to the final question then is that a system of devolved government is one which is sanctioned by a referendum in the area concerned (thus confirming that the area identified is the correct one for the purposes of question 1 above), and establishing the devolved administration's political sovereignty (for the purposes of question 3 above), and put in place by an Act of the Westminster Parliament (confirming, necessarily, Westminster's retention of legal sovereignty).

Summary: a Working Definition of Devolution

To reiterate, what is set out here is not claimed to be an unalterable set of defining characteristics—the flexible nature of the UK constitution militates against that.

[80] Bradley and Ewing, above n 33, at 45.

[81] Known as the 'Sewel convention'. Bradley and Ewing report that 'such consent has readily been given since 1999': *ibid* at 45 at their n 63. Noreen Burrows commented critically on the frequency of use of the Sewel Convention in 'Devolution: Lessons from Scotland?', a paper delivered at the 2001 SPTL Annual Conference, 10 Sept 2001. See also Alan Page and Andrea Batey, 'Scotland's Other Parliament: Westminster Legislation About Devolved Matters in Scotland Since Devolution' [2002] *Public Law* 501.

[82] For detail see Burrows, above n 5, at 79–82.

[83] Burrows, above n 5, at 24.

This is simply an exercise in clarifying the defining principles or characteristics of devolution by reference to what has been put in place in Scotland, Wales and Northern Ireland: if a persuasive case is made for amending the defining characteristics, then so be it. In any event, it is not suggested that every example of devolution should meet all the defining characteristics. What is crucial is that any variations should not obviate the fundamental rationale of devolution: the transfer of central government power to governing institutions responsible for distinct geographical areas within the United Kingdom, answerable primarily to their local electorate for decisions in relation to the subject matters devolved.

In summary then the answers to the five questions posed above are as follows. In a devolution scheme, the area to which power is devolved should be one with which the people within it identify (whether on the basis of national or regional identity). The governing institutions to which power is transferred should be (a) locally elected, (b) contain distinct executive and legislative elements, with the (c) legislative element able to scrutinise the activities of the executive element, and desirably, also play a role in policy development. The power transferred should (a) give the devolved institution the ability to act (whether executively, legislatively or via some combination or variation of both); (b) be reviewable (preferably) only for exceeding the terms of the establishing Act (ie not on the wider range of common law grounds of judicial review); and accompanied with sufficient fiscal autonomy for the devolved body to be able to carry out its functions. The primary avenue for the control of the devolved body should be the local democratic process, complemented by judicial review. While the UK executive may retain, via the relevant Secretaries of State, some role, and the Westminster Parliament continues to be sovereign, these powers should not be exercised except (a) at the request of the devolved body (eg pursuant to the Sewel convention), or (b) in the case of Northern Ireland, the need to ensure public order and the continuance of the peace process. Finally, a devolution scheme should be effected by a Westminster statute only after the consent of the area to receive devolved power has been obtained in a referendum.

WHAT IS ENGLAND BEING OFFERED?

Introduction

Prior to the White Paper's proposals, and the Regional Assemblies (Preparations) Act 2003, there were three components to the Government's programme for the decentralisation of power within England. First, in April 1998, pursuant to the Regional Development Act of the same year, eight regional development agencies (RDAs), with boards appointed by the Secretary of State, were established with responsibility for co-ordinating and implementing economic development in

[84] The RDAs cover the following regions: the East, East Midlands, North East, North West, South East, South West, West Midlands and Yorkshire and Humberside.

their regions.[84] Next, in London on 6 May 2000, pursuant to the Greater London Authority Act 1999, a new Assembly and Mayor were elected. Finally, the Local Government Act 2000 was passed, allowing local authorities, subject to a local referendum vote in favour, to introduce directly elected mayors (similar to the model already established in London).

Supplementary to those developments, the Government also endorsed the setting up of voluntary regional chambers within England. Under the Regional Development Agencies Act, a voluntary chamber has been designated to work with each region's RDA, acting as a sounding board and providing some level of local scrutiny of the RDA. However, these voluntary chambers, rather than being elected, are made up of 'regional stakeholders,' primarily business people and representatives from unions and the education sector. In March 2001, a fund of £15 million was established by central government in order to strengthen the ability of the eight regional chambers to scrutinise their respective RDAs and thereby 'strengthen regional accountability.'[85]

The latest proposals for devolution in England, contained in the White Paper *Your Region, Your Choice: Revitalising the English Regions* and the Regional Assemblies (Preparations) Act, continue the theme of the regionalisation of England.[86] England's regions are offered what the White Paper refers to as 'assemblies', though these 'assemblies' are already being referred to as Parliaments, or mini-Parliaments. The leader of the Newcastle City Council was reported as saying that it would be a source of pride for the North East if it became the first English region to have a 'parliament.'[87] The *Independent*'s report read, 'England is to get up to eight new mini-parliaments with tax-raising powers.'[88] In the debate following the announcement of the White Paper in the House of Commons, supporters of further regional devolution stated, 'what Scotland has, Yorkshire and Humberside need.'[89] Relevant, however, to our question in this section, ie, whether England is being offered devolution, is the pointed remark of another MP:

> If the benchmark is Scotland and Wales, how on earth does [the Deputy Prime Minister] think that representative democracy, or real accountability, is served by a handful of neither nowt nor summat representatives, representing several hundred thousand electors in tiny assemblies that have no proper link with their electorate?[90]

Replying, the Deputy Prime Minister put the Government's position:

> [Regional devolution in England] is different from what we did in Scotland, Wales or London. ... We are not establishing parliaments in the regions—that is a fundamentally

[85] Department of Trade, Local Government and the Regions, *Regional Chambers* at http://www.regions.dtlr.gov.uk/chambers/index.htm

[86] Above n 1.

[87] *Daily Telegraph*, 10 May 2002.

[88] *Independent*, 10 May 2002.

[89] Austin Mitchell, Hansard, HC Deb, 9 May 2002, col 285.

[90] David Curry, Hansard, HC Deb, 9 May 2002, col 285.

[91] John Prescott, Hansard, HC Deb, 9 May 2002, col 285.

different proposition—we are establishing directly elected assemblies.[91]

What then, addressing the five questions suggested in the previous section, are we to make of the White Paper's proposals? Are the Deputy Prime Minister's directly elected assemblies worthy of the title of devolution he implicitly claims for them in the Foreword to the White Paper?

Evaluating the White Paper's Proposals: Is this Devolution?

To What Geographical Area?

Chapter 6 of the White Paper outlines the proposed boundaries for the proposed regional assemblies.[92] The proposals in chapter 6 are confirmed in section 28 of the Regional Assemblies (Preparations) Act 2003. The regional boundaries chosen are inter alia congruent with those of the already established RDAs, and have, according to the White Paper, a 'reasonably high legal of public recognition.'[93] In support of this statement a 1999 *Economist* survey is quoted which:

> Found that in six out of the eight Government Office regions [which match the boundaries proposed for the regional assemblies] outside London over three-quarters of respondents could name the administrative region in which they lived. Only in Yorkshire and the Humber (66 per cent) and the East of England (52 per cent) was the figure below this level.[94]

Accepting that 'it could be argued that there is an important difference between public recognition of a region and public acceptance or allegiance' the White Paper refers to the requirement for a referendum vote in favour of establishing an assembly prior to one being established.[95] With the possible exception of historically distinct areas within the proposed regions (for example Cornwall, which comes within the South-West),[96] the White Paper's proposals may be said to meet the first requirement of devolution, that power be devolved to geographical entities with which people identify.[97]

What Type of Institutions are Proposed?

[92] See above n 84.

[93] Above n 1, at para 6.2, p 49. 'Regions' are defined in section 28 as being the regions '(except London) specified in Schedule 1 to the Regional Development Agencies Act 1998 (c.45).'

[94] *Ibid.*

[95] *Ibid.*

[96] If the scheme proceeds it is to be hoped that the particular concerns of regions such as Cornwall are answered to the satisfaction of their populations. See also discussion in the Standing Committee on Regional Affairs on Governance in England, 18 Dec 2001; and 'Tories reject South West assembly,' BBC News, 12 Dec 2001(http://news.bbc.co.uk/1/hi/england/1706501.stm). For further detail of the local campaign for a Cornish assembly see http://www.senedhkernow.freeuk.com/

[97] It should be noted that publication of the Regional Assemblies (Preparations) Bill prompted the emergence of voices within other sub-regions expressing similar concerns to those of some inhabitants of Cornwall. See 'County "not part of East Midlands" (concerning Lincolnshire), BBC News, 21 Nov 2002 (http://news.bbc.co.uk/1/hi/england/2498957.stm); and 'MP rejects regional assembly plan' (concerning West Sussex), BBC News, 20 Nov 2002 (http://news.bbc.co.uk/1/hi/england/2496715.stm).

Will They be Locally Elected? The White Paper proposes that assembly members be elected using an additional member system (AMS) every four years.[98] The majority of an assembly's members will be elected on a first past the post basis from individual constituencies, with the balance being elected on the basis of regional lists. The regional list members will then be allocated to ensure proportionality. A 5 per cent minimum vote in the region will be required before a party is eligible for a list seat—a provision to avoid the assembly membership being fragmented by representatives of minority parties. Apart from providing a measure of proportionality, the system will have the benefit of ensuring regional representation, a particularly important point in regions with distinct sub-regional units such as Cornwall in the South-West. The White Paper proposals may then be said to meet the requirement of local election.

Is There as Assembly/Executive Distinction Within the Institution? The assemblies will be small, with a minimum of 25 and a maximum of 35 members.[99] The basic split in these new bodies will be between the 'executive' and the 'scrutiny' members. An executive must be provided from the 25 to 35 members. The White Paper proposes that the executive have a maximum membership of six, ie leaving 19 to 29 members to provide the 'scrutiny' function. The 'scrutiny' members will be assigned to scrutiny committees. The number of these is unknown. However, assuming there was just one committee for each of the 10 areas in respect of which an assembly will prepare a strategy,[100] with each committee having five members, an assembly of 50 members would be required if each scrutiny member were to focus on one subject area. Clearly, the 19 to 29 non-executive members are likely, therefore, to have to sit on more then one committee; yet the White Paper indicates that these members are only going to be required to attend, and be paid, for three days a week. So, while there will be a legislative (or rather scrutiny)/executive split within the regional assemblies, the design requirement of 'smallness' is a concern; it may be that there are insufficient 'legislative/scrutiny' members effectively to carry out the tasks they will be given.

A further novelty in democratic design, and possibly one with the potential to detract from the clarity of the assembly/executive demarcation is the continued role of the RDAs. These bodies almost appear to be alternate regional executives. They retain the task of developing the regional plan, although the assemblies may direct that changes be made to the plan prior to it being published.[101] While the RDAs are to retain day-to-day operational independence, they will now answer to the assembly for their performance. The chair and members of the RDAs will be appointed by the assembly and are expected to have business knowledge.[102] Assemblies will provide funding from their own block grants—the extent to which

[98] Above n1, at para 6.9, p 50.

[99] Being 'small' is in fact one of the design guidelines (along with, inter alia, being 'democratic') set out in the White Paper, above n 1, at para 7.1, p 52.

[100] See below n 108.

[101] See the White Paper, above n 1, at para 4.22, p 38.

[102] *Ibid* at para 4.22, p 38.

they seek to dictate to the RDA how the money is spent is at their discretion—though notably the Government expresses a preference that the assemblies continue to permit the RDAs budgetary flexibility.

Will the Legislative Element Play a Role in Scrutinising the Executive and in the Formulation of Policy? The task of scrutinising the executives will rest with both the assembly as a whole and the scrutiny committees. The scrutiny committees are to be the primary forum in which the executives are held to account. The White Paper indicates that the Government intends to give the assemblies some latitude about how they establish and run the scrutiny committees. They may carry out post-event scrutiny, act as a 'sounding board,' or as a source of ideas as policy is developed.[103] Importantly, no executive members will sit on the committees; this should lessen the potential for them to be co-opted by the regional executive.

As with the committees of the Scottish Parliament the scrutiny committees are also expected to play a role in the development of policy.[104] Experience in Scotland suggests, however, that while the scrutiny and policy development role may be combined, the combination of both can be onerous.[105] Recalling comments made above concerning the size of the assemblies, and in particular the proposal that non-executive members will only be paid for three days a week, it is likely that members will find it difficult to perform satisfactorily all of their roles in the time allowed. Accordingly, our overall conclusion in relation to the second question must be that while *prima facie* the structures proposed may be appropriate, the small size of the assemblies may make it difficult for their members effectively to carry out their functions.

What is the Nature of the Power Transferred?

Legislative, Executive, or Both? The assemblies' primary instrument of policy-making will be their power to promulgate *strategies.* Three levels are proposed: high level targets; strategies concerning specific subject areas; and an overarching regional strategy. First, the assemblies will set high level 'targets' which they will agree with government.[106] These targets will concern, for instance, the region's economic performance. Assemblies will be rewarded by central government for meeting the target with extra funding. Unlike in Scotland, for example, where the Parliament and executive are left to their own devices, receiving an annual block grant to do with as they will (so long as the policies they pursue are within the competencies granted them under the Scotland Act 1998), the English regions will

[103] *Ibid* at para 7.5, pp 52–53.

[104] *Ibid* at para 7.6, p 53.

[105] For analysis of how the Scottish Parliament's committees worked in their first year see Barry Winetrobe, *Realising the Vision: a Parliament with a Purpose—An Audit of the First Year of the Scottish Parliament* (London, Constitution Unit, 2001). For a similar analysis of the Northern Ireland Assembly, see Rick Wilford and Robin Wilson, *A Democratic Design? The Political Style of the Northern Ireland Assembly* (London, Constitution Unit, 2001).

[106] See the White Paper, above n 1, at ch 4 generally and para 4.7, p 35.

have central government sitting over them like a hybrid upper house of review.

In order to achieve their high level targets, the assemblies will have the power to produce a series of 'regional strategies'. These regional strategies are a novel type of instrument in British constitutional law. They are to contain 'detailed plans' indicating how the assembly will achieve its 'high level targets.'[107] The assemblies will be under an obligation to ensure that their strategies, which will cover 10 areas, are consistent with each other; [108] and will be 'encouraged' to achieve this consistency by producing 'an "overarching" strategy setting out their vision for the region and their key priorities on the range of issues for which they have responsibility.'[109] Presumably their 'vision for the region' will either be, or encompass, the 'key objectives' for the region contained in the 'high level targets' agreed with central government. Finally, the White Paper stresses the government's desire that the 'regional vision' represent a 'shared goal' and, in order for that to be achieved, indicates that assemblies will be expected to consult and work with a wide range of community groups in formulating both the overarching and individual strategies.[110]

Until the Bill setting out the detailed constitution of the proposed assemblies is produced, subsequent to the first regional referendum in favour of an assembly, it is not possible to provide any deeper evaluation of the 'strategies' which assemblies will produce. Care will be needed to ensure that the three different levels of strategies work well together; there is the potential for the proposed scheme to be overly complex.[111]

On What Basis Will the Institution be Reviewable? Given the similarity of the instruments proposed for the regional assemblies to those produced by the Greater London Authority, and possibly also to the instruments produced by the National Assembly for Wales, it is likely that the assemblies' strategies will be open to review not only on the basis of exceeding the powers of their statute, but also the full range of traditional common law grounds. However, it will not be possible to be any more certain about the answer to this question until a Bill to implement a regional assembly is published: the White Paper simply does not contain enough detail on this point.

Will the Institution have Sufficient Fiscal Autonomy? The area of expenditure is another area where there is ambivalence about the degree of power to be devolved. On the positive side, assemblies will receive their money in a block grant, which

[107] *Ibid* at para 4.8, p 35.

[108] *Ibid* at box 4.1, p 36: sustainable development; economic development; skills and employment; spatial planning; transport; waste; housing; health improvement; culture (and tourism); biodiversity. Annex D to the White Paper provides details of the regional strategies currently prepared by a range of bodies (including the RDAs, voluntary chambers, and relevant government office for a region) for each region.

[109] *Ibid* at para 4.11, p 35.

[110] *Ibid* at para 4.13, p 36.

[111] As experience in Wales indicates, an overly complex scheme is likely to draw adverse comment. See above n 23.

they will be at liberty to spend as they see best. However, the White Paper indicates that in return the government will 'expect each assembly to help achieve in their region a small number—perhaps six to ten—of targets agreed with the Government.'[112] The means by which an assembly meets its targets will be left to each assembly. However, those assemblies which meet their targets will be rewarded with extra money. No such mechanism for central government to influence the policies of a devolved institution is provided in any of the three established devolution schemes.

The assemblies will be able to supplement their grant income by a precept on council tax; a power also enjoyed by the Greater London Authority. This discretion is to be guided by the government's policy that 'we expect council tax payers (non-domestic rates and business taxes are outside assemblies' powers) in any region with an elected assembly to contribute the equivalent of around five pence a week for a Band D council tax payer.'[113] There is yet another super-scrutiny provision included, for the initial period, there will be a capping system on the precepts similar to that used vis-à-vis local authorities. [114] Finally, in what Sandford describes as an 'innovative' move, the assemblies will have the power to borrow (subject however to Treasury approval) in order to fund capital expenditure, as well as a temporary borrowing power for cash management purposes.[115] The White Paper appears therefore to promise a reasonable degree of fiscal autonomy. The two drawbacks, the incentive scheme for meeting targets agreed with central government, and the capping provisions, are relevant when considering question 4, to which we now turn.

Will the Primary Means of Oversight/Control be the Local Democratic Process?

The degree of central control allowed for in the White Paper is one of the most significant weaknesses of the Government's proposals. The proposed assemblies will be undermined in two respects: first, by provisions detracting from an assembly's ability to function as a devolved institution, and secondly, by provisions allowing for continued direct control (or interference) by Whitehall departments.

Provisions of the first sort include: the possibility for tension between the elected executive and their RDAs; the size of the assemblies, discussed above in terms of the assembly/executive division (there may simply be too few members to run an effective institution); and the proposal that non-executive members only be paid for three days a week (discussed above as regards scrutinising the executive: if these members are to sit on more than one committee, perform scrutiny and policy making functions, three days is likely to be insufficient).

Provisions of the second sort include: the suggestion that central government

[112] *Ibid* at para 5.3, p 44.

[113] Above n 1, at para 5.8, p 46.

[114] Compare the development through the nineteenth century of central government's control over local government in Martin Loughlin, *Legality and Locality: The Role of Law in Central-Local Government* (Oxford University Press, 1996).

[115] See the White Paper, above n 1, at para 5.10, p 46; Sandford, above n 53 para 42, p 17.

will monitor the directions assemblies give their RDA as to how the RDA allocates its budget;[116] the requirement that the assemblies agree their high level targets with central government;[117] the requirement that assemblies consult central government concerning the detail of their regional economic strategy, including the power for central government to require changes in the strategy—either to comply with 'national priorities', or if central government considers it likely that the strategy could have a detrimental effect on areas outside the region;[118] the requirement that assemblies consult central government on individual appointments to their local RDA;[119] the funding arrangements which allow for assemblies to be rewarded for meeting targets agreed with central government;[120] and the presence of a capping system, similar to that used in respect of local government.[121]

The combined effect of these factors will result in assemblies which, unlike those in Scotland, Wales and Northern Ireland, are much more subject to continued, and potentially intrusive, scrutiny by Whitehall civil servants. This, together with the likelihood that the assemblies will be reviewable on the same bases as the National Assembly for Wales and the Greater London Authority, is the most serious flaw in the proposals.

Will the Process Proceed with the Consent of the People in the Area Concerned?

The process suggested for devolution to the English regions may be said, with one caveat, to meet this requirement.[122] A devolution scheme will not be prepared for a region unless there is interest in the region.[123] Once a region has been assessed as interested in regional government, detailed proposals for the reorganisation of local government within the region to achieve a unitary system will be prepared.[124] A referendum on the following question will then be held: 'Should there be an elected assembly for the *(insert name of region)* region?'[125] If there is a majority in favour of a regional assembly then a second Bill will be prepared which will set out the detailed provisions for establishing the assembly.[126]

A caveat has already been raised in discussion under question 1 above concerning the position of areas like Cornwall which have a strong identity distinct from that of the region within which they lie. There is an argument that proceeding to hold a referendum in which such a 'sub-region' was effectively outvoted by a majority from the rest of the region as a whole would breach what Burrows refers

[116] See discussion above regarding 'what is the nature of the power transferred?'
[117] See discussion above n 106 and accompanying text.
[118] See the White Paper, above n 1, at para 4.34, p 38.
[119] *Ibid.*
[120] See above at p 100.
[121] See above n 114 and accompanying text.
[122] For the implementation process see the White Paper, above n 1, at ch 9, p 63.
[123] Above n 1, at paras 9.1 and 9.3, p 63 and the Regional Assemblies (Preparations) Act 2003, s 1.
[124] Regional Assemblies (Preparations) Act 2003, Pt 2.
[125] *Ibid* at s 3(1).
[126] See the press release which accompanied the Bill, above n 3. The Government appears to contemplate one empowering statute under which all the assemblies would be established after a positive referendum vote (above n 1, at para 9.12, p 67).

to as the fundamental principle of consent. It may be that in relation to areas such as Cornwall either a special consultation process is required or that they should even be offered an assembly of their own.

Summary: Does the White Paper Offer England Devolution?

The Government claims its aim is to 'strengthen England by empowering the regions' and that regional government does not mark the break-up of England.[127] The claim made in the Foreword to the White Paper (see the introduction to this chapter) is that the proposals for England can be seen as the next stage in the devolution process. They cannot. The White Paper's proposals, especially in their desire to allow Whitehall a significant continuing role even after the establishment of the regional assemblies, can more appropriately be characterised as the next step in English local government reform, not the next step in the devolution process (at least measured against the standards set so far for that process).[128]

The White Paper proposals may introduce a valuable layer of regional government within England, but the regional assemblies cannot be classed as devolved institutions alongside the new Parliament in Scotland, or the Assemblies in Wales and Northern Ireland. Though meeting certain of the defining principles, the proposals are simply too weak in key respects to justify the label of 'devolution': too little power is effectively devolved, and too much central control is retained. Altering the defining principles set out above to encompass what is proposed for England would, I suggest, result in the watering down of the fundamental principle of devolution (ie the transfer of power) to such an extent as to rob the term and the process of any significance.

CONCLUSION: COULD THE ENGLISH QUESTION BY ANSWERED BY ADDRESSING THE UNION QUESTION?

While not amounting to devolution, does the White Paper nevertheless have the potential to solve the English Question? Traditionally, answers to the English Question fall into one of two classes. The first class involves suggestions for some form of English Parliament and the full federalisation of the United Kingdom. The compelling argument against this solution is simply that a federation in which one part, England, would contain nine-elevenths of the population would be unworkable; as MacCormick points out, 'federal government presumes some equilibrium between the federated units, and a reasonable balance that can be struck between

[127] *Ibid* at para 8.2, p 58.

[128] The provisions in Pt 2 of the Regional Assemblies (Preparations) Act which provide for the reform of regional local government into a unitary form, prior to a regional assembly being established, could be seen (at least by the cynical) to support such a characterisation. See also 'Testing times for regional assemblies', *Economist*, 21 June 2002, 340.

central government and state governments.'[129] The other class of answers itself falls into two further classes: first, the regionalisation of England; and secondly, alterations to the Westminster Parliament itself, to create within it distinct forums and procedures for dealing with matters which concern only England.[130]

The White Paper seeks to address the English Question via the regionalisation of England. However, accepting that the heart of the English Question is an objection to the continued involvement by Scottish, Welsh and Northern Irish members of Parliament in the making of legislation for England, the regional structures proposed cannot be a sufficient answer—for England will continue to depend on Westminster as its sole de facto legislature, and nothing in the White Paper alters this.[131] The only way this strategy could work is if the English regions were given devolved institutions along the lines of those in Scotland and Northern Ireland, with the ability to pass their own primary devolved legislation.[132] Yet as MacCormick points out, this would necessarily require the 'regional sub-division of the English common law', which no one is seriously likely to suggest given the obvious complexities it would entail.[133] Furthermore, there is an argument that pursuing the regionalisation of England in such a way that Scotland lost its distinctive position as one of the founding nations of the Union, becoming instead comparable to an English region, would be so unpopular in Scotland as to itself destabilise the Union.[134]

The solution to the English Question, it is suggested, lies not in considering the relationship of the English regions to the Union, or tinkering with Westminster's procedures to provide distinct methods for dealing with English matters, but in addressing directly the relationship of England as a national whole, to Scotland, Wales and Northern Ireland—ie, by asking the Union Question. The White Paper's answer to the English Question—along with the other answers commonly proposed—all have one thing in common, a concern to manage the natural dominance of England within the Union. The politics of devolution (from the nineteenth century onwards) is marked by a continuing search for new strategies to balance this dominance with the historical fact that the United Kingdom was formed by the union (though on varying terms) of distinct nations. This is also illustrated in the tension between the strict legal definition (in English constitu-

[129] Above n 10, at 195. See also Hazell who argues that such a federal settlement would be 'grotesquely over-balanced': above n 6, at 8.

[130] For discussion of these strategies, which will not be discussed further here, see Hazell, *ibid* at 10–21; and Brigid Hadfield, 'Towards an English Constitution', above n 35.

[131] Westminster's continuing English role is specifically noted in the White Paper, above n 1, at para 8.11, pp 59–60. At least in relation to Welsh primary legislation (also made by Westminster) the Welsh Assembly has an accepted role (see above n 82)—no comparable co-operative relationship appears to be contemplated for the proposed English regional assemblies.

[132] The complexities and problems of the Welsh Assembly (including, significantly, its lack of devolved primary legislative competence) do not make it a recommendable model for the English regions. Further, as noted above, it seems likely that its inadequacies may in any event prompt the evolution of the Welsh system into one more like those in Scotland and Northern Ireland. This is the policy at least of the Welsh Liberal Democrats and the Welsh Nationalist Party, Plaid Cymru.

[133] Above n 10, at 194.

[134] *Ibid.*

tional law)[135] of the United Kingdom as a *unitary* state, as opposed to the political science characterisation of the United Kingdom as a *union* state.[136] We end then with the suggestion of reformulating the Union so that the constituent parts of the United Kingdom become individual (though co-operating) members of the European Union. Such a reformulation would not necessarily need to mark the complete end of the Union within the British Isles: as MacCormick notes, it would be prudent, drawing on the example set by the co-operation between the Nordic countries in the Nordic Council, to build on the structure provided by the Council of the Isles (arising from the Belfast Agreement of 1998) to create new Union institutions which 'would [help to] maintain community in policy and ... [harmonise] aspects of law among the various parts of this archipelago once (or if) they became mutually independent member states of the European Union.'[137] In such a scenario the European Union would in effect be used as the counterweight to England's dominant position within the reformulated United Kingdom; while the new co-ordinating institutions, linking the nations currently bound together in the United Kingdom, could preserve the collective strength of the new Union's members within the wider European Commonwealth. Clearly further work will need to be carried out to provide the detail of how such a reformulation would be carried out, and what the governing institutions of the new Union and its members would be. That will however have to await another time.[138] Whatever path for the future is chosen, however, the aim should be making the Union (in whatever form) a collective exercise of the will of all the people who live within it.

[135] The term 'English constitutional law' is used deliberately: Scottish constitutional lawyers may, as noted above, n 57, have a different perspective on this point.

[136] See Burrows, above n 5, at 189–92; MacCormick, above n 10, at chs 4 and 5; Michael Keating *Plurinational Democracy: Stateless Nations in a Post-Sovereignty Era* (Oxford University Press, 2001); Michael Keating, 'So Many Nations, So Few States: Territory and Nationalism in the Global Era' in Alain-G Gagnon and James Tully (eds), *Multinational Democracies* (Cambridge University Press, 2001); and more generally, Stein Rokkan and Derek Urwin *Economy, Territory: Identity. Politics of Western European Peripheries* (London, Sage, 1983).

[137] Above n 10, at 197.

[138] MacCormick has begun to sketch out some of the issues:above n 10, at 199–204; as has Michael Keating in 'Beyond Sovereignty: Nations in the European Commonwealth', ch 5 in his *Plurinational Democracy: Stateless Nations in a Post-Sovereignty Era*, above n 136. See also Arthur Aughey, *Nationalism, Devolution and the Challenge to the United Kingdom State* (London, Pluto Press, 2001).

6

Does the Devolved Northern Ireland Need an Independent Judicial Arbiter?

BRIGID HADFIELD

INTRODUCTION

WITHIN THE BROAD theme of public law in a multi-layered United Kingdom a clearly crucial issue entails the non-static nature and extent of the constitutional discreteness of each layer. If devolution is a new layer or tier of public power brought into the constitution through the coming into force of the Scotland, Northern Ireland and Government of Wales Acts 1998, it becomes important to identify not only the politico-constitutional consequences of the interposition of that layer but also the custodians of its constitutional integrity. In terms of constitutions which divide power on a territorial basis, devolution is most readily compared with federalism. It is relatively easy to identify the key characteristics of devolution and to contrast them with federalism, although this is not to suggest that either is a rigid and uniform construct.

In a federal system, power is allocated by an overarching written constitution, the sole legal source of central and provincial power; in the devolved United Kingdom, the Westminster Parliament is and remains sovereign and is itself the source of devolved authority. In a federal system, the written constitution is amendable only through a formula which involves both central and provincial authorities; in the devolved United Kingdom, the Westminster Parliament alone possesses the power to amend (indeed even repeal) the devolution Acts. In a federal system, the central and provincial powers are of co-ordinate status (allowing for a mixture of independence and interdependence), each possessing areas of exclusive competence; in the devolved United Kingdom, the Westminster Parliament has, but the devolved legislatures do not have, exclusive legislative competence. In terms of layers of governance, the relationships in devolution are most clearly those of the legally superordinate and its subordinate rather than of co-ordinate levels of power. The key characteristics of devolution, however, permit its modification or reinforcement by a variety of different means in varying political contexts. There may be a (flexible) understanding that the Westminster Parliament will not legislate