

POST DEVOLUTION: CRYSTALLISING THE FUTURE FOR REGIONAL GOVERNMENT IN ENGLAND

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Introduction

Devolution in Scotland, Wales, Northern Ireland has established a revised structure for territorial government in the United Kingdom. These arrangements have been one of the most far reaching re-allocations of powers in the recent history of the United Kingdom. At a time when government has become increasingly complex and multi-layered the devolution measures have drawn attention to the lack of an equivalent level of government in England. Although London has a directly elected Mayor and Assembly exercising a number of strategic London-wide functions, following the failure to gain popular approval in the referendum held in the North East region in November 2004 the prospects for directly elected regional government in the remainder of England have, in the short term at least, receded. However, it is clear that despite the lack of any equivalent form of elected government for the English regions, there have been significant steps towards introducing a form of regional governance throughout England. This article seeks to provide a critical discussion of the English regional governance initiative and to assess the prospects for the introduction of elected government for the English regions.

It is argued that any such trends in regional government and governance need to be understood in the light of what has been termed 'a multi-layered constitution'. In an institutional sense the United Kingdom has witnessed the introduction of what has been identified as multi-levelled (as opposed to layered) government. Looking first at the recognised institutional structure. At supra-national level the UK and other member states are subject to EU law and international obligations. At the level of the nation state, there are elected national parliaments and executives. At sub-national level, most European nations have a configuration of federal, regional/devolved government and below this also of local government. In addition to these formal levels, multi-layered constitutionalism recognises additional layers not only above and beneath, but between the formal institutional levels, and also sees the layers running horizontally. Taking for a moment the formation of geological strata as an analogy, the 'layers' have been laid down, and are being laid down as part of a dynamic process.¹ Further, the layers interact at

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¹ The dynamic element is particularly evident in an uncodified constitution where statutes are passed and conventions constantly develop in relation to important aspects of the constitution.

horizontal as well as at vertical levels, with some layers more prominent than others. An important consequence of this modified state formation is that the relatively clear division between public and private elements has become obscured. The public sector has been shrinking with the emergence of what has been termed 'a contract state'. Governance, as opposed to government, is not necessarily delivered through formal mechanisms of civil service and local government but often by the private sector. The multi-layered constitution recognises: supra-national global considerations;² that the contemporary civil service has been organised into executive agencies at arms length from the core decision making; state contracting with the private sector and privatisation accompanied by statutory regulation;³ soft law agreements;⁴ informal remedies;⁵ human rights requirements;⁶ the emergence of e-government⁷ and so on. In the light of such far reaching transformation, it has been increasingly important to not only map the revised institutional framework of government and governance, but also to review the mechanisms of accountability that apply to it. In this article the case of devolution in Scotland, Wales and Northern Ireland and governance in London and the English regions provides an excellent example of both the different formal institutional levels and of multi-layered governance.

The approach will be to first look at the structural framework of devolution and the broad pattern established for the allocation of functions and powers between central and devolved government. Second, there will be discussion of the wider constitutional and administrative implications for England caused by devolution. Third, it will be explained how the Regional Development Agencies Act 1998, which was introduced concurrently with

² Including the intervention of multi-national corporate power and international obligations. See, e.g. D. Held, A. McGrew, D. Goldblatt, J. Perraton *Global Transformations: Politics, Economic, Culture*, London, Polity, 1999; W. Hutton *The World We're In*, London, Abacus, 2003.

³ See, e.g. Utilities Act 2000 and C. Graham *Regulating Public Utilities*, Oxford, Hart Publishing, 2000.

⁴ Informal concordats have been employed widely to assist with the implementation of devolution to Scotland, Wales and Northern Ireland. See, e.g. R Rawlings 'Concordats and the Constitution' 116 *Law Quarterly Review* (2000) 257.

⁵ The Citizen's Charter initiative has been rebranded under Labour as *Public Services Reform* and is now based on four guiding principles which regard the citizen as customer: national standards in public services; devolution to local leaders; more flexibility in delivery; greater customer choice. See P. Birkinshaw *Grievances, Remedies and the State*, 2nd ed., London, Sweet & Maxwell, 1995. Also for the wider trends toward informal dispute resolution see C. Glasser and C. Harlow 'Legal Services and Alternatives: The LSE Tradition' in R. Rawlings (ed.) *Law, Society and Economy*, Oxford, Oxford University Press, 1997.

⁶ The European Convention on Human Rights was effectively incorporated as a domestic 'Bill of Rights' by the Human Rights Act 1998.

⁷ Other commentators have developed 'Differentiated policy models' and 'policy networks' to discuss the substrata beneath the surface of the institutional levels of government and main stream legislative provisions but such analysis focuses on public policy rather than accountability. See, e.g. R. Rhodes *Understanding Governance: Policy Networks, Governance, Reflexivity and Accountability*, Buckingham, Open University Press, 1997; D. Richards 'New Labour, the State and the Constitution' in S. Ludlam and M. J. Smith (eds) *New Labour in Government*, Basingstoke, Macmillan, 2001.

devolution, cleared the path for a layer of devolved governance in the English regions.⁸ Fourth, there is consideration of the manner in which powers and functions which would have been re-distributed between central government and the English regions as part of the governments proposals for elected regional assemblies. The article concludes with an assessment of the way forward for English regional government considered as part of what is termed a 'multi-layered constitution'.

Constitutional Characteristics of Devolution

Although constitutional changes have been extensive under the Labour governments elected since 1997, the devolution arrangements were not undertaken as part of a wider strategy of constitutional transformation.⁹ Rather, the package of measures contained in each devolution statute has amounted to a distinct model for particular problems associated with the territorial entity. These devolution schemes were designed pragmatically. They have conferred sufficient power to satisfy local political aspirations while also addressing dissatisfaction felt at the periphery with the centralising tendencies emanating from Westminster. As a prelude to the discussion of the provisions intended for the English regions that follows, it will be helpful to draw attention to the main characteristics of each of the models of devolution which have been introduced to date.

Scottish Devolution

Although central government at Westminster has been careful to retain sovereignty Scotland has been granted the strongest form of devolution. Under the Scotland Act 1998 it has a single chamber Parliament of 129 elected members¹⁰ which meets for a 4 year term.¹¹ Following an election to the Scottish Parliament a government is formed after Parliament has nominated a First Minister. In turn, the First Minister is empowered to appoint ministers from MSPs to form a Scottish Executive. The executive is roughly equivalent to the Cabinet (under the Westminster system) and the ministerial appointments are made subject to Royal approval.¹² The Scottish Parliament and Executive have been given responsibility for many aspects of domestic policy within Scotland including: education, law, courts, prisons, judicial appointments, economic development, agriculture, fisheries, local government, the environment, housing, passenger and road transport, forestry and the arts. At the same time there are particular functions reserved for Westminster.¹³ The Scottish Executive is the administrative organ which

⁸ There has been some revision of the structure of local government and new initiatives which attempt to re-invigorate the existing system.

⁹ For more detailed discussions of UK devolution see N. Burrows *Devolution*, Sweet & Maxwell (2000); V. Bogdanor *Devolution in the United Kingdom*, Oxford University Press, (1999).

¹⁰ Additional member system of election. Scotland Act 1998 s.6 herein after referred to as the SA.

¹¹ SA s.2 an election can be called prematurely in certain circumstances.

¹² See SA s.47.

¹³ See SA 1998, S.29 and Sch.4.

has taken over most of the powers of the Scottish Office,¹⁴ and it is responsible for the implementation of policy in Scotland. The Scottish Parliament in addition to exercising an oversight function over the executive has been given the power to pass primary legislation.¹⁵ This power is strictly limited to matters under the scope of its legislative competence.¹⁶ Further, the Scottish Parliament and the executive has been granted tax raising powers (so far unused)¹⁷ but the method of funding remains mainly under the pre-existing Barnett formula¹⁸ determined by the Westminster government.¹⁹ Devolution has introduced a locally elected Parliament and given Scotland improved mechanisms of accountability that involve an increased level of political participation.²⁰

Welsh Devolution

Welsh devolution²¹ is based on a National Assembly for Wales elected every 4 years with 60 members which is required to form policy and take decisions in its particular areas of responsibility.²² A Welsh First Secretary and a cabinet style government is formed from the Assembly members following an election. The Welsh Assembly Government took over by transfer orders most of the administrative functions of the Secretary of State for Wales.²³

¹⁴ Prior to devolution the Secretary of State for Scotland was the Cabinet minister with executive responsibility for Scotland.

¹⁵ For a discussion of the SPs law making role see A. Page 'A Parliament that is Different? Law Making in the Scottish Parliament' in R. Hazell (ed.) *Devolution, Law Making and the Constitution*, Exeter, Imprint Academic, 2005.

¹⁶ The interpretation of the Scotland Act 1998 s.29(2)(b) is important constitutionally, since it provides that a matter is outside the competence of the Scottish Parliament if it relates to any matters reserved for the Westminster Parliament. If this section were to be given a narrow definition, it would restrict the Scottish Parliaments legislative capacity. The Judicial Committee of the Privy Council (similar in composition to the judicial committee of the House of Lords) is required to determine whether the Scottish Parliament enacts legislation which is outside its powers and it is empowered to set aside such legislation. See G. Gee 'Devolution and the Courts' in R. Hazell and R. Rawlings (eds.) *Devolution, Law Making and the Constitution*, Exeter, Imprint Academic, 2005.

¹⁷ These powers have not so far been used.

¹⁸ Referred to as the Barnett Formula. See A. Midwinter, 'Territorial Resource Allocation in the UK: A Rejoinder on Needs Assessment' *Regional Studies*, Vol 36, 2002, 563-567. For a robust defence of the Barnett formula in preference to a needs based formula. It is argued that the added complication of reaching a formula for needs assessment would lead to greater scope for disagreement and more territorial lobbying.

¹⁹ See Scotland Act 1998, Part IV ss.73-79.

²⁰ An impressive feature in Scotland and Wales is the proportion of women in the Scottish Parliament and the Welsh Assembly.

²¹ For a comprehensive study of Welsh devolution see R. Rawlings *Delineating Wales, Constitutional, Legal and Administrative Aspects of National Devolution*, Cardiff, University of Wales Press, 2003 and R. Rawlings 'The New Model Wales' *Journal of Law and Society*, 1998 461-509. Section IV 'Lawmaking and Adjudication' deals with the functions of the assembly.

²² The main features of Welsh devolution are contained in the Government of Wales Act 1998, hereinafter referred to as the GWA.

²³ GWA s.22(2) and sch.2 e.g. agriculture, forestry, fisheries and food, environmental and cultural matters, economic and industrial development,

The Cabinet members have the equivalent of departmental responsibility for their given policy areas. But whereas the Scottish Parliament is granted general competence subject to the reserved matters under the Scotland Act, in the case of Wales powers are conferred in respect of particular areas of policy, and also for the Welsh quangos.²⁴ Accordingly, the Assembly has responsibility for conducting executive scrutiny over the Welsh Assembly Government and quangos. However, unlike the Scottish Parliament the Welsh Assembly does not have the power to pass primary legislation,²⁵ nor does it have any tax raising powers. The Welsh Assembly Government relies on the Secretary of State for Wales to sponsor bills required in Wales through the Westminster Parliament.²⁶ However, the Assembly is able to pass secondary legislation. As in Scotland the financial allocation for devolved government in Wales comes from Westminster, and it is based on the Barnett block grant formula. Although devolution in Wales has been generally welcomed as a success, there have been calls for modifications. The Richard Commission which was set up in 2002 to look into increasing the powers of the Welsh Assembly reported in March 2004. It recommended that an expanded Assembly elected by (STV) should be given full legislative competence on a similar basis to the Scottish Parliament and that there should be a split between the Assembly and the Welsh executive.²⁷ Following the May 2005 General Election it seems likely that some increased powers will be granted to the Welsh Assembly but that a referendum will be required before the Assembly is given full legislative powers.²⁸

Devolution in Northern Ireland

The main objective in Northern Ireland was to accommodate the deep-seated political differences which have existed between Unionist and Nationalist communities,²⁹ and, at the same time, establish a system of devolved

education and training, health, housing, local government, social services, sport and tourism, town and country planning, transport, water and flood defences and the Welsh language.

²⁴ This term refers to non-departmental governmental organisations, funded and appointed by government, *e.g.* Welsh Health authorities, Welsh Tourist Board.

²⁵ Since the introduction of devolution there have been calls to give the Welsh Assembly the power to pass laws but until such time as the legislation is amended, it is the responsibility of the Secretary of State for Wales to guide Welsh legislation through the Westminster Parliament. The Welsh Assembly has the power to pass secondary legislation.

²⁶ See K. Patchett 'Principle or Pragmatism? Legislating for Wales by Westminster and Whitehall' in R. Hazell and R. Rawlings (eds.) *Devolution, Law Making and the Constitution*, Exeter, Imprint Academic, 2005.

²⁷ See Report of the Commission on the Powers and Electoral Arrangements of the National Assembly of Wales (2004).

²⁸ The intention of introducing a Bill to increase the powers of the Welsh Assembly was announced in the Queen's speech May 2005 – see, R. Rawlings 'Hastening Slowly: The Next Phase of Welsh Devolution' 2005 *PL*, 824.

²⁹ To reconcile these differences at other levels: firstly, the Act establishes an Equality Commission for Northern Ireland to ensure that the equality of opportunity obligations under ss.75 and 76 of the NIA 1998 is complied with in all areas. Second, a Northern Ireland Human Rights Commission (NIHRC) was established to keep under review the adequacy and effectiveness in Northern

government to replace Stormont³⁰ which collapsed in the early 1970s. The political institutions in Northern Ireland have only operated sporadically due to political difficulties over issues that included decommissioning. First, the Northern Ireland Act 1998 provides for a directly-elected Northern Ireland Assembly, with law-making powers, consisting of 108 members elected every four years. These members are elected by Single Transferable Vote (STV) from 18 six-member constituencies. The Assembly has legislative powers over those matters which previously fell under the responsibility of the six Northern Ireland Government Departments namely, for agriculture, economic development, education, environment, finance and health and social services but these have been divided into ten ministerial portfolios post devolution. The Presiding Officer of the Assembly examines proposed legislation to ensure it falls within the legislative scope of the Assembly.³¹ Legislation passed by the Assembly requires the Royal Assent.³² In Northern Ireland there is a unique system of compulsory power sharing at every level of decision making to ensure joint participation by both communities in the processes of government.³³ In common with Wales, no tax raising powers are granted to the Northern Ireland Assembly.³⁴ In order to accommodate Nationalist aspirations for a united Ireland the system of government is linked to that of the Irish Republic. To satisfy Unionists fears that the Union could be severed without consent, there are East-West links within United Kingdom. The North-South Ministerial Council brings together members of the executive of the Northern Ireland Assembly and representatives of the Irish government for the purposes of co-operation on issues of common interest. The British-Irish Council is a body to consider broader mutual interests with the UK. It consists of representatives from the Scottish Parliament, Welsh Assembly, Channel Isles and Isle of Mann. Also, nationalist aspirations are safeguarded by a consent principle that ensures that Northern Ireland will remain a part of the United Kingdom only while a majority of the electorate wishes it to do so.³⁵

Ireland of the law and practice relating to the protection of human rights. The NIHRC has a balanced membership representing the local NI community.

³⁰ B. Hadfield 'The United Kingdom as a Territorial State' in V. Bogdanor (ed.) *The British Constitution in the Twentieth Century*, Oxford, Oxford University Press, 2003, see p.595ff for discussion of devolution and the Irish question.

³¹ The NIA s.5(6) further provides that this law making power should not affect the sovereignty of the UK Parliament. For a discussion of the law making powers of the NI Assembly see G. Anthony and J. Morison 'Here, There and (Maybe) Here Again: The Story of Law Making for Post-1998 Northern Ireland' in R Hazell and R. Rawlings (eds.) *Devolution, Law Making and the Constitution*, Exeter, Imprint Academic, 2005.

³² NIA s.5.

³³ Cross community support to ensure participation is defined under NIA s.4(5) and is required for, among other things, the election of First Minister and Deputy First Minister, Assembly's Presiding Officer, Assembly standing orders and approval of the annual budget.

³⁴ As for Scotland and Wales the funding for the Northern Ireland Executive is provided by central government block grant calculated under the Barnett formula.

³⁵ See s.1 Northern Ireland Act 1998.

Mayor and Assembly for London

The most significant change in the structural reorganisation of regional government in England since the election of the Labour government in 1997 has been the introduction of an elected London Mayor and Greater London Assembly. The restoration of a strategic level of government for London can be cited as further evidence of the Labour government's commitment to the devolution of power from the centre. The removal of the Greater London Council in 1985 by the Thatcher government had taken away a layer of government which had the task of co-ordinating the strategic aspects of policy and administration on a metropolitan basis. In dealing with such issues an all London body has a role complementary to that of the inner and outer London boroughs. The formation of the Greater London Authority (GLA) establishes an intermediate level of government directly accountable to the local electorate in London.

After a referendum approving the principle, the Greater London Authority Act 1999 led to the introduction of a Greater London Authority consisting of a Mayor and Assembly for London. In May 2000 and May 2004 elections were held in which Londoners were able to vote separately for a Mayor and for the Assembly which is elected by an additional member system of proportional representation. This additional member system which is similar to that used for elections to the Scottish Parliament and the Welsh Assembly was preferred, since it gives a more balanced party representation.³⁶ The Mayor and Assembly is responsible for spending an annual budget which on current figures will be approximately £9.6 billion for 2005-06.³⁷ This new level of London wide government also restores a form of democratic accountability for a range of important services and bodies.³⁸ The Mayor is placed at the head of the executive and is directly responsible for the strategies the GLA adopts to achieve its objectives. He is also responsible for the quality and effectiveness of the services which the authority delivers. The system is based on a clear separation of powers, with the Assembly holding the Mayor to account for his/her policies. In this capacity the Assembly is able to question the Mayor and the Mayor's staff by holding public hearings on issues of importance. In comparison with the Scottish, Welsh and Northern Irish devolution models the Mayor and the GLA have a much more limited range of responsibilities and funding powers, but the office extends to cover crucial strategic areas such as transport, planning, environment, crime and policing and sustainable development. But central government across the river at Westminster has been careful to retain

³⁶ Fourteen members represent the constituencies and eleven top up members represent London as a whole. See Greater London Authority Act 1999 s.2.

³⁷ See Published Budget 2005-2006; Mayor's Annual Report 2004-2005 at www.london.gov.uk/approot/mayor/annual_report/.

³⁸ The main areas of responsibility for the new authority include: transport (an integrated strategy for London and traffic management and regulation); economic development (responsibility for London Development Agency); Police, fire and emergency services (the Act creates a new Metropolitan Police Authority); Planning (requirement to develop a land use strategy for London); Environment (air quality and waste management); Culture (museums, library services and the arts).

ultimate control over certain aspects of high profile policy areas e.g., London transport.³⁹

Devolution and Governance

In one sense each devolution statute can be regarded as equivalent to a constitution for its respective part of the UK.⁴⁰ It will be explained in the next section that looked upon from a vertical axis devolution has constitutional implications for the inter participation of the actors representing the varying levels of government.⁴¹ Equally, it can be seen that rupturing the vertical relationship by creating a new level of devolved government has required realignment of administrative processes across the horizontal plane as well as the vertical axis. New strategies have been required to cope with the complex policy networks responsible for policy delivery as part of multi-layered governance. Looked at in terms of administration it can be said that to a certain extent devolution has put a seal of democratic legitimacy on administrative structures that were already largely in place. For example, Scotland has never been wholly incorporated into the UK and always retained its own distinctive church, legal and educational systems.⁴² All these policy areas were distinctive under the Scottish Office. To allow for such differences pre-devolution, Westminster legislation intended for Scotland (and Wales) followed a different procedure.⁴³ At the point of policy implementation, the growth of executive devolution was a feature of the system of government of the twentieth century.⁴⁴ Power in many policy fields had come to be exercised by officials under the direction of a Secretary of State for Scotland and for Wales. Indeed, for the most part, the powers that have been devolved in Scotland,

³⁹ There has been a clash with central government over the Public Private Partnership (PPP) method for regenerating London Underground imposed by central government. The weakness of the mayor's legal position was demonstrated in judicial review decisions. See *R v (1) London Underground Ltd (2) London Regional Transport, ex parte Transport for London* [2001] EWHC Admin 637; *R v Mayor of London, ex parte (1) Westminster City Council (2) Cathy Preece (3) Gareth Adamson*, Lawtel 31/72002. See P. Wintour 'Judgment day for London's Mayor' *The Guardian*, July 23 2002

⁴⁰ See J. Hopkins *Devolution in Context: Regional, Federal and Devolved Government in the European Union*, London, Cavendish, 2002 at p.168; B. Winetrobe 'Scottish Devolution: Aspirations and Reality in Multi-Layer Governance' in J. Jowell and D. Oliver (eds) *The Changing Constitution*, 5th ed., Oxford, Oxford University Press, 2004 p.173ff.

⁴¹ See the introduction to M. O'Neill (ed.) *Devolution and British Politics*, Harlow, Longman, 2004 at p.5 'Current devolution represents a significant shift in . . . historical arrangements'.

⁴² See, e.g. the Treaty of Union 1707. Article 18 guaranteed Scottish private law. Scottish Act of Security 1706 secured the protestant religion and the Presbyterian Church.

⁴³ The role of the Scottish/Welsh Grand Committee. See A. Bradley & K. Ewing *Constitutional and Administrative Law*, 12th ed., Essex, Longman, 1997 at p.201.

⁴⁴ Enforced compliance with central government policy was possible even where the local electorate opposed the policy. See D. Griffiths 'The Welsh Office and Welsh Autonomy' [1999] *Public Administration* 793-807 at p.805; I. Holliday 'Scottish Limits to Thatcherism' 1992, *Political Quarterly* 448-459.

Wales and Northern Ireland⁴⁵ have corresponded to the remit and responsibilities of the previous departments of state.

A fundamental problem is that the devolution legislation merely provides an outline which has been sketched out to varying degrees of detail to describe each of the respective systems of devolved government, in the main by specifying the principal institutions and the disparate powers conferred on each administration.⁴⁶ At an administrative level devolution needed to be incorporated into the existing uncodified constitution. Sub-rules, conventions and concordats have been adopted that exist and work outside the legislative framework. Inter-governmental relations have been addressed by informal processes. In particular, concordats has been drawn up between central government and the devolved administrations as a principal mechanism for the implementation of devolved government. Concordats have been referred to as a form of ‘codification’ of the processes of government⁴⁷ and it is widely acknowledged that the concordats are of practical importance for the administrative implementation of devolution⁴⁸. They have contributed to the continuity and smooth transition of policy and have also helped facilitate policy co-ordination between the many overlapping layers of modern governance.⁴⁹ That is to say a similar process of informal links and agreements is evident further down the policy chain and in relation to government regulation.⁵⁰ Concordats emerged fairly late in the process and ‘represent a further step down the road of juridification in the

⁴⁵ In the case of Northern Ireland many of the devolved powers that had been vested in the Stormont system of government (which was suspended in 1972) reverted to the Northern Ireland Office. V. Bogdanor *Devolution in the United Kingdom*, Oxford, Oxford UP, 1999, p.99.

⁴⁶ Scotland Act 1998, e.g. Part I Parliament, Part II The Scottish Administration, Part III Financial Provisions, Part IV Tax Varying Powers. Sch.5 specifies reserved matters. Government of Wales Act 1998 Part I Assembly, Part II Assembly Functions, Part III Assembly Procedure, Part IV Assembly Finance, Part V other provisions about the Assembly, Part VI Reform of Welsh Public Bodies, Schedule 3 specifies functions to be transferred rather than ‘reserved matters’ for Westminster. Northern Ireland Act 1998 Part II Legislative Powers, Part III Executive Authorities, Part IV The Northern Ireland Assembly; Part V North-South Ministerial Council and British Irish Council, Part VI Financial Provisions, Part VII Human Rights and Equal Opportunities. Some commentators regard each statute as equivalent to a local constitution.

⁴⁷ R. Rawlings 2001 ‘The Shock of the New: Devolution in the United Kingdom’ in E. Riedel (Hrsg.) *Aufgabenverteilung und Finanzregimes im Verhältnis zwischen dem Zentralstaat und seinen Untereinheiten*, Baden Baden, Nomos Verlagsgesellschaft, 2000 p.83.

⁴⁸ The Department of Constitutional Affairs states that: ‘The Concordats are intended to promote constructive co-operation and communication. They set out a working framework within which Ministers and officials may continue and develop relationships between the administrations. The primary aim is to ensure that if either is planning action impinging on the responsibilities of the other, it gives adequate forewarning.’

⁴⁹ R. Rawlings ‘Concordats of the Constitution’ [2000] *LQR* 256-286 at p.276.

⁵⁰ P. Leyland ‘Utility Regulation in an Age of Governance’ in N. Bamforth and P. Leyland *Public Law in a Multi-Layered Constitution*, Oxford, Hart Publishing, 2003.

form of “bureaucratic law”⁵¹ Thus for the picture to come into any sort of focus we find that, certainly at an administrative level, reference has to be made to a developing body of *soft* law. A notable feature of the hand over of power since devolution has been a smooth transition with little or no disruption to the delivery of policy.⁵² In many policy areas the operationalising of the devolved bodies has allowed funding to be allocated according to local priorities.

In sum, the devolution arrangements have provided a new level of government subordinate to Westminster on an asymmetrical basis which, not only provides the electorate in each nation with the right to vote on the basis of proportional representation, but also introduces a unique set of democratic institutions and processes for Scotland, Wales, Northern Ireland and London. The Scottish Parliament has been granted limited powers to raise taxes, but otherwise the financial formula that determined the overall sums available to Scotland, Wales and Northern Ireland has been left untouched.

Constitutional Implications of Devolution

Viewed from a constitutional standpoint devolution has produced an inequality of political representation, an issue sometimes referred to as the ‘West Lothian question’. As one commentator has put it: ‘It raises serious questions about the role of MPs as members of the UK parliament, and about the nature of the Union itself. The Union has traditionally been built on an equality whereby all members can vote on all matters, regardless of territorial extent of their application, as members of a single parliamentary body.’⁵³ If, for instance, we look at the current position in Scotland, the introduction of a Scottish Parliament and Executive with considerable power plays havoc with the notion of representative government in the United Kingdom. MPs representing English, Welsh and Northern Irish constituencies are no longer able to vote on devolved matters in Scotland but Scottish MPs at Westminster retain the right to vote on domestic policy for the rest of the UK.⁵⁴ Further still, by the transfer of many domestic functions to the Scottish Parliament Scottish Westminster MPs have a greatly reduced role to play in relation to their constituents. The obvious line of accountability for the devolved areas of domestic policy in Scotland is through their Scottish representatives (MSPs).

⁵¹ Rawlings 2000 at p.258. This article presents an in depth critical evaluation of concordats. See also M. Laffin, A. Thomas and A. Webb ‘Intergovernmental Relations After Devolution’ [2000] *Political Quarterly*, [2000] 223-245.

⁵² This hand over of power was made possible through a series of concordats drawn up between Whitehall and the new executives e.g. *Concordat between the Cabinet Office and the Scottish Administration*. The significance of concordats is discussed in greater detail below.

⁵³ See M. Russell & G. Lodge, ‘The Government of England by Westminster’, in R. Hazell (ed.) *The English Question*, Manchester University Press, 2005 (forthcoming).

⁵⁴ See R. Johnston, C. Pattie and D. Rossiter ‘Devolution and Equality of Representation in the United Kingdom: A Constitutional Mess’, *Political Quarterly*, Vol. 73, No. 2, April-June 2002 158-172 who also discuss the over representation of Scotland and Wales in the House of Commons.

Many aspects of policy can be introduced throughout England by central government with the approval of MPs representing Scottish, Welsh and Northern Irish constituencies without the government having to gain approval from English MPs alone. By way of contrast, a separately elected Parliament or Assembly decides equivalent matters in the devolved parts of the UK. In other words, an effect of devolution has been to throw open the question of parliamentary representation for England which in terms of political representation is treated less favourably to Scotland, Wales, Northern Ireland and London. How to address this question and the provision of an equivalent level of government for England is the focus of the remainder of this article⁵⁵.

Voices of discontent at the lack of provision for England have been heard most stridently in the socially disadvantaged English regions bordering Scotland and Wales that have missed out economically to the greatest extent from devolution,⁵⁶ but until recently there has been minimal attention to assessing the likely impact of these arrangements at the heart of the UK.⁵⁷ The Campaign for an English Parliament, as its name implies, presents a case for the introduction of an English Parliament. A proposal for an equivalent body to the Scottish Parliament might appear to have some merit since setting up a Parliament for England could provide the constitutional basis for correcting the glaring asymmetries relating to representation, accountability and administration which, as we have just noted, have been raised by devolution. However, there are obvious reasons why such a proposal has little chance of being implemented.⁵⁸ First, it has hardly any support within any of the mainstream political parties, or more widely with the English electorate. Second, a Parliament for England with equivalent powers to the Scottish Parliament would be a strong competitor to the Westminster Parliament which would no longer have a pivotal role in relation to domestic issues. Third, an English Parliament would be an additional elected political body requiring a fresh cohort of politicians at a time when there is already evidence of voter fatigue with existing elected political institutions. Fourth, establishing an English Parliament would prompt a debate about the financial provisions on which devolution is based and, in so doing, open up fresh controversy over the allocation of resources within the UK. In turn, such controversy might provide further impetus to the devolution process by prompting wider calls for Scottish independence. Fifth, an English Parliament would be very costly to introduce. It must be stressed that there has been limited popular support in England as a whole for an English Parliament, or indeed, for any comparable constitutional reform.

An alternative response to the problem pertaining to the voting rights of Westminster MPs, which is much less radical than resorting to an English

⁵⁵ The Regional Development Agencies Act 1998 introduced a new policy for economic regeneration by dividing England into 9 regions.

⁵⁶ See, *e.g.* Campaign for the English Regions: <http://www.cfer.org.uk/home.htm>; Giving the People a Voice: A Campaign for Yorkshire's White Paper (September 2001). Campaign for an English Parliament.

⁵⁷ V. Bogdanor, *Devolution in the United Kingdom*, Oxford, Oxford UP, 1999 p.266.

⁵⁸ The issue of an English Parliament is discussed in B. Hadfield 'The English and Welsh Questions' in J. Jowell and D. Oliver (eds.) *The Changing Constitution*, Oxford, Oxford UP, 2004 at p.246ff.

Parliament, would be to agree on a new convention or implement new procedures and rules within Parliament which would prevent Scottish and Northern Irish Westminster MPs from voting on legislation not applying in Scotland and Northern Ireland.⁵⁹ It should be pointed out that there is an obvious political difficulty with reaching such a resolution at Westminster in the immediate future. A Labour government which is heavily dependent on the support of Scottish and Welsh Labour MPs to get its legislation through Parliament is unlikely to agree to a change which has the effect of disabling its political power.⁶⁰ On the other hand, it has suited the Conservative Party in opposition to take up the call for ‘English votes for English laws’.⁶¹ A change in the rules which prevented MPs outside England from voting on English bills would effectively mean that Labour would no longer have an overall majority in the House of Commons for votes on legislation which concerned England alone and such a change would be a means of consolidating the power base of the Conservative Party in England where its support is normally at its strongest.⁶² In a different sense it has been pointed out that recent proposals to enhance the law making capacity of the Welsh Assembly⁶³ are likely to have an incidental impact on England. It will mean that as the revised and distinct procedure for law making in Wales is introduced: ‘. . . distinctively “English” legislation in the Westminster Parliament is on the horizon, a not insignificant innovation driven here from the other side of Offa’s Dyke’.⁶⁴

A related question which would also need to be addressed concerns the role of the House of Lords, or reformed second chamber, in dealing with legislation directed at particular parts of the United Kingdom. Life peers and the remaining hereditary peers originating from any part of the nation are presently eligible to sit and vote in the House of Lords. How could a rule restricting voting rights in the House of Commons be reconciled with the practice and procedure in a reformed House of Lords? Should a reformed second chamber have a regional element to its composition?⁶⁵ There are no

⁵⁹ See M. Keating ‘The UK as a post-sovereign polity’ in M. O’Neill (ed.) *Devolution and British Politics*, Harlow, Longman, 2004, p.323.

⁶⁰ Russell and Lodge 2005 above.

⁶¹ Both William Hague and Michael Howard as opposition leaders have supported this idea.

⁶² A further problem in introducing any restrictive rule over the way legislation is considered by MPs as it passes through Parliament concerns the technical difficulties in drafting legislation. *E.g.* where there are mixed clauses some of which only apply to particular parts of the UK. For detailed discussion of the implications of changing voting rules see: B. Hadfield ‘Devolution, Westminster and the English Question’ *PL* [2005] p.301.

⁶³ See *Better Governance for Wales*, Cm.6582, 2005. The proposed change will be in phases. First, a more consistent approach to legislative drafting. This has already been announced; second, to combat the legislative bottleneck at Westminster a new form of Order-in-Council for Wales has been devised; and the third phase, would grant full law-making powers to the Welsh Assembly, but only after approval by referendum triggered by a two thirds support in the Assembly.

⁶⁴ R. Rawlings ‘Hastening Slowly: The Next Phase of Welsh Devolution’ [2005] *PL* 824-852 p.841.

⁶⁵ See, *e.g.* M. Russell and R. Comes ‘The Royal Commission on Reform of the House of Lords: A House for the Future?’ [2001] 64 *MLR* 82-99 at p.90 and Royal

firm proposals to modify the procedure or composition of the Westminster Parliament in accordance with the options discussed. However, the speculation over possible further constitutional change illustrates the dynamics of devolution. It has prompted debate over further modifications to the constitution to address the issues it raises.

Governance for the English Regions

Since coming to office in 1997 the Labour government has repeatedly declared its intention not only to ‘modernise government’ but also to ‘bring democracy closer to the people’.⁶⁶ However, comprehensive reform through the introduction of some form of devolved government for England and its regions, which is by far the greater part of the UK in population terms with over 50 million people, was a notable omission from the devolution arrangements for the remainder of the UK set up between 1998 and 1999.⁶⁷ In part, the explanation for the absence of constitutional modifications relating to England is because England has only ever existed as a ‘state of mind’ not as a ‘consciously organised political institution’.⁶⁸ Put more precisely: ‘It is the supposedly unified and homogeneous nature of England which has in large part been responsible for the unitary state’.⁶⁹ England has tended to share aspects of its governance with Wales and to a lesser extent Scotland and Northern Ireland. Moreover, in discussing the West Lothian question we have already encountered the difficulties in overcoming the asymmetry caused by devolution without at the same time disrupting the balance of the constitution. Nevertheless, campaign organisations seeking elected regional government in some of the English regions outside London have been somewhat more successful in making their case.⁷⁰ The Labour government has introduced a layer of English regional governance in preparation for what it promised would be a more ambitious programme of elected English regional government.

Viewed from a governance perspective, the issue of policy co-ordination at regional level in England has been recognised for some time.

“The hollowing out of the departmental functions to a plethora of agencies, non-departmental public bodies and private sector entities has placed a new emphasis on the need for government organizations to engage in intergovernmental diplomacy and coalition-building in order to deliver their own priorities. An unexpected outcome of the atomizing of government has been the corresponding recognition by officials of the need to

Commission on Reform of the House of Lords, *A House for the Future*, Cm 4534 (2000) (Wakeham Commission).

⁶⁶ See, e.g. *Modern Local Government: In Touch with the People* (1998) Cm 4014.

⁶⁷ J Tomaney “New Labour and the English Question”, *Political Quarterly*, 1999 75-82. The possible introduction of an English Parliament and the prospects of regional government are discussed in the light of devolution for Scotland, Wales and Northern Ireland.

⁶⁸ R. Rose *Understanding the United Kingdom*, Harlow, Longman 1982, p.29.

⁶⁹ V. Bogdanor *Devolution in the United Kingdom*, Oxford, Oxford University Press, 1999 p.266.

⁷⁰ See, e.g. Campaign for the English Regions: <http://www.cfer.org.uk/home.htm>.

counter its effects through networking and their willingness to engage in diplomacy.⁷¹

In the early 1990's the Conservative government created the Government Offices of the Regions (ROs). The idea was to establish an integrated approach to policy making by bringing together government and its client groups. At this point as a result of the highly complex interweaving of different departments and diverse bodies covering different, but often related, policy areas, there was inadequate consistency in the operation of the wide variety of policy networks.⁷² Subsequently, some consolidation was achieved with the combining of departmental regional offices for the regions representing key departments under one roof.⁷³ It has been observed that 'the partnering region' relates to the novel forms of local democratic governance, including appropriate models of regional economic development, as well as the tools and practices of administrative and political cooperation across the various layers of government.⁷⁴ The regional policy of successive governments has been largely driven by a desire to co-ordinate policy at a regional level and equally a commitment to encourage economic development. Some commentators have not been convinced by the motivation behind such a policy, noting that the regional government initiative amounts to little more than 'another form of functional decentralisation'.⁷⁵

Under the 1997 Labour government the next step in the direction of regional government exactly coincided with devolution.⁷⁶ The Regional Development Agencies Act 1998⁷⁷ was a vehicle for the introduction of a new policy for economic regeneration.⁷⁸ The 1998 Act divided England into 8 regions (plus London) and created Regional Development Agencies (RDAs) in order to co-ordinate regional economic development and the new agencies were made responsible for formulating strategies for regeneration to promote business efficiency, investment and competitiveness in their areas⁷⁹ by forging links and formalising relationships with the business sector at regional level. The RDA's are mainly funded from central government and they are given

⁷¹ R. Rhodes, P. Carmichael, J. McMillan, A. Massey *Decentralizing the Civil Service: From unitary state to differentiated polity in the United Kingdom*, Buckingham, Open University, 2003 at p.147.

⁷² Stevens 2004 p.256.

⁷³ E.g. the Department of Trade and Industry, the Department of Employment, the Department of the Environment and the Department of Transport.

⁷⁴ R. Rawlings *Delineating Wales: Constitutional, Legal and Administrative Aspects of Welsh Devolution*, University of Wales Press 2004, p.433.

⁷⁵ R. Rhodes, P. Carmichael, J. McMillan, A. Massey *Decentralizing the Civil Service: From unitary state to differentiated polity in the United Kingdom*, Buckingham, Open University, 2003 at p.137.

⁷⁶ See J. Tomaney 'The Evolution of Regionalism in England' *Regional Studies*, Vol. 36.7 pp.721-731.

⁷⁷ R Hazell and B O'Leary 'A Rolling Programme of Devolution' in *Constitutional Futures: A History of the Next Ten Years*, Oxford, OUP, 1999, pp.36-40.

⁷⁸ See Regional Development Agencies Act 1998, Sch. I: East Midlands, Eastern, North East, North West, South East, South West, West Midlands, Yorkshire and the Humber and London.

⁷⁹ Regional Development Agencies Act 1998 ss.4 & 5.

limited powers to achieve this aim.⁸⁰ Financial allocations to the RDA's from the contributing central government departments⁸¹ are pooled into a single budget.⁸² The sum each RDA receives from this single pot is largely determined by a formula reflecting the economic situation in each region, which has been agreed between DTI and the RDAs. The formula uses a series of indicators as a proxy for the needs of each region, including the needs of businesses in the region. The most up to date data is used and a system of weightings is applied to the indicators to take account of existing funding commitments made by the RDAs. The North West is allocated £382 million, while the North East is granted £240 million. As we will shortly observe, equivalent bodies in Wales and, in particular, the Welsh Development Agency, were placed under the Welsh Assembly government, providing a direct element of democratic control and accountability.⁸³ Whereas the boards of RDAs are appointed by ministers and are only indirectly accountable to Parliament through the minister.

Another important reason for achieving a high degree of regional policy co-ordination has been to put the English regions in a position to bid for available EU funding which is allocated on a regional basis.⁸⁴ An extra tier of government opens up the opportunity of attracting more of the European Unions structural funds designated for the regions.⁸⁵ The EU dimension has encouraged the emergence of a greater degree of autonomous regional self government in Europe.⁸⁶ Spain has also been confronted with a combination of nationalist demands for self-government and economic pressures for greater autonomy, and Spain too has opted for a staged programme of asymmetrical devolution.⁸⁷

⁸⁰ Under s.5(2) of the Regional Agencies Act 1998 the agencies can give financial assistance, dispose of land or form or acquire and interest in a body corporate but only with the consent of the Secretary of State.

⁸¹ The departments are: Trade and Industry (DTI), Deputy Prime Minister (ODPM) formerly Environment, Education and Skills (DfES), Environment, Food and Rural Affairs (DEFRA) and Culture, Media and Sport (DCMS).

⁸² The total allocation for the year 2004-2005 was £1850 million. The amount for 2005-2006 has been set at £2163 million. The ODPM provides the largest contribution amounting to £1.5 but a substantial contribution from Trade and Industry £233 in 2004 - 2005. The contribution from the DTI rises to £463 million in £2005-2006.

⁸³ The government in Wales duly decided to abolish and modify some of the quangos it inherited.

⁸⁴ The White Paper notes at 8.16 that: 'Individual local authorities and regional bodies such as Regional Development Agencies have realised that, to make an impact in Brussels, they need to work together at a regional level to gain critical mass. The efforts of the UK's devolved administrations have demonstrated the benefits of such co-ordinated action'.

⁸⁵ M. O'Neill 'Great Britain: From Dicey to Devolution' *Parliamentary Affairs*, 2000, 69-96 at p.91.

⁸⁶ White Paper 2002 4.3 a regional assembly will take over the role currently performed by Government Offices on structural funds. The White Paper further states at 8.19 'Structural Funds have been the catalyst for strengthened links between the regions and the EU, and are one of the most visible signs on the ground of the benefits of EU membership.'

⁸⁷ See J. Hopkins *Devolution in Context: Regional, Federal and Devolved Government in the European Union*, London, Cavendish, 2002 at p.120ff.

Not only were RDA's introduced to develop and deliver economic strategies to secure better and more sustainable economic performance for their regions but, in addition, the Labour government established Regional Assemblies in all of the English regions.⁸⁸ The Assemblies were formed partly from politicians representing the various local authorities in the regions⁸⁹ (approximately two thirds); and partly from stakeholders in the form of economic and social partner organisations (approximately one third).⁹⁰ All members were nominated rather than being directly elected, and the role of the Assemblies has been to contribute to regional economic strategies and plans, and to scrutinise the delivery of such strategies and plans. The Assemblies vary in size from 117 to 36 members. For example, the North West Regional Assembly represents the North West region of England which includes the counties of Cheshire, Cumbria, Greater Manchester, Lancashire and Merseyside. The region has a combined population of 7 million and an annual budget of £2.3 million.⁹¹ The Assembly is part funded from local authorities. The remainder is allocated following a formal bidding process from strengthening Regional Accountability (SRA) and English Regions Network (ERN). The Assembly is staffed by full time officials responsible for providing support to Assembly members. The principal objectives of the North West Region Assembly are described in its constitution.⁹²

The Assembly promotes the interests of the region nationally and internationally and with European and Government agencies.⁹³ More specifically, it seeks to promote through joint action with the partnership of

⁸⁸ See Regional Development Agencies Act 1998 s.8 (1) If the Secretary of State is of the opinion-

(a) that there is a body which is representative of those in a regional development agency's area with an interest in its work, and

(b) that the body is suitable to be given the role of regional chamber for the agency,

he may by directions to the agency designate the body as the regional chamber for the agency.

⁸⁹ In some rural areas two tier County Councils and District Councils have been replaced by 46 unitary authorities. There are 36 single tier metropolitan borough councils in cities and towns and 32 London Borough Councils.

⁹⁰ Stakeholder is not defined in the White Paper, but the term refers to business, trade unions, the voluntary and community sectors, local authorities and other key partners in the public sector. Also referred to as the business community, social and environmental partners, and elected representatives from other tiers of governance.

⁹¹ The other Assemblies for which figures are readily available: Yorkshire and Humber Assembly £4.7 million; South East Region Assembly £4 million; South West Assembly £1.4 million; East of England Assembly £1.4 million.

⁹² Their work involves '... commissioning research, developing policies, liaising with partner organisations, producing documentation, lobbying and working to raise awareness of current issues in the region in relation to education, planning, health, transport, culture, communities, economic development, housing, European issues and the environment'.

⁹³ According to its own publicity published on its website: 'The North East Assembly has become a leading player in the region with a 'voice' on every important issue affecting the region. We are speaking for the North East at a regional, national and European level. Our role in representation, influence and lobbying extends to a whole range of areas that affect everyday lives'.

interests, the sustainable economic, social and environmental well being of the region. To reach this objective it must assess 'the strategic needs of the region so as to make a strong input into the Regional Strategy and scrutinise its preparation or review by the North West Development Agency (NWDA)'.⁹⁴ The Assembly was intended to provide a strong authoritative voice for the region and, at the same time, to provide a consultative framework between partners on how to meet the challenges facing the region. The Assembly acts as a kind of proto-decision making body. It then exercises an oversight function in respect of monitoring the NWDA's implementation of the strategies that have been agreed by the Regional Assembly. It must ensure that the developing agenda of bodies such as Regional Housing Board and the emergent Regional Transport Board remain fully accountable to the full Assembly and the region.

The Regional Assembly debates and determines the broad economic strategies and priorities for the region. It follows from this that the RDA and other public, and publicly funded bodies in the region, fully consider these strategies, indeed they are required to do so as part of their statutory responsibilities. The Regional Assembly also provides feedback to central government on whether reports and plans published by the regional development agency have the support of the regional assembly.

The potential for policy co-ordination in the regions by bringing together the various public and private interests as part of a governance narrative in what we have called here a 'multi-layered constitution' can be illustrated in respect to planning policy.⁹⁵ The Regional Assemblies as the regional planning body have been given a leading role in the co-ordination of planning policy as part of the Regional Spatial Strategy (RSS).⁹⁶ In theory it might be claimed that: 'Policy decision emerges as a consequence of activity within this network rather than through Parliament, and policy coordination is a by-product of inter-organisational power bargaining rather than a strategic activity'.⁹⁷ Under the latest central government initiative, the Regional Spatial Strategy,⁹⁸ the Assembly is required to link its economic, housing, transport and planning goals together in what is referred to as a broad 'spatial strategy'. Planning policy must focus on the needs of the region as a whole, but any policy that is drawn up must also highlight those areas that need more specific guidance or a different approach. This approach is designed to not only improve the co-ordination and the delivery

⁹⁴ See North West Assembly website.

⁹⁵ 'The Planning and Compulsory Purchase Act 2004 marked a significant change, formalising the regional planning arrangements that have existed in England for some 15 years'. M. Sandford and P. Hetherington 'The Regions at the Crossroads: The Future for Sub-National Government in England' in A. Trench (ed.) *The Dynamics of Devolution: The State of the Nations 2005*, Exeter, Imprint-Academic, 2005 p.92.

⁹⁶ Government Guidance, RPG 1.

⁹⁷ C. Stephens 'English Regional Government' in M. O'Neill (ed.) *Devolution and British Politics*, Harlow, Longman, 2004 at p.261.

⁹⁸ Planning and Compulsory Purchase Act 2004 s.1. The main difference between the Regional Spatial Strategy and the previous Regional Planning Guidance (RPG) is that the RSS is statutory and it will become part of the new style development plans called Local Development Documents (LDDs).

of regional policy, but also to achieve sustainable development within the region. The RSS is set to provide the overarching framework for growth in each of the regions over the next 15 to 20 years.

In conformity with statutory guidelines any such policy is required to embody more inclusive and participatory decision making.⁹⁹ The Assembly has to formulate corporate plans which must both demonstrate added value and relate to those issues which are relevant to the local authorities which they represent and also to their economic and social partners. But although the Assembly has a central role in regard to the planning process at regional level, it is crucial to remember that under the relevant statute ministerial direction provides a constant guide in the framing of the overall policy.¹⁰⁰ It has been argued that the combination of decentralisation with local participation, coupled with a strong element of ministerial direction, has emerged as a blueprint for ensuring effective compliance with policies from the centre.¹⁰¹ In regard to the input of central government, which is still able to intervene on the vertical axis to ultimately determine policy.

At this point a strong contrast can be drawn with all of the devolution models which grant executive power to the periphery over the functions that have been devolved. In particular, quangos are placed under the control of the devolved government. This establishes a fresh line of accountability to an elected body. It also means that the devolved government is free to abolish or re-shape many of the quangos under its remit, more or less at will. For example, the Welsh Assembly Government adopted a policy to only retain quangos where they are the most appropriate and cost effective means of carrying out the functions concerned.¹⁰² In the period following the introduction of devolution the Welsh Assembly Government had to reach some sort of accommodation with the Welsh Development Agency which was regarded by some Assembly members as an unwelcome competitor in managing the Welsh economy. A new relationship has been forged between the two bodies and as Professor Rawlings notes: 'The WDA is both a great survivor, even a direct beneficiary of the devolutionary scheme, and epitomizes the extended accountability of public bodies in Wales associated with the devolutionary development'.¹⁰³

As part of the multi-layered constitution there is evidence also of horizontal cross regional integration. The English Regions Network (ERN) has been formed as an umbrella organisation for the Regional Assemblies. The role of

⁹⁹ See Planning and Compulsory Purchase Act 2004 s.6 (1) which provides: 'For the purposes of the exercise of its functions under s.5, the RPB must prepare and publish a statement of its policies as to the involvement of persons who appear to the RPB to have an interest in the exercise of those functions.'

The websites of each of the Regional Assemblies sets out the broad characteristics of their RSS which are all closely related.

¹⁰⁰ Under s.1(2) of the Planning and Compulsory Purchase Act 2004 'The RSS must set out the Secretary of State's policies (however expressed) in relation to the development and use of land within the region'.

¹⁰¹ R. Rhodes, P. Carmichael, J. McMillan, A. Massey *Decentralizing the Civil Service: From unitary state to differentiated polity in the United Kingdom*, Buckingham, Open University, 2003 at p.137.

¹⁰² See Rawlings 2003 p.358.

¹⁰³ Rawlings 2003 p.363.

the ERN is first to bring members and officials together to discuss matters of mutual interest. Second, it has a role in co-ordinating the activities of the assemblies. For example, information can be shared in order to influence the development of policy and practice and the range of initiatives under way in the different regions can be formulated into an integrated framework. The Network also seeks opportunities for regional assemblies to strengthen the voice of the regions in Whitehall and Westminster. Transportation is a policy area with obvious cross regional implications.

The Proposed Elected Assemblies for the English Regions: What went wrong?

The RDAs and Regional Assemblies were slotted into place during Labour's first term 1997-2001 and these institutions were to form the basis for the next stage of devolution for the English regions. The Labour Party went into the 2001 general election claiming: 'there is no case for threatening the unity of the UK with an English Parliament or the denial of voting rights to Scottish, Welsh and Northern Ireland's MPs at Westminster'.¹⁰⁴ However, it recognised a democratic deficit in England, and it announced plans for a new level of elected government for the English regions. While the government made no general commitment to elected regional government for the country as a whole, it made a pledge to introduce directly-elected regional government in regions where the proposals were supported by a referendum.¹⁰⁵ The 2001 manifesto contained a promise to enhance the scrutiny functions of regional chambers as they took on more powers. As mentioned earlier, there has been little evidence of popular support among the electorate for more devolved government in England.¹⁰⁶ Moreover, it is very much open to question whether the White Paper proposals would have made a significant contribution in the nature and quality of government for the English regions. In assessing these proposals it is worth remembering that, even in its weakest form, devolution has been characterised by the following features: first, it extends to an established territorial entity. Second, devolution provides a form of elected Parliament or Assembly with powers over a form of primary legislation or secondary legislation; third, a wide range of functions were placed under the direction of the devolved government. Fourth, the elected assembly exercises an oversight function over the executive functions performed at devolved level. Fifth, devolution resulted in the bureaucratic apparatus of government in the form of the civil service and relevant non-departmental public bodies coming under the direct ambit of the devolved form of government; sixth, each type of devolved government was granted considerable discretion in how it spent the funds made available to it from central government. In other words, although the funding for devolution mainly derives from central government under block grant, according to the Barnett formula, the effect of having a pre-determined

¹⁰⁴ *Ambitions for Britain*, Labour Party Election Manifesto 2001, p.35.

¹⁰⁵ *Ambitions for Britain*, Labour Party Manifesto, 2001, pp.34-35.

¹⁰⁶ It has been pointed out that regionalism is not sufficiently embedded and is therefore only government backed official regionalism. See C. Stevens 'English Regional Government' in M. O'Neill *Devolution and British Politics*, Harlow, Longman, 2004, at p.253.

formula has guaranteed the broad limits of the funding allocation conferred from Westminster which is kept at arms length where funding is concerned.

A vote in a referendum in favour of regional government would have resulted in a region having an assembly elected by proportional representation.¹⁰⁷ The elected assembly would have consisted of between 25 and 35 members and the new elected body would have replaced the existing regional assembly. After it had been elected each assembly would have voted for an executive of no more than 6 members, with the remaining members performing an executive oversight function through scrutiny committees. Set against the devolved systems the proposed regional assemblies were to be given control over very limited policy domains. As well as the functions in the hands of the already constituted regional assemblies, the additional areas which might have been included were: economic development, housing, public health improvement and culture (currently under county councils and district councils). Social services, education and other local services would have remained with existing local authorities.¹⁰⁸

The government claimed that these arrangements were an attempt to improve policy delivery by ensuring better co-ordinated government at regional level. These bodies were to be granted limited powers. The elected regional assemblies would have been able to formulate *strategies* at three distinct levels: high-level targets; strategies for specific subject areas; and an overarching regional strategy.¹⁰⁹ However, it was not proposed to give the elected regional assemblies law making powers or powers over delegated legislation on a comparable basis to the powers granted in Scotland, Wales or Northern Ireland. RDAs were given the role of surrogate regional executives, retaining the task of developing a regional plan, although the elected assemblies would have been in a position to direct that changes be made to a plan before it was published. RDA's were to have been made accountable to the Assembly for their other activities, but would have otherwise retained their operational independence.

The main objectives of an elected Regional Assembly would have been to set out a number of high-level targets, which it would have been required to agree with central government. Assemblies were to be placed under a duty to promote sustainable development and improve the quality of life for their region, and each regional assembly was to have a co-ordinating responsibility for 'joining up' policy, while at the same time, it would have been required to develop strategies for strengthening the region. The prime function of Assemblies with the increased functions and powers contained in

¹⁰⁷ See White Paper: *Your Region, Your Choice: Revitalising the English Regions*, 2002, Cm 5511 The voting system for elected regional assemblies was to be the Additional Member System (AMS). The method already used for the Scottish Parliament, the Welsh Assembly and the Greater London Authority. It ensures the overall composition of an assembly will broadly reflect the votes cast for the different parties at the assembly election.

¹⁰⁸ The functions transferred to the assembly were not precisely defined and could vary from region to region, greatly adding to the asymmetry of any devolution of power.

¹⁰⁹ White Paper, above chap.4. Strategies will consist of detailed plans setting out how the high level targets can be reached.

the draft bill published in 2004 would be: 'to promote industry and develop the skills of the workforce according to regional priorities . . . [to] invest in the physical regeneration of housing and make related transport investments. In short, assemblies could assume the role of leading bodies in promoting regional regeneration'.¹¹⁰

The proposed system confirmed the special recognition for regional stakeholders. The White Paper suggested that a clearer decision-making framework would be achieved by giving the stakeholders better access to decision making processes. In common with the existing regional assemblies, the regional executive would have been required to ensure that relevant interests, both public and private, would be engaged in developing and delivering these strategies. The fact that assemblies would have been conferred with executive functions and powers to implement these regional policies represented yet another attempt by the government to bring decision making closer to the electorate, while at the same time identifying the involvement of stakeholders in the policy process.¹¹¹

According to the government the elected regional assemblies were not intended to add an extra tier of government,¹¹² nor would they result in the introduction of additional bureaucracy.¹¹³ The main reason the assemblies would not have duplicated the work of either the UK Parliament, or existing local authorities, was because the majority of their functions would have come from central government bodies, primarily the regional development agencies and the regional assemblies. This feature allowed the regional government initiative to be presented as representing a significant decentralisation of power. Secondly, the avoidance of duplication would have been achieved because, before a referendum was called on the desirability of an elected Regional Assembly, a review would take place to ascertain the best method for a unitary structure of local government for that region.¹¹⁴ The package on the table for democratic regional government would have allowed voters when making their choice in any referendum aware of the implications for the re-organisation of local government in their region.

The White Paper indicated that the elected regional assemblies were to receive a block grant from central government. Therefore, in practice, most of the funding would have come through a single Government payment. In common with other devolved government in the UK, an elected regional assembly would then have been in a position to decide how to use its allocation to address regional priorities. This discretion would have ranged over a much narrower set of policy domains. Subject to certain strict conditions, regional assemblies were to be given power to borrow money on

¹¹⁰ J. Tomaney 'By the regions, for the regions' *The Guardian*, 27 July 2004.

¹¹¹ See Local Government Act 2000, Part 1.

¹¹² One of the implications of the introduction of elected Regional Assemblies would be to revise the two tier structure of local government. See M. Chisholm 'Reorganizing Two-Tier Local Government for Regional Assemblies' *Public Money and Management*, April 2004 pp.113-120.

¹¹³ Draft Bill on Regional Assemblies 2004: Policy Statement, para.23.

¹¹⁴ Regional Assemblies (Preparation) Act 2003 Part 2 s.13.

the financial markets.¹¹⁵ Second, additional funds could be raised by the Regional Assemblies through local authority council tax. This money would be collected on behalf of the regional assembly by local authorities in the region as part of existing arrangements for collecting council tax¹¹⁶ but this precepting was to be achieved without affecting non-domestic rate payers and thus imposing an extra burden on business. An elected assembly would have been allowed to set a higher charge to fund additional spending if the assembly considered such a charge desirable, but the controlling hand of Westminster was to remain very much in evidence. Central Government would have been able to limit the amounts through arrangements similar to the existing local authority council-tax capping regime.¹¹⁷ In fact, overall these proposals stand out as a modest divestment of power by central government next to other devolved systems of regional government. For example, in Italy¹¹⁸ following the amendment of the Italian Constitution all matters not specifically mentioned in the Constitution are now assigned to the ordinary Regions.¹¹⁹ In Italy central government no longer has control over the legitimacy of regional administrative decisions, and the potential for granting significant financial autonomy has been increased.

Approval by Referendum

A further criticism concerns the way a referendum requirement has been applied to these and other changes to the structure of regional government.¹²⁰ The implementation of the government's proposals for elected regional assemblies depended on a referendum being held in each of the designated regions to approve the principle.¹²¹ This requirement might appear to follow

¹¹⁵ *Your Region, Your Choice: Revitalising the English Regions*, 2002, Cm 5511 at 5.11 states that: 'In principle, we believe that elected assemblies should decide on their own levels of capital spending to be supported by borrowing and should be accountable to voters for their decisions, subject to the levels of borrowing being prudent'.

¹¹⁶ It has been estimated that the contribution of council tax-payers to the running costs of the assembly would have been equivalent to around five pence per week for a Band D council tax-payer in any region

¹¹⁷ See *Strong Local Leadership – Quality Public Services*: Part II, chap.4. For example, regional assemblies would have been subject to a prudential regime that is also intended for local government which includes reserve powers to set lower prudential limits in certain circumstances.

¹¹⁸ See, e.g. Law 142/1990 which introduced general legislation for local government; Law 81/1993 which allowed for the direct election of City Mayors and Provincial Presidents; Law 59/1997 which allowed the government to transfer administrative functions to the Regions, Provinces and Town Councils; Legislative Decree 56/2000 which set out the fiscal arrangements. P. Leyland, J. Frosini, C. Bologna 'Regional Government Reform: assessing the prospects for devolution' [2002] *Public Law* 242-252.

¹¹⁹ Art.117 of the Italian Constitution.

¹²⁰ As well as the substantive arguments regarding referendums mentioned here the North East referendum was also controversial because of experimentation with postal voting techniques which it was claimed were open to abuse.

¹²¹ See the Regional Assemblies (Preparations) Act 2003 which, for example, enables the Government to specify the region(s) able to hold a referendum on an elected regional assembly and to fix the date of the poll. It also allows the

the same pattern as adopted for devolution, since a referendum was necessary to secure approval for the respective models of devolution in the devolved parts of the UK. Although a test of public opinion has been built into the process to determine whether there is sufficient public support in favour of regional government, the use of referendums in the manner prescribed cannot easily be justified. First, there is no scope under the Act to hold a general referendum in England on the broad principle of democratically elected regional government. The decision to set up the referendum process on a region-by-region basis was because of the lack of political support for regional government in the most highly populated parts of South East England. Reading between the lines, the government wanted to avoid embarking on a process that could fail at the first hurdle, as would be the case if a national referendum were held to test opinion and that referendum went against the principle of regional government. Second, the Act allows the minister to approve the holding of referendums in some regions and not others. After the legislation was introduced John Prescott, the Deputy Prime Minister, announced that he intended that there would be three regional referendums in 2004¹²² and later decided to cancel the planned referendums in Yorkshire and the North West region. The rationale that has been offered for this incremental approach is that a limited advanced consultation process would indicate a reservoir of basic support. However, the fact that citizens in some parts of the UK should have the entitlement to be consulted on such an important issue, while others were not to have that right, simply because they live in a different part of the country, cannot be defended. Third, the introduction of regional government itself depends upon gaining approval by referendum on a region-by-region basis. If some regions were to vote in favour, and others voted against, an outcome which looked likely on the basis of views which were current when the proposals were conceived, there would be an asymmetrical distribution of powers which would be even more pronounced than under present arrangements. Such an imbalance is justified by the government on the grounds that the electorate in some regions might consider that the degree of political representation is already sufficient, while others chose more democratic accountability by opting for a regional assembly. However, this reasoning ignores the principal argument for introducing a layer of government for the English regions, namely, to redress the inequality of democratic representation and accountability that has been greatly exacerbated by devolution.¹²³ The regional government initiative fails to address this problem on a national basis in England.

Finally, referendums have become an increasingly important part of the constitutional consultation process, but there are no established rules or conventions to determine when they should be held. As one commentator has pointed out: 'The high-sounding nature of this principle [of seeking national support by referendum] is mitigated somewhat by the facts that that whether or not there is a referendum and what constitutes fundamental change will be

government to set out the questions to be asked and determine those eligible to vote in such a referendum.

¹²² These will be in the North East, Yorkshire and Humberside and the North West.

¹²³ R. Johnston & D. Rossiter 'Inequality of Representation in the United Kingdom: A Constitutional Mess?' 2002, *Political Quarterly* 158-171.

decided by the government'.¹²⁴ In the case of the English regions it has been argued that the minister under Regional Assemblies (Preparations) Act 2003 has been granted too much discretion in deciding whether to hold regional referendums. Nevertheless, the Act provided that in the event of there being a 'no' vote the minister is forbidden from calling another referendum in that region for seven years.¹²⁵ The overwhelmingly decisive failure of the referendum in the North East of England has not only confirmed the difficulty in promoting popular support for elected regional government, but it has sidelined the published proposals for the foreseeable future.

Conclusion: What Next for England?

The proposals for elected regional assemblies were criticised in the press and by opposition parties and campaign groups¹²⁶ and the adverse reception contributed to their decisive rejection in the referendum held in the North East region on 4 November 2004.¹²⁷ So what went wrong? Federal systems of government tend to be adopted as a constitutional solution in nations with a substantial territorial area and an internal diversity of traditions. On the other hand, devolution has been developed in the UK to satisfy the particular requirements of the home nations of Scotland, Wales and Northern Ireland and a strategic level of government has been restored for London (supported by a referendum). Systems of devolved government with elements in common with the UK experience have been introduced in other European nations such as Spain and Italy. By way of contrast, the English regions have been invented as territorial entities on the basis of the RDA's which were set up for economic and administrative reasons rather than as a response to local political pressure, or to the constitutional imbalance caused by devolution.¹²⁸ Although English citizens in some parts of England feel some regional identity, particularly in the North East and Yorkshire, dividing England into regions has been an exercise of drawing lines on a map: an approach more reminiscent of the scramble for empire in the nineteenth century. On its own such a geographical division is hardly a sound basis for establishing a popular system of devolved government and not one likely to restore flagging public confidence in politics at sub-national level at a time when turnout in local government elections throughout the UK has been declining spectacularly. Another danger is that the arrangements for local government, and now regional government, simply becomes a familiar partisan battleground. The seven Metropolitan Authorities which operated at a similar level to regional government, between central government and local

¹²⁴ B. Hadfield 'Devolution, Westminster and the English Question' [2005] *PL* 286-305 at p.295. In discussing how far reaching changes need to be in order to require referenda, Professor Hadfield points out that the Scottish Parliament Constituencies Act 2004, without holding a referendum, retained the number of MSPs.

¹²⁵ See Regional Assemblies (Preparations) Act 2003 s.6(2).

¹²⁶ See Website of North East 'No' Campaign. <http://www.northeastnocampaign.co.uk/about.html>.

¹²⁷ The planned referendums in the North West region and Yorkshire had already been postponed.

¹²⁸ J. Tomaney 'New Labour and the Evolution of Regionalism in England' in J. Tomaney and J. Mawson (eds.) *England: The State of the Regions*, Bristol, Policy Press, 2002.

government until 1985 were dispensed with for political reasons. The abolition was regarded as a cynical response by the [then Conservative] government. All the authorities had been under Labour control and many were pursuing public transport, economic development and general expenditure policies which were in conflict with the Westminster government headed by Mrs. Thatcher.¹²⁹

The elected Regional Assemblies would have been given few competences. They would have lacked fiscal autonomy and they would have been granted limited powers. Moreover, Whitehall would have retained a prominent continuing role after the introduction of regional assemblies. In other words, the proposals would not have amounted to devolution in an equivalent form to the arrangements elsewhere in the UK.¹³⁰ However, the mistake was not the proposal to create a relatively weak form of government based on the English regions, but the attempt to introduce a new system applying only in some regions. A scheme introduced unevenly would have increased the asymmetries of devolution rather than tackling the underlying constitutional and administrative issues.

If we revisit our earlier discussion and note the manner in which regional governance currently operates, it appears that there remains a very strong case for building on foundations that have already been laid in the form of RDAs and Regional Assemblies. The introduction of such bodies can be regarded as recognition by government that there is a 'multi-layered constitution' which involves cooperative and participatory techniques of governance. The players in the overlapping policy networks require coordination at the base of the pyramid in all the English regions. The challenge for the government, and eventually Parliament, in addressing this issue is to introduce a convincing model applicable to the entire English nation which allows the practice of governance to be adequately connected to democratic mechanisms of control. A new strata of elected government with responsibility for the strategic functions presently in the hands of RDAs and Regional Assemblies, supplemented with responsibility for additional policy areas with a significant strategic dimension is required. This is not the place to offer a detailed discussion of a specific set of proposals, but the form of government introduced for the London Mayor and Greater London Authority is the obvious model which should be adopted.¹³¹ After a national referendum to approve the principle on a nationwide basis, each region would have an elected full time Regional Mayor responsible for policy implementation. This elected office, probably supported by a small cabinet, would be held in check by a regional assembly elected by an additional member system. The Assembly would have powers to amend or approve strategies coming from the Regional Mayor and make budget amendments. The Regional Mayor, in common with the London Mayor, would have a high

¹²⁹ See M. Loughlin *Legality and Locality: The Role of Law in Central-Local Government Relations*, Oxford, Oxford University Press, 1996 at p.118. These authorities were introduced in the 1970's and were abolished in the mid 1980's.

¹³⁰ R. Cornes 'Devolution and England: What is on Offer' in N. Bamforth and P. Leyland *Public Law in a Multi-Layered Constitution*, Oxford, Hart, 2003 at p.130ff.

¹³¹ P. Hetherington 'Howard targets regional bodies' *The Guardian*, 11 November 2004.

profile and become the personification of the region following in the footsteps of Mayor Ken Livingstone in London.¹³² It is possible to envisage such a post emerging as an attractive regional position for politicians, either on the way up, or on the way down in their political careers. The Regional Mayor and cabinet, subject to the approval of the assembly, would be responsible for appointments to the RDA and other regional quangos. A national framework on this basis, although not equivalent to devolution, would achieve parity at regional level throughout England, and although the financial parameters would be variable according to the functions given to these bodies, such a system would be much less expensive to introduce than proposals for an elected Regional Assembly based on even the Welsh devolution model.¹³³ Of course, there would be many further questions to answer relating to such a system. For example, what precise changes to make regarding central and local government to allow the new regional level of government to be seamlessly integrated? Should non-elected stakeholders continue to be represented as part of an elected assembly and should non-elected stakeholders be granted voting powers? Should the regional assemblies have powers to make delegated legislation? What degree of financial autonomy should the new bodies be granted? How would the regional elected Mayor be coordinated with other local authorities?¹³⁴ In view of the adverse reception given to an elected assembly for the North East, there is no immediate chance of progress with such an agenda. However, looking a little further into the future, it is possible to envisage the enthusiastic support of influential political figures, such as an incoming Prime Minister, to promote a new scheme of elected government applying to all the English regions.

The present layer of regional governance, based on RDAs and Regional Assemblies, allows an indirect form of representation at regional level, as the Regional Assemblies consist of members nominated by local authorities in their region, but the central issue remains to be addressed, namely, improved accountability mechanisms. These are absent at this intermediate level of government. As an interim measure pending the introduction of elected regional assemblies, important quangos which have responsibility for regional development should be placed under democratic control in order to

¹³² It is acknowledged that there are arguments against going down the path of 'personality' politics. See P. Leyland 'The Modernisation of Local and Regional Government in England: Towards a New Democratic State' in J. Frosini, L. Pegoraro, T. Waller *Europe, Regions and local government in Italy, Spain and the United Kingdom*, Bologna, Libreria Bonomo editrice, 2003 at p.189ff.

¹³³ See G. Marquand and J. Tomaney, *Democratising England*, London Regional Policy Forum 2000 and C. Stevens 'English Regional Government' in *Devolution and British Politics*, Harlow, Longmans, 2004 who points out at p.253 that a strategic coordination model outlined in the White Paper would have a budget of £20 million, while a strategic-executive model would have a budget between £1.1-2.5 billion depending on the size of the region. The Welsh model on the other hand would cost between £6 - £14 billion depending on the size of the region,

¹³⁴ See M. Sandford and P. Hetherington, 'The Regions at the Crossroads: The Future of Sub-National Government in England' in A. Trench (ed) *The Dynamics of Devolution: The State of the Nations 2005*, Imprint Academic, Exeter, 2005 p.106.

reduce the potential for central government to use powers of patronage in making appointments without any democratic constraints. The Labour government has expressed a commitment to greater transparency in the way such appointments are made and favours equal representation of women and pro rata representation of ethnic minorities.¹³⁵ Until sufficient political backing exists for elected regional government, English regional quangos, in line with the position in Scotland, Wales, Northern Ireland and London, could be made directly accountable to their electorate. At local government elections as well as casting votes for councillors local electors should be given the opportunity to vote for candidates to serve on the RDA's and other important quangos operating at regional level.

¹³⁵ See *Quangos: Opening the Doors* (1998).