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Political Adjudication or Statutory Interpretation –
Robinson v *Secretary of State for Northern Ireland*
(*Marie Lynch)*

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EDITORIAL

The articles contained in this issue are revised versions of papers presented at a workshop that was co-hosted in Belfast, on 27th – 28th September 2002, by Queen's University's Institute of Governance, Public Policy and Social Research and the *Northern Ireland Legal Quarterly*. The idea for the workshop followed the same sort of impetus as that which led to the very decision to establish an Institute of Governance, Public Policy and Social Research at Queen's. The Institute of Governance was established in 2001 with an award in excess of £5 million from the Government's Support Programme for University Research (SPUR).[1] Its creation reflects the recognition that the ways in which public policy is conceived and delivered are changing rapidly in the face of social, economic and political developments, such as globalisation, devolution, privatisation and Europeanisation. All societies must, in short, face the challenge of adapting to these changing patterns of governance in order to guarantee the making of effective public policy, and it was for this reason that the Institute was established with a view both to furthering interdisciplinary debates on the challenge, and also to creating new networks and research forums within which to conduct the debates.

While the research agenda of the Institute is wide-ranging, the particular focus of the Institute's work, and its whole means of operation, is cross-disciplinary and interdisciplinary. Indeed, this workshop was, as such, one of a number of early Institute initiatives that brought together academics and practitioners from the fields of the legal, social, and political sciences. It is perhaps particularly appropriate that the results of this collaboration should be published in a legal journal. While legal scholars in general, and public lawyers in particular, are increasingly coming to terms with ideas that the whole project of *government* is being reduced through a loss of decision-making power and accountability to bodies beyond the traditional state, ideas of *governance* are already well-developed in the literature of politics and the social sciences. Of course there are, inevitably, disputes about what the term governance means. Rhodes, for example, talks of it having at least six distinct meanings clustered around the idea of "governing without government".[2] Kooiman, on the other hand, emphasises that modern governance is defined by being less about the direct intervention of government and more about the ways in which the environment of action for private actors can be shaped by the state.[3] Others such as Skelcher, put the emphasis on notions of the "congested state" where there is a complex of networked relationships between public, private, voluntary and community actors which has produced a dense, multi-layered and largely impenetrable structure of public action.[4]

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[1] Further details about the Institute's activities can be found at www.qub.ac.uk/gov.

[2] See further R Rhodes, *Understanding Governance: Policy Networks, Governance, Reflexivity and Accountability* (1997), especially Chap 1.

[3] J Kooiman, *Modern Governance: New Government Society Interactions* (1993).

[4] 'Changing Images of the State: Overloaded, Hollowed out, Congested' *Public Policy and Administration* Volume 15, (2000) pp 3-19.

However, within all these formulations of governance the notion of hollowing out of the state is characteristic. There is a loss of functions upwards to the European Union and through wider globalisation, and downwards towards agencies and the private sector. Government does not now take place only within a single, unified national territory or by means of a unified, single system. The effects of globalisation mean that territory, like economy and culture, are increasingly multiple and plural rather than unified and national. Within the politics literature ideas of multi-level government have evolved from a simple recognition that there are layers beyond the national state to more sophisticated ideas of how power is dispersed into a multiplicity of sites, constituting nodes in a heterarchical network rather than layers in a hierarchical pyramid, which operate in a relationship of mutual influence rather than control. There are also ideas emerging that the activity of government is complex and multi-format too. There are now many more agencies and bodies from civil society and the private sector as well as from government and quasi-government and these operate at every level from the local, regional, national to the European to deliver both the policy and services of government. As one of the contributors to this volume writing elsewhere expresses it, there has been a "reterritorialisation of politics" which has involved "a dual process of sub-state mobilisation and supra-state integration" and a "search for new levels of political action".[5]

The influence of these ideas has now largely translated from political science to law. Most constitutional theorists accept in general terms that there has been a movement from government to governance, and that the role of the state has changed from being a guarantor and provider of security, wealth and law towards being more of a partner or facilitator for a variety of other bodies and agencies at various levels as they concern themselves with such issues. The additional value that lawyers may add to this debate is in developing and articulating further notions of "good governance" as promoting values of transparency, democracy and human rights, and in providing something of a normative framework to begin to evaluate new forms of governance.

It was in this spirit, therefore, that this group of scholars and practitioners came together to explore ideas about how government and governance might be re-configured. The papers presented ranged across, among others, issues of the relationship between pluralist democracy and changing understandings of sovereignty; what "good governance" should mean at a time of global terrorism and crises in international relations; whether we can 'join-up' the different sites of government and, more importantly, ensure that such joined-up government is accountable; and what role courts should play in ensuring accountability, whether in relation to joined-up government or, more controversially, State responses to international terrorism. In addressing one or more of these themes, each contributor has, in effect, shown how there remain many positive and negative aspects to current patterns in governance, as well as a number of unresolved and perennial dilemmas. The first article,

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[5] M Keating, 'Europe's Changing Political Landscape' in P Beaumont, C Lyons and N Walker (eds), *Convergence and Divergence in European Public Law* (2002) at p 7.

for example, by Prof Michael Keating of the European University Institute in Florence, examines in a positive light the overlapping challenges that are presented by sovereignty, nationalism, and pluralism. His contribution, as its title suggests ('Plurinational Democracy in a Post-Sovereign Order'), argues that nationalism, so often regarded as antithetical to "universal values, to liberal democracy and the very project of modernity itself", can – and should – be seen in terms that embrace pluralism and the accommodation of others. Highlighting how different nationalist identities have historically been more or less responsive to notions of inclusivity and pluralist democracy, he contends that, as nation state units no longer enjoy the sovereign powers that previously defined them (this a consequence of globalisation, European integration, and the rise of regional pressures), now is the opportune time to develop the logic of post-sovereign thinking in which national identities depend more upon territorial affiliation, rather than those that are ethnic, religious, or cultural. Arguments of this kind, while cast in slightly different terms, have also been made in some recent legal writings (the point is noted by Keating), and the cross-over between the disciplines marks out a clear understanding that it is feasible to retain traditional values and associations, without thereby allowing them to define the future only in accordance with the past. Point one in the collection, therefore, might be taken to argue that governance, as a process that embraces the full range of institutional, cultural, and political relations, can best be structured around key values of flexibility, respect, and tolerance.

The second article in the collection then shows how, in a very real sense, the process of governance can go awry when minimum values are not prioritised by government. The attacks of September 11th 2001 – while in themselves indicative of an absence of tolerance and related values – have since given rise to a "war on terror" which has, among other things, seen Western governments adopt draconian laws to counter the perceived emerging threat. In criticising in particular the response of the US and UK governments, Professor Phil Thomas of Cardiff University uses his article "September 11th and Good Governance" to demonstrate how legislative and executive actions have failed to correspond to the core legal value of the Rule of Law (which value may, in turn, be said to run prior to any legal system's capacity to engender equal respect for "others"). The problem, as identified by Thomas, is really one of how political expediency at a time of perceived and real crisis can lead to decisions being taken in the absence of effective control mechanisms, whether political or legal in form. Lamenting the brevity of the legislative processes whereby the USA Patriot Act and the UK's Anti-terrorism, Crime and Security Act were introduced, he notes how the political process has seemingly placed core principles in abeyance, with the motivation being found either in a concern for public safety and/or a concern among politicians to be seen to be doing something. All of which would, of course, then appear to leave it to the courts to ensure accountability and control but, here too, Thomas notes how concerns about the balance of judicial-executive relations has led UK courts to adopt an approach that is, at best, inconsistent in respect of balancing public safety concerns with those of the individuals who are most readily affected by new and sweeping State powers.

The judicial-executive problematic also provides the context for Dr Tom Zwart's article, "Comparing Standing Regimes From a Separation of Powers

Perspective". Here, the central question examined is how far courts can encourage open access to public law remedies, in itself a potentially important democratic safety valve, without crossing the line that separates the judicial and executive, and indeed legislative, functions. In considering the dilemma from a number of perspectives, Zwart, a comparative public law lawyer from the University of Utrecht, draws upon case law and commentary from Ireland, the US, the UK, Australia and India (among others) to show how there is a sliding scale upon which some national systems prefer a public interest approach to standing, while others tend more towards a narrow private interest model. Neither approach is, in the end, recommended as inherently superior to the other, as Zwart regards the application of standing rules as dependent upon different national contexts and understandings of what the separation of powers doctrine should entail. But within this conclusion, one point that stands out clearly relates to his comments about standing in UK law since the coming into force of the Human Rights Act. Although the section 7 "victim" requirement in the Human Rights Act is generally taken to herald a narrowing of the standing rules in UK law, Zwart points to existing case law of the European Court of Human Rights by way of arguing that the Strasbourg court itself has not always interpreted the "victim" requirement, on which section 7 is based, narrowly. Given this, and given Professor Thomas' concerns about the manner in which various aspects of the war on terror are being monitored, would public interest litigation on Human Rights Act points go someway towards fostering increased accountability and protection of rights?

The following three articles in the collection then relate, to a greater or lesser extent, each of the themes of accountability, transparency, institutional balance, and identities to the more specific context of devolution in the UK. The arguments here are about both the strengths and weaknesses in the current design. Peter Leyland of the London Metropolitan University, for example, uses his article "Devolution, the British Constitution and the Distribution of Powers" to provide a wide-ranging and critical analysis of the manner in which the devolution settlement does, or does not, work. For Leyland, the way in which the devolution reforms have been brought into being is rich with an apparent inconsistency as, to the extent that much of the programme fits with the language of UK constitutional law orthodoxy, the reality is that the reforms can equally be said to be "shaking the foundations of the informal constitutional arrangements that have been relied upon for many generations". This is then not only seen to raise concerns about how to resolve in the longer term the West Lothian question, the problematic balance within the Concordats, and the funding of the new government structures; it is also taken to raise concerns about how well-placed the UK's new governmental structures are in terms of ensuring effective representation and decision-making in the European Union (and, by analogy, the globalising economy and polity). Although the European Union has, in recent years, increasingly emphasised the importance of regions and the related principle of subsidiarity, the corresponding fact that European Union law is formally neutral as to the internal constitutional arrangements of its Member States leaves open the question of how far differing Northern Irish, Scottish, and Welsh interests will be represented at the supranational level. Does the reality of modern day governance, set beside the centralising tendency of the UK constitutional tradition (*viz* the fact that Westminster

remains finally responsible for European Union matters), not render as illusory the idea of representative government at the devolved level?

The beginnings of an answer to this question are provided by Dr Amanda Sloat's article, "Reconfiguring Scottish Politics: Domestic Governance v European Influence". Here, Sloat, of the Institute of Governance at Queen's, draws upon empirical research to consider both what was expected in advance of the Scottish Parliament *vis-à-vis* the formulation of European Union policies, and also what the Scottish Parliament has achieved since it came into being in 1998/1999. The pre-1998/1999 expectations are, as such, identified as including increased transparency and accountability at the local level through the existence of the Parliament, coupled with more "democratically legitimate and discernible participation" in policy formation at the European Union level (to be achieved through, among other things, the Scottish executive lobbying Westminster and Brussels in respect of 'home' interests). Although Sloat indicates that understandings of how far these expectations have been fulfilled depend very much on a particular political actor's perspective and experience, she does point to some statements to the effect that the "autonomous" representation of Scottish interests in Europe can, and does, occur. While these statements are not then taken to mean that Scottish interests are routinely pursued outside the framework of a unified UK policy line (attention is also drawn to the counter belief of other actors that it is, in general, better for Scotland to co-operate with, rather than oppose, central government), they are said to be consonant with the understanding that the bypass of Westminster does, at least to some extent, already happen. In other words, the statements might, at least in part, reasonably be taken to imply that the political reality of policy formation is that it sometimes takes place at one remove from that which is 'mandated' by constitutional orthodoxy and corresponding legislative frameworks.

The sixth article, by Robin Wilson of Democratic Dialogue, a Belfast think-tank and partner institution of the Institute of Governance, also complements Leyland's paper, and in particular Leyland's comments about the financial arrangements and implications of devolution. The article, "Private Partnerships and the Public Good", focuses on the problems that Northern Ireland now faces in terms of financing the provision of high level public services (the article was written prior to the suspension of the Northern Ireland institutions in October 2002, although the arguments clearly remain relevant, on the assumption that institutions will be restored in the future). Principal among Wilson's concerns is the manner in which public-private partnerships have been used in Northern Ireland. At a general level, he notes that, while the merits of using private enterprises to provide public services is at the heart of left-right debates in other parts of the UK, the nature of the Northern Ireland institutions (power-sharing that emphasises national affiliations rather than socio-economic policy preferences and ideologies) has rendered parallel debates largely absent. And beyond that, he then also points to the politically unpalatable choices that may now have to be made if Northern Ireland is to enjoy strong public services. Thus, although Northern Ireland can already enter into borrowing arrangements with central government, the problem of financing "European-level public services" is taken to demand that local politicians "grasp the nettle" of requesting, among others, powers to vary regional income tax levels. Wilson's caution,

therefore, is not just that models for public service provision need to be fully debated; it is that they also need to be fully and properly financed.

The final contribution in the collection is Dr Cathal McCall's "From Barrier to Bridge: Reconfiguring the Irish Border After the Belfast Good Friday Agreement". McCall's contribution provides a particularly appropriate concluding piece as his article considers the significance of constitutional change in the Republic of Ireland and Northern Ireland (of which devolution is a key component) from a perspective which reflects much of the intellectual content of Professor Keating's opening article on nationalism and post-sovereign orders. Focusing on how the Good Friday Agreement has given rise to unprecedented cross-border institutional co-operation on the island of Ireland (which co-operation must, of course, now also be seen in the light of the suspension of the Northern Ireland institutions), McCall, of the Institute of Governance, identifies the factors that have brought about changed political attitudes, particularly among Northern Ireland's unionist community. These factors, which are said to include European influences, cultural changes in the Republic of Ireland, changed British-Irish inter-governmental relations, and changed party political power relations in Northern Ireland, each relate to the post-sovereign qualities considered by Keating, and while McCall notes that any ideological shift in Northern Ireland remains in a "transitional phase", it is difficult to deny that there is here at least some kind of a practical manifestation of post-sovereign politics. It is also difficult to deny that such post-sovereign politics continue to provide the most appropriate template for fostering political progress in Northern Ireland and, indeed, much further a-field.

Beyond these points and conclusions, there are of course, and as indicated above, many other aspects to the debates about governance, and readers of this number will doubtless disagree with some of the points made by the contributors, as well as with some of the underlying assumptions. That said, however, it is to be hoped that readers will equally agree that this is a very strong and challenging collection of articles. The points raised are not only insightful, but sometimes provocative, and we, the editors, would like to thank each contributor for their time, thought, and enthusiasm for this project. We would also like to thank the various chairpersons at the workshop – Mr David Capper, Professor Rick Wilford, and Ms Susan Breau – together with a number of other participants, notably Dr Claire Kilpatrick, Professor Istemi Demirag, and Dr Rory O'Connell. Finally, our thanks are due to SLS Legal Publications, publishers of the *Northern Ireland Legal Quarterly*, for so generously funding aspects of the workshop.

Gordon Anthony, Elizabeth Meehan, and John Morison.

PLURINATIONAL DEMOCRACY IN A POST-SOVEREIGN ORDER *

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INTRODUCTION

It may seem paradoxical that in a globalising world with instant communication and a growing consensus on the values that should underlie a legitimate polity, we are seeing a resurgence of nationalism. For some, these trends stand in stark contradiction, the one pointing to the future, the other to the past. For some, nationalism is a threat to universal values, to liberal democracy and to the very project of modernity itself. For others, it offers new perspectives to liberation, democracy, the flourishing of cultures and a new relationship between the global and the local. Some see the proliferation of nationalisms as a harbinger of anarchy and strife, while others see nothing incompatible with nationalism and an ordered international society. It was ever thus. Nationalism since at least the nineteenth century has been Janus-faced, offering progressive or backward perspectives, depending on the context and its affinity with other ideologies. Yet the modern era does present a radically different context, in which we can not merely ride the tiger of nationalism but use it to good purpose – but only if we make an intellectual shift from the nineteenth century mode of thinking to one more in keeping both with our longer history and with the social and political realities of the present. In particular we need to recognize national identities as plural rather than singular, and to accept that we have moved forward (or back) into an era of post-sovereignty, in which old frameworks for political order are no longer relevant or desirable. The basic premises of this paper, which I developed at greater length elsewhere[1] are twofold: that trans-national integration and the transformation of the state do encourage new and revived nationalisms; but that they also provide new ways of accommodating them in a new form of democratic order. The paper looks first at the emergence of the new nationalisms. Then it argues that to appreciate them we need to look back again at history; examine the present more critically; and peer imaginatively into the future. Finally, it considers the prospects for plurinational democracy in a political order marked by shared and divided sovereignty.

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* This is a revised version of an earlier paper published as *Beyond Sovereignty. Plurinational Democracy in a Post-Sovereign World*, Proceedings of Grande Conférence Desjardins, Montréal, 8 March 2001 (a version also appeared in the *Queen's Papers on Europeanisation* series, No 1/2002).

[1] M Keating, *Plurinational Democracy. Stateless Nations in a Post-Sovereignty Era* (2001); and M Keating and J McGarry (eds), *Minority Nationalism and the Changing International Order* (2001).

Globalisation and Neo-nationalism

Globalisation is a complex and much-contested concept, to which we cannot do justice here, so let us take it as short-hand for the transformation of the state consequent on trans-national economic integration and interdependence, the communications revolution and the rise of certain forms of world culture (whether these be truly global or merely North American is not to the point here). Together with the rise of individualism and other social changes, this has led to a certain demystification of the state and its claims to overall authority. The state has also been losing autonomy and functional capacity even as it has, in some ways, extended its scope. Above all it has lost its former ability to integrate diverse strands of economic and social policy in formulas such as the 'Keynesian welfare state' which represented a model of economic management, a complementary social welfare system and a state built on common identity which could legitimate the whole policy package. Above all, states have lost their old capacity for territorial management as economic restructuring assumes both global and local forms, pitching sub-state territories into competition in global and continental markets.[2] These challenges to the state have led to a search for new functional spaces, in the form of regional (meaning sub-state) government and administration and regional (meaning supra-state) trade areas or regimes. They have also provoked a search for new political spaces beyond the state, whether above or below it. Some of these political responses may take the form of ethnic politics, populism and a retreat from reality; others may involve the search for new forms of inclusive democracy and accountability. Now there is a certain tendency to link the resurgence of minority nationalism with the former as a form of 'tribalism' (if not of racism) while the latter is linked to the large state or the new trans-national order. Ralph Dahrendorf[3] is representative of this tendency, criticizing Catalan and Québec nationalism as an inappropriate response because of its ethnic associations, at a time when Quebec and Catalan nationalists were falling over themselves to prove their ethnic openness, while failing to mention the ethnic nationality law still retained by his native Germany. Of course, minority nationalism may be narrow minded and ethnically exclusive; my point is that it is no more intrinsically so than the forms of (of unstated) nationalism inhering in the consolidated state.

Instead of a retreat to ethnic exclusion, we may be seeing, at least in Quebec and the plurinational states of western Europe, a more interesting but no more tractable issue. Surveys have shown that public opinion in the minority nations of the United Kingdom, Spain, Belgium and Canada, is converging with that of the majority on all the major value questions. These are not societies trapped in pre-modernity or undergoing a reactionary phase. Nationalist movements in these societies are de-ethicising and increasingly stressing territorial criteria for membership. In other words they are modernizing just like everyone else, but they are doing it in their own way and seeking their own niche in the global political and economic order. It is not so surprising that, as the overarching state loses authority, new political

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[2] M Keating, *The New Regionalism in Western Europe. Territorial Restructuring and Political Change* (1998).

[3] 'Preserving Prosperity', *New Statesman and Society*, (1995) 13/29, p 36.

movements should emerge based on existing institutions, cultures and traditions. Yet the fact that the minorities are de-ethicising and adopting the same values as the majority does not necessarily make accommodation easier. On the contrary, as long as national minorities were mere ethnic fragments making cultural demands, they could be accommodated by policy concessions. Now they are constituting themselves almost as global societies, claiming general powers of social regulation, and thus coming into conflict with the globalising prerogatives of the state. Moreover, by de-ethicising and stressing their civic credentials, minority nationalist movements enhance their legitimacy in the contemporary liberal era. There are few things so bewildering to citizens of national majorities as this idea that the minorities seek self-government without wanting to be radically 'different'. It often arises from their failure to consider their own national particularism and to assume that it is somehow equivalent to cosmopolitan liberalism. This allows critics of minority nationalism to insist that for the minorities to have any right to exist as such they must be 'different' (from themselves); but then to insist that, if they are different, they can have no rights since they cannot respect the universal norms of liberalism.

Nationalism and Democracy

Nationalism, as I have noted, has two faces and there is a long-standing debate on its relationship with liberal democracy. One account is that nationalism emerged from the French revolution as a logical consequence of the doctrine of popular sovereignty, which required that the 'people' be defined. It was used in the course of the nineteenth century against the forces of the *anciens régimes*, notably in the revolutions of 1848. Thereafter it turned to the bad as it was associated with aggression and xenophobia, culminating in two world wars. Another, albeit rather discredited idea has it that there is a 'good' western nationalism and a 'bad' eastern one. More relevant to our purpose, however, is the theoretical argument about nationalism and democracy. John Stuart Mill summed up one point of view in arguing that 'free institutions are next to impossible in a country made up of different nationalities.'[4] The reasoning is that social communication and trust are necessary to found the basis of a deliberative community and to engage in the alternation of power without reducing every question to an absolute. Majorities can be made and remade according to the issue, rather than consisting permanently of the same group. This logic could have two consequences: that states should assimilate their minorities in the French fashion; or that multinational states should break up into their national components. Neither solution seems totally acceptable today. While there are still no doubt powerful pressures for the assimilation of minorities, there is a strong norm in favour of protecting the rights of existing cultures. National separatism merely creates new minorities, unless accompanied by ethnic cleansing or forced assimilation in the seceding territories. On the other side of the argument was Lord Acton, who condemned the theory of nationality, by which he meant the theory that every ethnic group should have its own state, as a recipe for tyranny and what we might now call

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[4] *Utilitarianism. On Liberty and Considerations on Representative Government* (1972) p 392.

totalitarianism, as well as for perpetual strife.[5] Instead he preferred the multinational and pluralist state as in the old empires. This in fact was not so much a denial of nationality as a denial of the political implications that it was given by nineteenth century nationalists. We can update Acton's ideas for the modern world and ask how the principle of nationality can be made compatible with democracy in a complex and plurinational order.

It is clear that, in practice, the nation-state in which the *demos*, the *ethnos* and the *polis* coincide, is a limiting case, the exception to the general run of politics. More common is the complex state in which multiple communities of identity and interest coexist. Deliberative communities or 'political spaces' exist at various levels, the state level, the sub-state level including minority nations, and perhaps even at the trans-national level.[6] To oblige citizens within one democratically-constituted political space to accept decisions made in another space in which they can never command a majority may thus constitute a violation of democracy. Arguments on the part of the majority community to the effect that everyone is an equal citizen under the constitution are thus disingenuous, a cloak for permanent majority domination. This was, for example, the case in the United Kingdom in relation to Scotland during most of the 1980s and 1990s – and note that we can sustain this argument without any reference to loaded concepts like ethnicity. It was also true of Ireland during the nineteenth century. In the present era, we are seeing the emergence or re-emergence of different deliberative communities at various levels, the minority nations, the cities, the regions and, rather than this being seen as a problem, we might see it as an opportunity to strengthen democracy. To try and engineer democratic spaces around functionally-defined tasks, as for example in many of the efforts to democratise the European Union by making it look more like a parliamentary state, is probably the wrong way to go. It would be equally mistaken, however, to try and reconfigure functional systems and policy making institutions to conform to the emerging deliberative communities, for example by breaking the world up into miniature nation states, as this would be a mere recipe for political impotence, technocracy and rule by the interests of capital. In some instances, the nation state may remain the most appropriate forum for political deliberation and formation of democratic will, as in Scandinavia, but in other cases we need to think of more plurinational forms of democracy able to span the state, sub-state and trans-national levels.

To explore these issues we first need to look back into history and question the state-centred teleology that has informed so many debates about sovereignty and authority.

The Usable Past

It is no coincidence that the renewed debates about the state and the nation have sparked off a wave of historical revisionism and controversy across the world, but particularly within the multi-national states.[7] Firstly, there has

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[5] 'Nationality' in G Himmelfarb (ed), *Essays on Freedom and Power* (1972) p 141.

[6] Keating, *op cit* n 2.

[7] Keating, 'How Historic are Historic Rights? Competing Histories and the Struggle for Political Legitimacy' *Conference on Etnicidade e Nacionalismo*, Consello da Cultura Galega, Santiago de Compostela, April 2000.

been a questioning of received social science accounts of national integration. These largely teleological accounts tended to identify state building and national integration with modernization itself. They saw market integration, industrialization, capitalism, cultural integration and the penetration of the modern state into all parts of its territory as linked processes, which would produce homogeneous nation-states without important cultural, ethnic or territorial cleavages.[8] Some modernists portray both European integration and globalisation more generally as a continuation of these diffusionist trends, leaving ever less space for particularisms. More commonly, however, European integration and globalisation have served further to question the sovereign nation-state as the sole form of political order and have provoked scholars into looking again at pre-modern forms of authority and their similarities to the modern post-sovereign order. The sovereign nation-state can, in this account, be seen as an exception or interlude rather than the end point of political development. Already in the 1970s, Rokkan was presenting the construction of European nation-states as a problematic and incomplete process, leaving behind important cleavages.[9] Tilly has shown how different forms of nation-state emerged according to circumstances and that alternative paths, based on city regions, were in principle possible.[10] Even in international relations, scholars have begun to question the 'Westphalian' paradigm as a historical account[11] or as an adequate way of understanding contemporary politics.[12] I have also sought to present the territorial state as historical contingent, and the process of integration as at least potentially reversible.[13]

Among historians there has been a parallel shift. To simplify, we can identify two competing historiographies, the state historiography and the peripheral one. State history echoes the conclusions of the sociological diffusionists, but with a rather different method. History is seen teleologically as a progress to national unity, with the sovereign state representing its final expression. As historians modernized and became more scientific, origin myths could be dismissed as romantic nonsense. Indeed, historians could celebrate the diverse origins of the nation as a source of its strength and its success moulding them into one as a sign of the national genius; but the teleology is only reinforced thereby as this unity is seen as the essence of progress. The pre-modern order of Europe, with its diffused

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[8] K Deutsch, *Nationalism and Social Communication. An Inquiry into the Foundations of Nationality* (1966).

[9] See S Rokkan, 'Territories, Centres and Peripheries: Toward a Geoethnic-Geoeconomic-Geopolitical Model of Differentiation with Western Europe' in J Gottman (ed), *Centre and Periphery. Spatial Variations in Politics* (1980) p 163; and S Rokkan and D Urwin, *Economy, Territory, Identity. Politics of West European Peripheries* (1983).

[10] See *Coercion, Capital and European States, AD 990-1990* (1990); and C Tilly and W P Blockmans (eds), *Cities and the Rise of States in Europe, AD 1000 to 1800* (1994).

[11] A Osiander, *The States System of Europe, 1640-1990. Peacemaking and the Conditions of International Stability* (1994); and H Spruyt, *The Sovereign State and Its Competitors* (1994).

[12] J Agnew and S Corbridge, *Mastering Space* (1995).

[13] *Op cit* n 2; and *State and Regional Nationalism. Territorial Politics and the European State* (1988).

authority is presented as an obstacle to progress and enlightenment. The estates systems, fueros, special laws, historic rights and the whole patchwork of authority that characterized the pre-state order are dismissed as bastions of reaction and privilege, obstacles to the advance of capitalism, markets and middle class liberalism. Marxists have often shared this teleology – Engels' strictures on nations without history are well known and a modern Marxist historian like Hobsbawm can draw a distinction between large nation-states, which have a progressive potential, and minority nations, which tend to reaction.[14] This bias to the consolidated nation-state often accompanies a cultural disdain for the minority or non-state cultures and languages, which are also presented as signs of backwardness and obstacles to progress. An extreme form of this combination of statism and nationalism is the French 'jacobin' tradition, itself largely an invention of the Third Republic, pitched into conflict with monarchism and the Church.

Peripheral historiography presents a very different account. There is often a myth of primordial innocence and primitive democracy, before the alien intrusion of the modern state. Historians may present the incorporation of their territory into the state as an act of conquest, in which case it is illegitimate and was never accepted by the people. The resulting counter-history is the mirror-image of state history, postulating a united people living in primitive independence and enjoying a precious if anachronistic sovereignty. Such analyses often underpin a radical rejection of the state and an argument for secession. Alternatively, peripheral history may present incorporation as the fruit of a pact, in which historic rights were not surrendered, with the implication that the pact can be renegotiated. This underpins arguments for pactism in a plurinational order, on the lines of the union state[15] or fragment of state.[16] In Canada, this takes the form of the 'two nations' thesis, while in Scotland, Catalonia and the Basque Country there are deeply rooted traditions of pactism and negotiated authority as the basis for the state. Peripheral histories have also challenged the liberal and progressive pretensions of state history. State historians present historic institutions of the pre-state era as necessarily reactionary because they were not democratic or liberal. Peripheral historians point out that no institutions in the Middle Ages were democratic by modern standards and that there is no reason why estates, foral bodies or guilds could not have democratised in the same way that the English and then British Parliament did.[17] So there was more than one potential path to democratic modernization. As the state loses its mystique, these histories of diffused authority are refurbished as the basis for a post-sovereign political order and new forms of democracy. The new historiography does not present us with a clear set of historic rights or a counter model of the state. Historiographies are in competition and some minority nations have more of a 'usable past' than others. Counter-histories are as prone to fabrication and myth as are the statist variety. Historic rights frozen in time would be of little use, of questionable moral value, and

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[14] See *Nations and Nationalism since 1780* (1990); and 'Nationalism. Whose fault-line is anyway?' (1992) *Anthropolgy Today.*

[15] Rokkan and Urwin *op cit* n 9.

[16] G Jellinek, *Fragmentos de Estado* (translation of Uber Staatsfragmente) (1981); and M Herrero de Miñon, *Derechos Históricos y Constitución* (1998).

[17] M Sorauren, *Historia de Navarra, el Estado Vasco* (1998).

impossible to reconcile. Nothing would be more dangerous than to get into arguments about exactly who had what right when or to revert to the tired debates over historic injustices. Least of all I am suggesting a naïve neo-mediaevalism. The debate does, however, remind us of how many forms of authority, including that of the state itself, are in fact rooted in tradition rather than rational forms of order.[18] Most importantly, it shows how the consolidated nation state is merely one historically contingent form of order and points to another way of conducting politics, in a pluralist mode. Such a way of thinking about power has extraordinary resonance in a world in which authority is moving upwards and downwards and political communities are reconfiguring beyond the state.

What Do the Nations Want?

There is a remarkably well-entrenched view in the social sciences that the principle of nationality and nationalism are inherently linked to the state. As Hobsbawm puts it, a nation "is a social entity only insofar as it is related to a certain kind of modern territorial state, the 'nation-state', and it is pointless to discuss nation and nationality except insofar as they relate to it."[19] This leads to the view that nation self-determination is a dangerous principle, since there are far too few states available for all the nationality groups that could claim them.[20] In any case, it is argued, nations are only inventions and we can hardly found a right on such a contrived concept since this would merely encourage 'vanity secessions' by demagogic nationalist entrepreneurs.[21] Now to argue that nations are invented is really to state the obvious, since all human collectivities are inventions. To use this as an argument selectively against certain types of nations is disingenuous. It recalls the 'invention of tradition' school,[22] which is as much of an invention as the inventions it criticizes. Nations are, of course, created and recreated constantly. This is not, on the other hand, to say that they can be conjured up from nothing or that any cultural group constitutes a real or potential nation which might break away at any time. This, another common error, is to confuse ethnic group with fully-fledged nations committed to self-determination.

Nations are to be distinguished from ethnicities or mere cultural groups on the one hand or regions on the other partly by their self-consciousness of being a nation, partly by objective characteristics. Above all, however, they are distinguished by their claim to self-determination. This is not a claim that is usually made frivolously since it involves a great deal of effort, some cost and a lot of exposure to critics and enemies. What is remarkable is not the proliferation of such claims but their comparative rarity. It is usually possible to distinguish self-determination claims from other sorts of claims,

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[18] N MacCormick, *Questioning Sovereignty. Law, State and Nation in the European Commonwealth* (1999).

[19] (1990) *op cit* n 14 at pp 9-10.

[20] E Gellner, *Nations and Nationalism* (1983); and A Buchanan, *Secession. The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec* (1991).

[21] R S Beiner, 'National Self-Determination: Some Cautionary Remarks Concerning the Practice of Rights' in M Moore (ed), *National Self-Determination and Secession* (1998) p 158.

[22] E Hobsbawm and T Ranger (eds) *The Invention of Tradition* (1983).

although there are always borderline cases. Theorists who worry about a world in which everyone made such claims are probably subjecting themselves to needless intellectual anguish. Self-determination, on the other hand, does not mean the right to create a state of one's own. The argument that there are not enough states to go round is only one argument, and a difficult one to defend coherently given the recent proliferation of states and the existence of micro-states. More problematic is just what we mean by a sovereign state in an era when state sovereignty has been so attenuated, especially for small states with large neighbours. If it is true that the sovereign state is an illusion, then self-determination should be redefined as the ability to negotiate one's position within the emerging international order. We might therefore expect a redefinition of nationalist goals and strategies to take account of the new global economy and the nascent trans-national regimes.

An examination of the demands of minority nationalist movements in Europe and in Quebec shows that, in most cases, they are indeed well aware of the limits of national independence for small nations and are arguing for something other than the traditional nation-state. Most minority national movements have embraced free trade and trans-national integration, but they have drawn different conclusions as to the implications. There are, broadly, three positions. Firstly, there are those who believe that their respective trans-national regimes permit sovereign independence at a lower cost than in the past. Market access is assured, there are guarantees against unilateral trade sanctions, thus protecting smaller states, and a series of costly and dangerous issues, including defence and security and even the currency, will be externalised. There is, within this group, a division of opinion on how far trans-national integration can go without fatally damaging their own prime objective of self-determination and autonomy. Some insist that trans-national regimes should remain strictly intergovernmental, while others are prepared to accept drastic limitations on sovereign authority. A second strand of opinion is less overtly separatist and holds that some continuing link with the original state will be necessary in order to manage interdependencies and minimise risks. This 'sovereignty-association' position is more likely where the trans-national regime does not provide the full range of external solutions to the problems posed by independence, hence its greater attraction to nationalists in Quebec than in the European cases. The third position is the radical 'post-sovereigntist' one adopted by those who have embraced globalisation and trans-national integration to the point of believing that sovereignty in the classic sense has little meaning any more. They are more concerned with maximizing autonomy and influence for the nation than with the trappings of sovereignty, and are usually very ambivalent as to their ultimate aims, preferring to see how the world evolves before they commit themselves.

Perhaps the most classically sovereigntist is the Scottish National Party which, since the 1980s, has been committed to independence- in-Europe. Scottish nationalism has not traditionally been radically separatist and from its origins sought an overarching framework for independence, notably within the British Empire; Europe now supplies this external support system. For some Scottish nationalists, Europe provides an opportunity to resume full statehood in an essentially intergovernmentalist European Union along Danish lines. Others, however, have taken on board the lesson that no-one in

Europe is sovereign in the old sense and are committed to a high degree of integration, with Scotland at the heart of inner core. Some leftist minority nationalists in Europe have embraced a radically post-statist and post-sovereigntist policy, looking to a future Europe of the Peoples in which states have disappeared altogether; this is the position of the Esquerra Republicana de Catalunya, Plaid Cymru-the Party of Wales, and the Bloque Nacionalista Galego. Others see independence as a long-term goal, dependent on further European integration but ultimately dream of some form of statehood. This would include most of the Partido Nacionalista Vasco and the (former) Flemish Volksunie. Then there is Convergència i Unió, which has adopted the traditional Catalan strategy of eschewing separatism but playing in multiple political arenas at the same time, the Catalan, the Spanish, the European, the Mediterranean, and the Latin American. The strategy of recent governments of Flanders bears a certain resemblance. The absence of a trans-national regime like the European one limits the options for Quebec nationalism but it is divided between those who want Quebec sovereignty together with an association with the rest of Canada, and those, like Jacques Parizeau, who believe that international agreements like NAFTA, NATO and the WTO will take care of the externalities.

These are all different strategies but none of them involves creating anything like a traditional nation-state in the nineteenth century sense and most of them are moving towards a post-sovereign conception of the nation and its rights. Self-determination in this vision does not mean secession but rather the ability to negotiate one's own position in the new state and trans-national order, subject to the rights of others and all the constraints that political realities impose. Small nations, especially those sandwiched between powerful ones, have long been aware of these limitations.[23]

Critics argue that the people are not ready for post-sovereignty, preferring the certainties of the nation-state, whether the one they are in or a new secessionist one. They also claim that only intellectuals can embrace multiple identities.[24] We can test this one with empirical data and it is found wanting. In those minority nations for which we have data, there is overwhelming evidence that people have assumed dual or multiple identities – in many cases this is nothing new. Nor are these identities stable or fixed; rather they are contextual and used for different purposes in various circumstances. There is a trend in Quebec for the Québécois identity to strengthen as Quebec becomes the prime point of reference for politics, but Canadian identity has shown itself resilient and capable of being mobilized. Scottish identity has been growing and politicising over time, but multiple identities still prevail, as they do in Catalonia. Both these nations have shown a high capacity to assimilate incomers into the national identity, precisely because it does not entail the surrendering of state-related identities or a high social or cultural cost. Basque identity has moved from the narrow, ethnicist, indeed racial, definition of Sabino Arana towards a more inclusive form that can be acquired by incomers, although terrorist violence poses a constant danger of social polarization. Northern Ireland is a highly polarized society but there is already evidence that the end of violence can reduce

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[23] P Puig i Scotoni, *Pensar els camins a la sobirania* (1998).
[24] T Nairn, *After Britain. New Labour and the Return of Scotland* (2000).

polarization and longer term evidence that identities are more fluid and their implications less clear than the more ardent republicans and unionists would insist. Indeed in all of these cases we might turn Nairn's criticism on its head and say that it is the intellectuals and not the people who torment themselves with absolutist questions about their identity.

Public opinion has also shown itself very resistant to the idea that there is a sharp line to be drawn between advanced forms of devolution, including asymmetrical devolution, sovereignty, and independence. We might conclude that the public are ill-informed and unsophisticated (although I do not draw this conclusion). What we cannot say is that they are demanding clear-cut, classical statehood. Surveys showing that large numbers of Québécois want sovereignty and to remain in Canada at the same time are legion. A survey series in Catalonia going back to 1991 shows that, offered a series of choices, about one in six Catalans choose independence. Yet when asked about the concept of 'the independence of Catalonia' twice as many respond favourably.[25] Surveys of constitutional options in Scotland since the devolution referendum of 1998 show about a quarter in favour of independence, but when other surveys ask whether people would vote Yes in a referendum on Scottish independence the figure rises to around a half. Surveys have shown that a majority of Scots think that a devolved Scotland should conduct its own negotiations in the European Union, but that an independent Scotland should continue to be defended by the British army. About a third of Basques support independence, but half would like to have Basque passports. They overwhelmingly support the idea of self-determination but only a third consider this to be equivalent to independence, although most electors elsewhere in Spain think that the one entails the other.

The new nationalisms are not only less statist but, as noted above, link their project to trans-national integration and, in Europe, to European unity. Evidence that the electors have adopted the connection between minority national affirmation and trans-national integration made by the parties is mixed. Quebec has always shown stronger levels of support for free trade than most of English Canada[26] but the association at the individual level between free trade and nationalism is weak, probably because of the hostility by Quebec unions which means that the working class are cross-pressured. Since the late 1980s, Scotland has shown less hostility to Europe than has the rest of the United Kingdom, a contrast with the 1970s when peripherality, nationalism and the strength of traditional labour politics all served to increase suspicion of Europe. The biggest difference between Scotland and England, however, is in expectations, as Scots have proved much more open than English electors to the idea of a future in which Europe is united, there is a single currency and the various parts of the UK find their own place in Europe. Northern Ireland Catholics are the strongest supporters of European integration in the United Kingdom, seeing it as a way of transcending the division of Ireland, although Protestants are much more reticent. Catalan electors took a while to adopt the idea of Europe but have now become quite

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[25] ICPS, *Sondeig d'Opinió*, Institut de Ciènces Polítiques i Socials, Barcelona. (1991-98).

[26] P Martin, 'When Nationalism Meets Continentalism: The Politics of Free Trade in Quebec (1995) 5(1) *Regional and Federal Studies* 1.

enthusiastic, demonstrating much higher levels of European commitment than voters elsewhere in Spain; this is particularly true of supporters of the nationalist parties. Basque electors, on the other hand, are cool on both Spain and Europe, showing that the nationalist leadership, which has been less active on the European front than its Catalan counterparts, has not yet made the link effective. Supporters of moderate Flemish nationalist positions also come out a strongly pro-European, although voters for the extreme Vlaams Blok are more hostile.

There does then seem to be a political market for a form of post-sovereigntist strategy, whose precise form will differ from case to case. Public opinion in the minority nations does not seem strongly attached to a specific state geometry and is open to new solutions. The common objection to national self-determination, that the nation is impossible to define, that nationality restricts communities and encloses them, and that self-determination means secession[27] thus fails.

Plurinational Democracy

Two key ideas inform my proposed approach; plurinational democracy and post-sovereign order. Plurinationality is a little different from multinationality, which may just refer to the co-existence of two or more sealed national groups within a polity. In plurinationalism, the very concept of nationality is plural and takes on different meanings in different contexts. In some cases its manifestations may be cultural and only weakly politicised, as was arguably the case with Scotland in the mid twentieth century; at other times it may be mobilized as the dominant political issue. For some people, nationality may be singular, as in Canada outside Quebec, where most of the population adheres directly to a Canadian nation. Others might feel members of the state community through membership of a smaller national community, as with many Québécois and Scots, while others again may identify only with the smaller unit, treating state citizenship purely instrumentally. This all complicates matters enormously, but helps ensure that the various communities are interlinked and inter-communicating. From this perspective, the insistence of Catalan nationalists on playing a role in Spanish politics is not an anomaly or piece of hypocrisy but a contribution to stability. The tendency in Belgium to split off into separate national communities is a sign in the opposite direction, only mitigated by the common European framework.

The plurinational state is an extension of the concept of plurinationality itself, referring to the existence of multiple political communities rather than a single, unitary demos. Considering the state in this way is also consistent with historiographical approaches stressing the union rather than unitary principle. It also opens up the prospect of constitutional asymmetry. A critical aspect of this concerns symbolism and recognition and here the United Kingdom, despite its reluctance until recently to concede the substance of devolution, has led the way. The very name of the state indicates its complex nature, while the term ‘national’ is freely attached to the institutions of Scotland in Wales, both in the state and in civil society.

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[27] See M Freeman, ‘The priority of function over structure. A new approach to secession’ in P Lehning (ed), *Theories of Secession* (1998) p 12.

To the bewilderment of foreigners, the United Kingdom has four separate soccer selections but only one Olympic team, while for rugby purposes there is an all-Ireland team spanning the territory of two states. Quebec and Catalonia also have 'national' institutions but there is less willingness to accept this in the rest of the state. Plurinationality also helps deal with the question of divided societies, like Northern Ireland, where identities are not nested and may link up with those of neighbouring states. The Good Friday Agreement in Northern Ireland explicitly recognizes this by providing for a multiplicities of identities and their recognition and allowing individuals to make their own choice.

Plurinational democracy involves the recognition that there are multiple *demoi* in the polity, whether the polity be a state or the wider European order. A unitary conception of democracy focused uniquely on the state or its majority component thus violates democratic principles. Strengthening democratic spaces where they exist on the other hand, is a contribution to democratising the state, and as a contribution to addressing the broader European democratic deficit may be preferable to contrived federal solutions or the creation of an unlikely unitary European *demos*.

A Post-sovereign Order

The post-sovereign order is also a complicated concept, since it refers to a world in which there is no longer a single principle of authority. The demystification of the state stemming from its loss of functional capacity and the rise of other forms of normative order have caused an intense debate on the idea of sovereignty and whether it is still a valid principle or order. On the one hand are those who say that the loss of functional autonomy of the state represents the end of sovereignty and that we had better stop using the concept. On the other are those who insist that sovereignty is a normative principle and is not about mere power. It cannot be attenuated and remains an absolute principle. A third group, with which I identify, recognizes that sovereignty still exists in many forms but that it is increasingly shared and divided and cannot be said to inhere purely in the state. This links closely to debates about legal pluralism and multiple legal orders which have become an important question in legal studies, especially of the European Union. Such is the dependence of political science (and much other social science besides) that we do not yet have a new paradigm to encompass the new dispensation. Social scientists are given to resolving this type of terminological conundrum by resorting to the prefixes 'neo' and 'post', not abandoning the old terms but incorporating them in the new. The term 'post-industrial', for example does not denote the abandonment of industry - all post-industrial societies are industrial - but refers to a stage in which industrialism no longer provides the sole or main social paradigm. So I have, with some trepidation, used the term 'post-sovereignty' to capture that which is both new and old.

It is no coincidence that the idea of legal pluralism should have come into vogue in Europe since the 1990s, at a time when European integration has called into question received ideas of sovereignty. Nor is it by chance that many of its exponents should be Scottish lawyers, brought up in a system of law that has survived for three hundred years without its own legislature, with a mixture of original elements and those derived from parliamentary statute. The principle of absolute parliamentary sovereignty has never been

recognized in Scots law, the argument being that since the old Scottish Parliament never claimed absolute sovereignty the new Parliament of 1707 could not have inherited it. In England, on the other hand, the Diceyan view has prevailed that the UK Parliament inherited all the prerogatives of the old English one, including absolute sovereignty.[28] This was for many years little more than an intellectual curiosity, but since the re-establishment of the Scottish Parliament, nationalists have been arguing that it is the heir of the old Scots Parliament and thus of an element of original sovereignty. The Labour Party has faced both ways, signing on to the Claim of Right of 1988 which claimed that sovereignty lay with the Scottish people, and then insisting in its Scotland Act (1998) that the sovereignty of the UK Parliament was and would continue to be absolute. A similar argument prevails in the Basque Country where the nationalists have insisted that their self-governing rights are a form of original law rooted in the ancient *fueros* and are not the gift of the Constitution of 1978. States have similarly insisted that the European Union is merely the recipient of delegated powers from states, against legal scholars who have argued that it is a distinct, if not self-standing, legal order in its own right.[29]

As I emphasized above, post-sovereignty does not mean the end of sovereignty, but rather the end of its traditional meaning as a state monopoly. Instead, it is shared and divided, and can have a number of sources, including the state, customary law and convention, and trans-national law. It is often objected[30] that all this is talk is premature, since a new order does not exist and the nations will not wait until it comes into being, so that statehood is still the only game in town. It is true that the new order is inchoate and its future uncertain, but the nations are in most cases waiting quite patiently to see how it develops, adapting their strategies to circumstances as they evolve. If a new order is not yet with us, there are plenty of signs of things to come and plenty of opportunities already to engage in nation-building in the trans-national order. In any case, to expect a new order to be fixed and ready before the nations took their place in it would be to violate a central part of my argument, since it would prevent the nations from contributing to the shape of the new order as it evolves, leaving the big states to set the rules.

It is in Europe that the post-sovereign idea has received its fullest expression. Europe is a densely organized political space, with the European Union at the centre but extending to bodies like the Council of Europe, the Organization for Security and Cooperation in Europe, the Western European Union, the European Economic Area and NATO (which of course includes Canada and the United States). Within this developing space the principle of state sovereignty is challenged in multiple ways, even while the states remain a key basis for authority.[31] Despite the resilience of the states, the spell of sovereignty is broken and this has provided an important cue for stateless

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[28] A V Dicey and R Rait, *Thoughts on the Union between England and Scotland* (1920).

[29] McCormick *op cit* n 18; and Z Bankowski and E Christodoulidis, The European Union and as an Essentially Contested Project' in Z Bankowski and A Scott (eds), *The European Union and Its Order. The Legal Theory of European Integration* (2000) p 17.

[30] By Tom Nairn, for example, *op cit* n 24.

[31] G Jáuregui, *La democracia planetaria* (2000).

nationalist movements to reformulate their ideas. Important nationalizing functions of the state have also been lost. Individual human rights are increasingly independent of citizenship, allowing a rights discourse unencumbered by nationalizing ideology or implications. Again the United Kingdom provides the clearest illustration, since the devolved assemblies and parliament in Northern Ireland, Scotland and Wales are subject directly to the European Convention for the Protection of Human Rights, which is applicable without reference to UK law. This avoids the problem that has arisen in Quebec where the Canadian Charter of Rights and Freedoms is widely rejected, not so much for its content as for the nationalizing project of which it formed a part. Such a nationalizing Charter in the United Kingdom would encounter similar problems in Scotland and, above all, among the minority community in Northern Ireland. Europe's regime for the protection of national minorities and cultures is less developed and the states of the European Union have shown a regrettable tendency to revert to their old habits of imposing respect for rights in eastern and central Europe while exempting themselves. Yet it is a start and there is a clear norm of respect for national minorities as a condition for admission to the European order.

Europe also provides multiple opportunities for the projection of stateless nations, some rather symbolic, others more substantive, in the emerging political space. This is a rather open and pluralistic political structure, with many points of access and the Catalans in particular have shown themselves adept at operating in multiple political arenas at the same time—the local, the state, the European, the Mediterranean and even the global. Europe can serve this purpose because it is less than a state and more than a free trade area. A European state built on national lines (whether federal or unitary) would go against the trend to post-sovereign order and would incite opposition from both state and minority nationalist forces. A mere free trade area would fail to provide political opportunities for stateless nations and others, and would privilege market relationships and business interests and narrow the political agenda to tightly defined economic questions. A pluralistic but politicised European order, on the other hand, provides a space for interaction among a multiplicity of normative orders, on the basis of shared understandings and values. These understandings are not based on common 'ethnicity', or on opposition to a defined 'other' but rather on a form of 'constitutional patriotism'[32] and civic values. Some of these values are universal, such as democracy and human rights, while others are potentially universal but not realized in other liberal democracies like the United States – notably universal health care and the abolition of capital punishment. The post-sovereign order is thus not a return to universal anarchy but a form of 'metaconstitutionalism'[33] in which issues of power and authority can be debated and worked out under a system of common understandings. This evokes Tully's concept of linked communities able to communicate amongst themselves rather than being isolated and independent.[34] Constitutionalism thus becomes the stuff of regular politics,

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[32] J Habermas, 'Die postnationale Konstellation und die Zukenft der Demokratie' in *Die Postnationale Konstellation. Politische Essays* (1998) p 91.

[33] N Walker, 'Beyond the Unitary Conception of the United Kingdom Constitution' (2000) *Public Law* 384.

[34] See J Tully, *Strange Multiplicity. Constitutionalism in an age of diversity* (1995).

rather than a one-off moment after which 'normal' politics can resume. It is a messy process and can descend into an undignified scramble for advantage, but the key point is that it keeps moving. Canada has, in a way, been going through a similar process for the last thirty years, as it seeks to redefine itself as a society and to negotiate the place of Quebec and the native peoples within this society and in North America more widely. It lacks, however, an overarching and denationalised framework such as exists in Europe, so that constitutional debate tends to come back to rather classical nineteenth century concepts of sovereignty. The Clarity Bill stipulating the conditions for responding to a Quebec referendum is a clear example of this. There is now abundant evidence that, in Quebec, as in the stateless nations of Europe, there is a constituency for a post-sovereign and plurinational politics but neither the framework nor the political leadership is there to take advantage of the opportunity to think about democratic order in a post-sovereign world.

In plurinational societies, modern democracy cannot be identified exclusively with state democracy and other democratic frames may be appropriate. Nationalist movements in stateless nations have been exploring new forms of post-sovereign self-determination, although there are important differences within and among them. There is as yet no post-sovereign political order to which they can accede, but the world is moving in that direction. Social scientists have never been very good at prediction, mainly because they assume that the world will behave in the future in the same way as it did in the immediate past. We may be in one of those eras in which detecting the signs of change may be vital to understanding our future.

SEPTEMBER 11TH AND GOOD GOVERNANCE

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> "Amid the clash of arms, the laws are not silent, they may be changed but they speak the same language in war as in peace."
> Lord Atkin, *Liversidge* v *Anderson* [1]

INTRODUCTION[2]

The murder of some 3,000 people in New York, Washington and Pennsylvania, on September 11th by suicidal terrorists profoundly affected the American psyche.[3] Political seismic shock waves reverberated around the globe and governments lined up behind President Bush's swift declaration of 'war on terrorism'. This paper addresses the terms of that declaration by examining the relationship of good governance with executive and legislative responses introduced in the USA and the UK.

In times of social, economic and political calm the application of good governance is relatively easy. But in times of unrest, war and emergency the extraordinary problems that arise test the mechanics of good governance. Essentially, do the responses to September 11th constitute good governance by observing the rule of law?[4] Should these responses fail this test, how do they fare when examined for their criminal justice efficiency? What does a cost -benefit analysis of these responses tell us?

In a world dominated by one super-power, that power may, in large part, choose between proceeding on the basis of law or on the basis of pure

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[1] [1941] 2 All ER 612. This is a dissenting judgment for, in essence, the House of Lords stated it is not for the courts to interfere with the executive in security matters in wartime.

[2] I wish to recognize the support of the Research Committee of Cardiff Law School for providing funds that allowed me to benefit from the student research support of Kirat Nagra now of New Delhi and Ashima Arora now of Houston, Texas. In addition I thank David Campbell, Ruth Costigan, Peter Fitzpatrick, Paddy Hillyard, Urfan Khaliq, and Penny Smith for constructive comments. This paper was completed in November 2002.

[3] The American press carried statements such as "In a few minutes the world changed" and not just the world, "a universe is now lost." *San Francisco Chronicle* 30 December 2001. Between 1966 and 1999 there were 3,636 deaths in Northern Ireland related to political violence. D. McKittrick, S. Kelters, B. Feeney and C. Thornton, *Lost Lives* [1999].

[4] The *World Development Report*, published annually by the World Bank, consistently recognizes and affirms that establishing the rule of law is one of the five fundamental tasks which governments must perform. World Bank, Washington D.C. (1997) 4. The OECD recognizes that democracy, good governance and the rule of law are central to the achievement of the development goals of the 21st century. OECD, *Final Report of the Ad Hoc Working Group on Participatory Development and Good Governance*, (1997). Good governance is seen as including support for the rule of law as described by K. Ginther, E. Denters and P.de Waart (eds) *Sustainable Development and Good Governance* (1995) 20. See generally, R.A.W. Rhodes, *Understanding Governance, Policy Networks, etc* (1997); N.D. Lewis, *Law and Governance* (2001).

political, economic and military power. If a country is uninterested in the development of an international criminal court, declares itself not bound by international treaties[5] or important bilateral agreements concerning the protection of the environment, and moves against international violence with scant regard to established legal principles, then the rule of law is downgraded to a secondary position to be used only when politically expedient.

Nevertheless, in modern, democratic states that operate under the rule of law the criminal justice system should be subject to certain expectations. These include the principles of reasonable cause; no detention without trial; innocence until proven guilty; an open trial in a judicial court; legal advice and representation of choice; punishment reflecting the seriousness of the crime. These principles are sometimes blurred at their edges but they are both expected and present in matters of crime control.

The total immersion of society in legal culture is nowhere better illustrated than in the USA. A century and a half ago, de Tocqueville wrote "Scarcely any political question arises in the United States that is not resolved sooner or later into a judicial question."[6] More recently, Hartog has argued "Throughout American history law was inescapably, at times overwhelmingly, present . . . "[7] As another observer put it, "The United States has become probably the most law-run and lawyer-run country in the history of mankind."[8] The importance of law as a cultural icon and the backbone of good governance cannot be over emphasised.

However, a major exception may be found in times of national emergency. At such moments executive action may become the dominant force. The traditional triumveral balance, between the judiciary, the legislature and the executive, becomes stressed and is reconfigured in the attempt to address the crisis. The outbreak of war is the paradigm case that produces challenges to good governance.[9] The fear of gross terrorist threats produces similar tensions and reactions.[10]

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5 For example, in December 2001 President Bush pulled out of the ABM treaty with Russia saying "it hinders us from developing an anti-missile shield that will deter an attack from a rogue state." *New York Times*, 13 December 2001. See also, C. Douzinas, "Postmodern just wars: Kosovo, Afghanistan and the new world order'' in *Law After Ground Zero* ed J. Strawson (2002) 29.

6 A. de Tocqueville, *Democracy in America* (1984) 280.

7 H. Hertog, "Abigail Bailey's Coverture" in *Law in Everyday Life*, eds Sarat and Kearns, (1993) 107.

8 H. Berman, W. Greiner and S. Saliba, *The Nature and Functions of Law* (1996) 3. Today, there are over one million lawyers in the USA out of a national workforce of some 110 million. Each year, the country's law schools graduate another fifty thousand lawyers, a number that roughly corresponds to the total number of lawyers in China. In two years the US law graduates outstrip the total number of practicing lawyers in the UK.

9 The best illustration is the work of A.W.B. Simpson, *In the Highest Degree Odious: Detention without Trial in Wartime Britain* (1992). W.H. Rehnquist, *All the Laws but One* (1998) 218. "Without question, the government's authority to engage in conduct that infringes civil liberty is greatest in time of declared war."

10 A recent and new illustration of the use of 'national emergency' is the bio-emergency associated with the foot and mouth epidemic in the UK. During that

Emergency legislation passed as a consequence of national catastrophe associated with terrorism has a predictable pattern. It involves an unseemly scramble amongst the executive and legislature so that they are seen to be doing 'something'.[11] Policy and law are hastily tightened, with scant recourse to reasoned chamber debate or recognition of standard procedures, in order to respond to media and public outcry.[12] Thus, the politicians' anxiety to be viewed as resolving the crisis overrides both established process and rational action. Indeed, such hasty responses may even have a negative effect in isolating vulnerable groups and disenchanting sections of society. The result is predictably disturbing: enhanced powers given to security agencies and the police; deviation from established principles of law; alienation of innocent, affected people; and disappointing results, even alienating consequences, of these attempts to control anti-terrorist activities which have not been subject to normal standards of scrutiny. This is a sequence evident both within the USA and the UK as a consequence of September 11th.

The state's responses to terrorism are invariably 'extraordinary' in the way wartime responses are extraordinary, although the former has a disturbing habit of being transformed from the category of 'abnormal' to 'normal' legislation, or at the very least affecting subsequent criminal legislation.[13] These events test the executive's commitment to the rule of law and to good governance. Because of the extreme powers given by such extraordinary legislation, there is an incumbent requirement to provide limits to its terms, scope and life span. Legal responses of this nature should be restricted in terms of time to the shortest and most clearly stated period; should refer to closely defined groups or people in order to limit the likelihood of innocent people being dragged into the anti-terrorist legislative net, and, finally, should always remain within the boundaries of good governance. This paper is based on the inviolability of these principles and explores the ways in which various governments have responded. In addition, it considers the importance of the legislative process recognising that the failure to honour them leaves open the door to executive exploitation and the misuse of power. It also reflects on the issues of the efficiency of anti-terrorist legislation. Does this legislation stop, deter or punish criminals; is it 'comfort legislation' directed towards producing and maintaining public confidence; or is it counter productive through the alienation of innocent victims and ethnic, religious and immigrant groups?

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period it is claimed that the rule of law and natural justice were suspended in order to respond to the epidemic. See the forthcoming work of D. Campbell and R. G. Lee, Cardiff Law School.

[11] "At a time of threat, to be seen to be doing something rather than nothing is a natural human – and perhaps particularly ministerial – reaction." Lord Jenkins of Hillhead, House of Lords, 27 November 2001, col 199.

[12] "Circumstances and *public opinion* demand urgent and appropriate action after the September 11th attacks." [itals added] D. Blunkett, House of Commons, 19 December 2001, col 22.

[13] J. Sim and P. A. Thomas "The Prevention of Terrorism Act: normalising the politics of repression" (1983) *Journal of Law and Society* 71.

The Experience Of History

The most striking recent examples of ill-considered legislation are the responses to terrorist activities. There is a strong and clear parallel between the current legislative processes in both the USA and the UK. First, by way of illustration, I examine the Parliamentary passage of the Prevention of Terrorism (Temporary Provisions) Act 1974. It was subject to a mere 17 hours of debate in the House of Commons before its 'draconian powers' were approved. Parliamentary debate was driven by the public outrage caused by the Birmingham pub bombings that resulted in the death of 21 people and the injury to a further 180. Brian Walden MP stated in the House of Commons: "The justification for the Bill to my mind, is overwhelming, and I make no bones about the fact that I shall not listen with too much patience to any anxieties about whether this or that or the other civil right may temporarily be somewhat abridged. . . . Let us be frank. The overwhelming mood in my constituency and I believe in my city, is one of vengeance."[14] The absence of rational discussion and the presence of vengeance fuelled by public outrage characterised the mood of both Parliament and the nation. Clare Short attended the debate on the Bill in her previous capacity as a Home Office civil servant. She whispered to her neighbour, the man who drafted the Bill, that it would do nothing to prevent terrorism. His reply was "that is not what it is about".[15] Dafydd Elis Thomas MP told me at the time that despite his personal reservations it was more than a person's seat was worth to vote against the Bill given the extreme level of public shock and outrage. Thus, even concerned politicians were tempted to place their principles on hold during this tense and extraordinary period.

A similar legislative response was made both in Ireland and the UK over the Omagh bombings in Northern Ireland in August 1998.[16] In Dublin the Offences Against the State (Amendment) Bill was published on 31st August, debated in the Dail on September 2nd between 10 am and 11.30 am, and thereafter in the Seanad on the 3rd, followed by an immediate quasi-presidential signing (this was because the President of Ireland was overseas).

In Westminster a similarly complex Bill, that quickly became the Criminal Justice (Terrorism and Conspiracy) Act, was pushed through Parliament in 27 hours. It was published and made available to members for reading at 6 pm on the day previous to the House of Commons debate. Tony Benn, in debate, compared the procedure with that associated with the former USSR "What a way to treat Parliament. . . as though we were the Supreme Soviet, simply summoned to carry through the instructions of the Central Committee."[17] From across the Chamber, Richard Shepherd, a Conservative MP, stated "not in the face of terrorism or anything should we abandon the liberty and freedom to discuss these matters. This is no way for the House to

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14 Hansard, vol 882, 28 November 1974, cols 648-50.

15 F.Wheen, *The Guardian*, 2 September 1998. See also, C.A.Gearty and K.A.Kimbell, *Terrorism and the Rule of Law* (1995) 17.

16 For a detailed account of the Parliamentary passage of this legislation see P.A.Thomas "Emergency Terrorist Legislation" Journal of Civil Liberties (1998) 240.

17 Hansard, House of Commons, 2 September 1998, col 717.

conduct its business. The government is acting manipulatively. We have been knee-jerked here."[18] In the House of Lords Sir Patrick Mayhew, former Northern Ireland Secretary from 1992 to 1997, declared: "We are invited to make law which may turn out to be dangerous and therefore bad law for a purpose which will probably not be achieved in practice."[19] Thereafter, the Queen proved exceedingly obliging. Whilst on holiday in Scotland, she gave the Royal Assent to the Act sometime before it had completed its Parliamentary passage.

Should the reader be tempted to think that emergencies and zealous executive action are restricted to world wars and terrorism, they would be wrong. Ireland provides illustration after illustration of executive detention from early times of its occupation up to, and including, the present.[20]

Balancing Freedom And Safety

Immediately after September 11th David Blunkett, the Home Secretary, stated: "We could live in a world which is airy-fairy, libertarian, where everyone does precisely what they like and we believe the best of everybody and then they destroy us."[21] In the House of Lords, during the second reading of the Antiterrorist, Crime and Security Act [ATCSA], Lord Roker, Home Office Minister, stated "It [the Bill] strikes a balance between respecting our fundamental liberties and ensuring that they are not exploited. The problem is that in a tolerant liberal society, if we are not guarded we will find that those who do not seek to be part of our society will use our tolerance and liberalism to destroy that society. That is a reality."[22] Identical sentiments, albeit expressed more elegantly, were offered earlier by the American judge, Learned Hand, whilst commentating on the delicate balance applicable in time of warfare. He wrote "a society in which men recognise no check upon their freedom soon becomes a society where freedom is the possession of only a savage few."[23] Thus the argument runs that the pursuit of safety in the war against terrorism carries a price: the temporary diminution of freedom. The increased demands for the assurance of public safety brings with it the necessary and lamented reduction in individual freedom. The interests of the many trump those of the individual. In turn, the institutions and principles that support and promote individual freedom must also be trimmed in these unusual times.

The true cost of emergency legislation is that the social unity achieved through the single goal of defeating terrorism results in the discreditation,

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18 *Supra* Cols 714-5.

19 Hansard, House of Lords, 3 September 1998, col 36.

20 For example, The Protection of Life and Property (Ireland) Act 1871; An Act for the Better Protection of Person and Property in Ireland, 1881. The history of Northern Ireland, including modern times, is replete with such Emergency legislation.

21 Guardian, 12 November 2002. For an analysis of this statement see P. Hillyard "In defence of civil liberties" in *Beyond September 11th* [ed] P.Scraton, (2002) 107.

22 House of Lords, Hansard, 27 November 2001, col 143.

23 *The Spirit of Liberty* (1952) 191. See, R. Posner "Security versus Civil Liberties" *The Atlantic*, December 2001, and, R.D. Gastil "What kind of Democracy?" *The Atlantic*, June 1990.

loss or suspension of established symbols that include cherished rules governing the control of criminal behaviour and also the protection of the rights of the individual. The united, lock-step march of society in its fight against terrorism results in the suppression of the dissident voice.[24] Freedom of speech suffers. Critical comment about the executive is interpreted as being unpatriotic. One is either with or against the executive: there is no other position. The wartime spirit produces national unity in a single cause.

In this way, the rule of law is both challenged and damaged and thereafter takes on a new, unhealthy form. A closed military tribunal replaces the right to a public, judicial trial and imposes assigned counsel rather than permitting legal counsel of choice. Rules of criminal evidence and procedure are changed to ensure or at least increase the likelihood of a criminal conviction. Witnesses give testimony anonymously, behind screens;[25] juries are replaced by sole judges;[26] convicted criminals appear as 'supergrass' witnesses for the prosecution; people convicted of no offence are detained without trial through the internment process; the police are given extraordinary powers to combat terrorist activities.[27] Legal formalism remains but the spirit of the law is lost.[28]

The media adopts a supportive position when terrorism threatens and the executive is given uncritical media support in its activities.[29] For example, the editor of *New Republic* wrote "This nation is now at war. In such an environment, domestic political dissent is immoral with a prior statement of national solidarity, a choosing of sides."[30] Additionally, such executive action in democratic states[31] provides an extended licence to repressive regimes that nakedly exploit these moments of terrorism to further control and suppress minority voices and those who adopt a critical stance concerning the values and actions of the state. For example, the Chinese

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[24] A.G., John Ashcroft questioned the patriotism of those speaking out for civil rights: "Your tactics only aid terrorists, for they erode our national unity and diminish our resolve. They give ammunition to America's enemies." *Washington Post* 7 December 2001.

[25] R. Costigan and P. A. Thomas "Anonymous Witnesses" *NILQ* (2000) 326.

[26] As in the Diplock courts in Northern Ireland.

[27] There is much literature on these issues but for a recent and valuable overview see, N. Whitty, T. Murphy and S. Livingstone, *Civil Liberties Law: The Human Rights Act Era*, (2001).

[28] Classic examples are found in Germany under National Socialism. See F. Neumann, *The Rule of Law* and also *Behemoth: the structure and practice of National Socialism.*

[29] E.W. Said, *Covering Islam: How the media and the experts determine how we see the rest of the world* (1997) and *Orientalism* (1978).

[30] A pundit on Fox News demanded that US forces invade Libya and Iraq. On September 12th an NBC announcer stated "some of the freedoms we have we may no longer be able to take for granted and may to give up." These examples are taken from L. Lapham "Notebook: American Jihad" Harper's, January 2002.

[31] See for example the Anti-Terrorist legislation introduced post September 11th; Australia; Canada; Italy; New Zealand; South Africa; India; Colombia; Jordan and the European Union.

government has used the events of September 11th to crack down on signs of Uighur resistance to Chinese rule in the province of Xinjiang.[32]

Not only does terrorism produce widespread distress, anxiety, fear, but as stated, provokes public responses of unity through adversity. In addition, the threat of terrorism offers financial and growth opportunities to private enterprise,[33] bureaucrats[34] and to institution builders. For example, an ailing airline industry may receive financial support from the state to keep the country 'flying'.[35] Security forces may be offered a 'new enemy' when traditional enemies have been defeated or have diminished in power.[36] The new enemy demands increased, specialist attention and therefore a larger budget is required to respond to the new threat.[37] The arms industry is offered an expanded market and larger profits via an increased defence budget[38] and the investment market responds accordingly.[39] The defence

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32 For a detailed account of these developments in China see the Financial Times, 27 July 2002. In other countries the USA responses have encouraged further repressive executive actions in the Philippines; Russia; Uzbekistan; Egypt and in Israel, the Prime Minister, Ariel Sharon described the Palestinian leader, Yassar Arafat, as "our Bin Laden".

33 Vice President, Dick Cheney, is the former CEO of Halliburton corp. A subsidiary is now involved in a $16 million project to construct cells at Guantanamo Bay for new internees from Afghanistan. It is also providing services at Force Provider military camp, Afghanistan. The oil lobby is strongly represented in the US Executive: former President Bush is linked with the Carlyle Group; C. Rice was formerly with Chevron; D. Rumsfeld, formerly of Occidental and President Bush, formerly of Harken.

34 On September 11th, Jo Moore, a special adviser in the Department of Transport, wrote an email stating that the terrorist attacks in the USA offered an opportune moment to release stories that the department wished to bury.

35 The President produced an emergency package for the airlines: £5 billion in cash and $10 billion in loan guarantees though their financial problems existed prior to September 11th. See, S. Tombs, "Markets, Regulation and Risk: The US Airlines Industry and Some Fallout from September 11th" in *Beyond September 11th*, ed P. Scraton, (2002) 157.

36 The USA 'war on drugs' is being scaled down because of cost and the growing importance of the anti-terrorist programme. *The Guardian*, 21 October 2002.

37 The Homeland Security Act November 2002, establishes a department employing 170,000 staff with a $38 billion budget. *Indian Express*, 21 November 2002. The FBI director has announced "a dramatic departure from the past" by making terrorism prevention the FBI number one task. Mr. Mueller requested 900 extra agents. Currently, 3,700, one third of the agency staff, are working on these issues. There will also be a total restructuring of the FBI. *The Guardian*, 30 May 2002. In the UK the Prime Minister blamed tax rises on the impact of September 11th. *The Guardian*, 15 May 2001.

38 President Bush avoided a "guns and butter" budget by cutting taxes and certain social programmes whilst simultaneously increasing the defence budget, since September 11th, by $50 billion. *The Guardian*, 12 July 2002. Boeing is currently working overtime to produce sufficient equipment for the proposed invasion of Iraq. *The Guardian*, 29 July 2002.

39 Companies that marketed security devices, bomb detection devices, and surveillance and bio-warfare technologies rocketed up 146 percent after September 11th as did a number of defence contractors. "Picking Warstocks is Hell" *San Francisco Chronicle* 20 December 2001.

budget increases dramatically.[40] Thus, terrorism provides opportunities for both ailing and aggressive industries and an unchallengeable expansion programme for national security agencies[41] and the military.[42] The *Wall Street Journal* called on the President to take full advantage of the "unique political climate" to "assert his leadership not just on security and foreign policy but across the board."[43] Because these developments occur in strained times, the normal checks and balances that would be employed to ensure appropriate use of public finances are suspended or short circuited.[44] Immediacy and results are the order of the day.

Dworkin argues that the claim of the executive that there is an essential balance to be drawn between safety and freedom constitutes a false dichotomy.[45] The popular political argument that such is the terrorist threat to our security that the levels of freedom to which we are constitutionally entitled and often experience must be reduced. Thus, safety trumps freedom in special circumstances and for a limited time. This should mean that when the emergency is over, the previous levels of freedom, having been preserved and protected, can return and be enjoyed. However, strengthening safety exposes alleged terrorists to a higher risk of unjust conviction because traditional procedural safeguards associated with the rule of law are subject to temporary suspension. Dworkin states that the idea of a trade-off suggests that the general population must be willing to accept limitations on their personal freedom. In fact, very few people will be affected by this new relationship. Middle America, like middle England, will continue to operate in ways oblivious and untouched by the new politics introduced by executive action. Those who will be ensnared and possibly victimised by the new and lower standards of justice are resident aliens, first generation immigrants, ethnic minorities and followers of Islam, just as the general Irish community living in mainland Britain were stigmatised by their accents and names at the height of the IRA bombing campaigns.[46] These are the people who will be targeted through the new procedures for special attention, surveillance, interrogation and possible criminal convictions. It is not a question of how

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40 The defence budget for 2003 is the biggest in military spending, in both absolute amount and in percentage terms, since the first years of the Reagan administration. It amounts to $1 billion a day. Senator Kent Conrad, North Dakota, who chairs the Budget Committee, said: "We're at war and when the president asks for additional resources for national defense, he generally gets it." See, www.wsws.org 6 February 2002.

41 M15, MI6 and GCHQ were given significant budget increases in July 2002, rising over 7% annually over the next three years: £896 million in 2002 to £1.18 billion. This rise excludes the cost of new head quarters for the GCHQ estimated at £800 million. *The Guardian*, 16 July 2002.

42 In the UK, the Chancellor of the Exchequer, Gordon Brown, announced in his budget speech that the Ministry of Defence would receive an extra £1 billion a year which is the highest increase since the end of the 'cold war'. Rising from £29.3 billion to £30.2 billion. Brown stated this reflects the need to "meet the urgent moral challenge of global terrorism." *Ibid*.

43 Editorial, September 19, 2001. It encouraged more tax cuts, oil drilling in Alaska, and use of Social Security surpluses.

44 For an enthralling account of 'conspiracy theory' see G. Vidal, *The Observer*, 27 October 2002.

45 *The Threat to Patriotism*, New York Review of Books, 28 February 2002.

46 P. Hillyard, Suspect Communities, (1993)

much liberty will the reader of this paper sacrifice. The answer is little or none. The appropriate question is what does justice require in order to be just?

The idea of trading off freedom for safety on a sliding scale is a scientific chimera, which, in reality, is misleading. Are murderers offered less protection through law than those who commit social security fraud or embezzle? The punishment will differ but similar rules of practice and evidence are applied to the murderer and the fraudster. Thus, the denial of rights to some that are available to others represents a slippery slope, particularly when those to whom rights are denied are themselves members of a vulnerable group such as aliens or members of an ethnic or religious minority. Their risk of false conviction for terrorist offences is no less than that of the fraudster and indeed is greater if their rights are minimised.[47] The history of terrorist trials in the UK is significantly marred by miscarriages of justice.[48] Balance should not enter the equation: it is false and misleading. Instead, it is an issue of reducing the constitutional and civil rights of possibly vulnerable people and groups who are alleged terrorists in the name of national security.

USA Legislative Responses[49]

Commenting on President Franklin Roosevelt's support for the wartime internment of Japanese immigrants and Japanese Americans, Professor Francis Biddle wrote "The constitution has not greatly bothered any wartime President. That was a question of law, which ultimately the Supreme Court must decide. And meanwhile – probably a long meanwhile - we must get on with the war."[50] President Bush's declaration of 'war' against terrorism differs in that he used the word 'war' rhetorically, not in its legal and constitutional sense, and that he originally intended the war to be 'ongoing'

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47 For example, Ali al-Maqtari, a Muslim visitor to the US, was arrested on September 15th and jailed for eight weeks. Apparently, he was arrested because his wife wore an Arab headdress, they spoke a foreign language, French, and because he had box cutters on him which he used in his job in a market and she in a shipping room of a plant nursery. His testimony before the Senate Judiciary Committee, judiciary.senate.gov/te120401f-almaqtari.htm

48 The most infamous 'terrorist' miscarriages of justice are the Birmingham 6, the Guildford 4, Maguire 7 and Judith Ward.

49 It is not intended to provide a detailed analysis of the US and UK anti-terrorist legislation. This is available elsewhere, e.g. D. Cole, "Enemy Aliens" *Stanford Law Rev* [2002] 953: H. Fenwick, "The Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to 11 September" Modern Law Rev (2002) 724: R. Talbot "The balancing act: counter-terrorism and civil liberties in British anti-terrorist law" in *Law After Ground Zero*, ed. J. Strawson [2002]; A. Tomkins, "Legislating against terror: The Anti-Terrorism, Crime and Security Act 2001" Public Law [2002] 205; C. Bowden "CCTV for inside your head: blanket traffic data retention and the emergency anti-terrorism legislation" Computer and Telecommunications Law Review [2002] 21: Editorial "Anti-Terrorism, Crime and Security Act 2001" *Criminal Law Rev* [2002] 159.

50 *In Brief Authority* (1962) 219.

against individuals and organisations rather than against a nation state.[51] This commitment was illustrated by the cosmic name he initially gave to his campaign against international terrorism: "Infinite Justice".

The principal legislative response to September 11th is the anti-terrorist legislation, entitled, "Uniting and Strengthening of America to Provide Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001". This creates the powerful acronym, the USA PATRIOT Act of 2001. It is a monster piece of legislation amounting to 342 pages, covering 350 subject areas, encompassing 40 federal agencies and carrying 21 legal amendments.[52]

House Judiciary Committee chairman F. James Sensenbrenner introduced this legislation on October 2nd. It became law on October 26th. This record breaking speed was made possible only by forcing the pace to the point where serious debate and discussion was rendered impossible by the restricted time scale and the public demand for political action. Indeed, even Congressional procedure thus truncated was challenged by Attorney General. John Ashcroft who stated that it would be dangerous to delay the Bill's passage for more than a few days.[53] Senate Majority leader Tom Daschle said "all hundred of us could go through this bill with a fine-tooth comb and cherry pick and find improvements. . . . We've got a job to do, the clock is ticking and the work needs to get done."[54] In the Senate only Russell Feingold voted against the Patriot Act, with sixty-six against it in the House of Representatives. With Congressional staff locked out of their offices due to the anthrax scare, few members of Congress had time to read the summaries of the Bill let alone the fine print of the document that was passed in such haste. Indeed, what red-blooded American politician, with an eye on re-election, would vote against such legislation?[55] Bush, whose sabre-rattling rhetoric demanded immediate political support, urged on the representatives. He declared that "in order to win the war, we must make sure that the law enforcement men and women have got the tools necessary, within the Constitution, to defeat the enemy. . . . We're at war. . . a war we're going to win."[56] The Act moulded by these warrior words and passed

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51 Subsequently, President Bush expanded his 'war' to include nations which collectively constitute the "axis of evil" with Iraq being identified as the principal protagonist.

52 See the following section for a brief account of some of the controversial powers in the new legislation. However, this paper does not set out to provide a detailed analysis of the US and the UK anti-terrorist legislation.

53 R. Dworkin "The Threat to Patriotism" *New York Review of Books*, 28 February 2002.

54 CNN.com 12 October 2001.

55 Compare with the words of Dafydd Elis Thomas, MP, page 369. Similar sentiments were expressed in that public pressure and the continuance as an MP demanded that the politician restrain from adopting a principled but unpopular position.

56 He further declared that 2002 would also be "a war year. Our war against terror extends way beyond Afghanistan". *The Guardian*, 27th December 2001. Draft plans trailed in the media in July 2002 indicate that Iraq is likely to be invaded in January 2003. *The Observer*, 6 July 2002. Vice President Dick Cheney referred to "forty or fifty countries" that could need military disciplining. J. Pilger, "The real story behind America's war" *New Statesman*, 17 December 2001.

in furious and frustrated haste, left federal prosecutors, defenders, regulators and administrators throughout the country scrambling to decipher what Congress and the Bush administration had packed into the legislation. The public responded in positive terms. Pre-September the approval rating of Bush was 44% but that leapt to 86% in December 2001.[57] In various public polls, roughly two-thirds said they supported the actions of the administration. However, a quarter of those polled stated that President George Bush and Attorney General John Ashcroft had not acted in a sufficiently aggressive manner.[58] More recently, those who demanded a more vigorous response would be pleased to read in the President's National Security Strategy of the United States that he contemplates pre-emptive action and also the possibility of unilateral action.[59]

USA Patriot Act

The Act provides, *inter alia*, the following sweeping powers:

Powers of detention and surveillance are given to the Executive and law enforcement agencies; the courts are deprived of meaningful judicial oversight of the exercise of those powers.

The Secretary of State is empowered to designate any group, foreign or domestic, as 'terrorist'. This power is not subject to review.

A new crime, 'domestic terrorism', is created. It includes acts dangerous to human life that are a violation of the criminal law if they appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping.

It permits investigations of activities otherwise protected by the First Amendment activity if those activities can be tied to intelligence purposes.

It undermines the privacy protection of the Fourth Amendment by eroding the line between intelligence gathering and gathering evidence for criminal proceedings. It expands the ability of the government to spy by wiretaps and computer surveillance. It provides access to medical, financial, business and educational records and allows secret searches of homes and offices.

It undermines due process procedures by permitting the government to detain non-citizens indefinitely even if they have never been convicted of a crime.[60]

The possible uses and outcomes of this legislation have horrified many constitutional lawyers and civil rights groups. For example, domestic spying is given a renewed lease of life. Firewalls were erected after the Watergate scandal and the subsequent Senate investigation in 1975 chaired by Senator Frank Church. Church warned that domestic intelligence gathering was a "new form of governmental abuse", unconstrained by law, which had been abused by Nixon and by the FBI which spied on over half a million

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57 Washington Post 21 December 2001: *New York Times*, 3 January 2002.
58 www.publicagenda.org/specials/terrorism/terror_pubopinion.htm.
59 *The Guardian*, 21 September 2002.
60 My precis of the sections of the Act is based on the paper prepared by the ACLU of Michigan, www.aclumich.org.

Americans during and after the McCarthy era. One reform was the separation within the FBI of criminal investigation and intelligence gathering against foreign spies and international terrorists. The Act foreshadows the end of that separation by making key changes to the underpinning law: the Foreign Intelligence Surveillance Act (FISA) 1978. FISA demanded that wiretaps and searches for intelligence purposes, as opposed to evidence, are undertaken only if the 'primary purpose' was to listen to a specific foreign spy or terrorist. The new Act lowers the level to a 'significant purpose'. Roving wiretaps throughout the USA now operate on a single warrant. Americans engaged in civil disobedience or other forms of civil protest might be charged with "domestic terrorism" if violence occurs. Senator Patrick Leahy, the Senate negotiator on the Bill, said on the day it was passed: "The bill enters new and uncharted territory by breaking down traditional barriers between law enforcement and foreign intelligence." Morton Halperin, a defence expert, stated that if a government intelligence agency "thinks you're under the control of a foreign government, they can wiretap you and never tell you, search your house and never tell you, break into your home, copy your hard drive, and never tell you they have done it." Some of the surveillance provisions expire, or 'sunset', after a period of four years, unless renewed. U.K. experiences of the 'temporary' nature of its anti-terrorist legislation would suggest that it is likely that the sun will never set on this Act.

For a modern nation created largely by immigrants the new US laws covering non-citizens are ironically harsh. Section 412 of the Act permits indefinite detention of immigrants and other non-citizens. It requires that immigrants 'certified' by the Attorney General be charged within seven days with a criminal offence or an immigration violation, which need not be on the grounds of terrorism. Those detained for non-terrorist offences face the possibility of life imprisonment if their country of origin refuses to accept them. Detention would be allowed on the Attorney General's finding of 'reasonable grounds to believe' in the detainee's involvement in terrorism or an activity that poses a danger to national security, or the safety of the community or any person. A review of the detention takes place at six-monthly intervals, but what is striking is the absence of a trial in open court to test the state's case for prosecution.

During the Second World War President Roosevelt authorised the incarceration of more than 110,000 people of Japanese origin, 70,00 of whom were American citizens of Japanese descent,[61] 11,000 of German origin and 3,000 of Italian origin. President Bush is replicating this process through the rhetoric of undeclared war. Should it be thought that these new detention powers are merely precautionary and unlikely to be utilised, the actions of Attorney General Ashcroft constitute a sobering reality. He began by authorising the detention of 1,200 non-citizens. Some were held for months and as of July 2002 there were still 74 people held on charges of immigration violations, whilst 131 Pakistanis were deported to Pakistan in June aboard a privately chartered Portuguese plane amidst great secrecy. Some those who were deported had lived in the US for many years and left

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[61] See, M.Gradzins, *Americans Betrayed:Politics and the Japanese Evaluation* (1949).

their families and their jobs. None of the deportees were said to have links with terrorism.[62]

It is lawful under section 412 to detain people indefinitely. Legal advice is available but solely funded by the detainee. The government stopped updating the tally of those detained, so firm figures became unavailable. After refusing to make any information public about the detainees, including their names, location of detention, or nature of the charges, Ashcroft finally announced on November 27th 2001 that 548 detainees were being held on immigration charges and that federal criminal charges had been filed against 104 of them. The Justice Department also announced a plan for investigators to interview 5,000 people: Middle Eastern males between the ages of 18 to 33 who had arrived in the USA after January 2000. In response to a claim that this is a racially based roundup Ashcroft declared that "we are being as kind and as fair and as gentle as we can".[63] Of particular concern was the CNN poll that revealed 45 per cent of those polled would not object to the use of torture if it provided information about terrorism. There was also media discussion about the possible need for the use of 'truth serums' or sending suspects to countries where harsher interrogation measures were common.[64] It is important to remember that the 'disappeared' and tortured people of South American countries in the 1970s and 1980's were killed and tortured by military personnel trained by the CIA.[65] It was also announced that the US government is considering plans to send elite military units on overseas missions to assassinate al-Qaida leaders, without informing the foreign governments. Dick Cheney, the vice-president, was asked whether such action is lawful. He replied that he thought it was legal but "he would have to check with the lawyers on that."[66]

The final illustration of the new wave of executive action is the Military Order signed by the President on November 13th which allows for non-US citizens suspected of involvement in 'international terrorism' to be tried by special military commissions. The term 'alien' included combatants captured in Afghanistan and also aliens already resident in the US. These commissions are not subject to the regular rules and safeguards that cover military courts-martial. The President claimed that it was "not practicable" to try terrorists under "the principles of law and the rules of evidence" applicable in the US domestic criminal courts. These commissions were empowered to act in secret, to pass the death penalty by a two-thirds majority, and their decisions cannot be appealed to other courts. Subsequently, after considerable pressure, Donald Rumsfeld, US Defence

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62 *The Guardian*, 11 July 2002.

63 In August 2002, a Federal judge ruled that the Bush administration had no right to conceal the identities of hundreds of people detained after September 11th and ordered that most of their names be released within 15 days. N.A.Lewis, *New York Times*, 2 August 2002.

64 J. Alter, "Time to Think about Torture" *Newsweek*, 5 November 2001. "We'll have to think about transferring some suspects to our less squeamish allies even if that's hypocritical. Nobody said this was going to be pretty."

65 The CIA had plans to murder Fidel Castro and Patrice Lumumba of the Congo.

66 *The Guardian*, 13 August 2002. In November, 6 alleged Al-Quaida terrorists were killed in Yemen by a CIA drone bomb. It is reported the Yemen government was not informed of this impending attack. *Guardian Weekly*, 13 November 2002.

Secretary, refined the rules created by executive order by giving suspected terrorists the rights to the presumption of innocence; to choose counsel; to see the prosecution's evidence; trial in public; and to remain silent with no adverse inference being drawn. However, in such trials no jury will be introduced; hearsay will be accepted in evidence; and there will be no civilian review on appeal.[67]

The US base in Cuba, Guantanamo Bay, was identified by General Tommy Franks, head of Central Command, as suitable to hold Taliban and al Qaeda terrorists. Cuba was preferred ahead of Guam, a Pacific island. Subject to modification the Cuban base can detain as many as 2,000 prisoners. On January 12th Camp Delta received its first unlawful combatants and placed them in chain link cages. Ninety men manacled, hooded, with shaved beards, and some sedated, were flown in from Afghanistan. Subsequently, press photographs depicted them as hooded, shackled and kneeling in front of US soldiers. By October 2002 the figure had risen to six hundred and twenty prisoners. It is expected to house a further two hundred by Christmas 2002.[68] The base is to be included in a '20 year plan' for Guantanamo's naval base.

The men are detained in wire 'cages', measuring eight feet by six feet eight inches. They are exposed to the elements. The conditions are described by Amnesty International as "falling below the minimum standards for humane behaviour". This is perhaps unsurprising given that Donald Rumsfeld described the men as "the hardest of the hard core" adding "I do not feel the slightest concern over their treatment".[69] He described the base as "the least worst place".[70] President Bush described all of them as "killers", prior to any tribunal hearings, and that they would not be granted the status of prisoners of war.[71] Bush stated that "non-US citizens who plan and/or commit mass murder are more than criminal suspects. They are unlawful combatants who seek to destroy our country and our way of life."[72] The term 'unlawful combatant' is used because the US government has not defined the Taliban as prisoners of war, thereby denying them their rights under the 1949 Geneva

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67 *New York Times*, 21 March 2002.

68 *The Guardian*, 26 July, 29 October 2002 and *The Observer* 3 November 2002. There are seven British nationals held there.

69 *The Guardian*, 17 January 2002. Brigadier-General Rick Baccus, the camp commander at Guantanamo Bay, was relieved of his duties in October 2002 after a newspaper report quoted a defence source as saying he was "too nice" to the inmates. *The Guardian*, 16th October 2002. Arc lights provide a 24 lighting system. One detainee is 15 years of age some are in their seventies. Each man spends 30 minutes a week showering and exercising. The remainder of the time is spent alone in his 'cell'. Trips to the clinic involve the man being shackled to the trolley and then chained to the clinic bed. The men are exercised in shackles on their ankles, waist and hands. Psychological techniques, including sleep deprivation, are used as part of the interrogation process. There have been four serious attempts at suicide. Thirty other men have tried to injure themselves. *The Observer*, 4 November 2002.

70 Mercury News, 2nd January 2002.

71 R. Dworkin, *New York Review of Books*, 28 February 2002. Pakistani anti-terrorist experts are quoted as believing that 55 of the 58 Pakistani militants held in Cuba have no ties to al-Quaeda. *New Straits Times*, 25 August 2002.

72 The Washington Post 30 November 2001. See also L. H. Tribe in *The New Republic*, 10 December 2001.

Convention; nor have they been defined as criminals, thereby denying them their rights under the US Constitution.[73] Organising a defence from with this camp will prove extremely difficult, assuming that it is the intention to try the men in front of military commissions. The alternative is that the men are interrogated and detained at the pleasure of the President. Indeed, on 28 March 2002 Rumsfeld suggested that detainees who had not been tried, or those who had been tried and acquitted, might nevertheless be kept in detention "for the duration of the conflict". Asked how he would define the end of conflict, he said it would be: "when we feel that there are no effective global terrorist networks functioning in the world that these people would be likely to go back to and begin again their terrorist activities."[74] Pierre-Richard Prosper, ambassador at large for war crimes issues, who stated that "the judicial process may have to wait until after the war on terror is won", reinforced this position.[75]

United Kingdom

The ink was hardly dry on the Terrorism Act 2000 that came into force in February 2001 before a fresh commitment to yet stronger anti-terrorist legislation was issued by the Labour government. Again, the brevity of its passage is exceeded only by the extent of the powers it provides.[76] The government allowed 16 hours for Commons debate. The Terrorism Act extended the powers of the police to investigate, arrest and detain. It created new offences allowing our courts to deal with terrorist activities which occurred outside our national borders. The moral panic that consumed the USA was reflected in its most constant ally, the UK.

David Blunkett, the Home Secretary, introduced the government's Anti-terrorism, Crime and Security Bill into the Commons on November 12th. It was a big Bill, containing 118 pages, 125 clauses and 8 Schedules. After a concentrated House of Lords savaging it became law on December 15th. The Home Secretary said " strengthening our democracy and reinforcing our values is as important as the passage of new laws. . . the legislative measures which I have outlined will protect and enhance our rights, not diminish them . . . "[77] Whilst claiming the powers were measured, reasonable and necessary on the day of the Bill's Parliamentary presentation, Blunkett laid a Human Rights Derogation Order. The UK thereby derogated from the European Convention on Human Rights Article 5 of which guarantees the right to liberty and prohibits detention without trial. The UK is the only signatory to

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[73] *The Washington Post*, 30 November 2001.

[74] www.Crimesofwar.org 17 May 2002.

[75] *The Guardian*, 21 September 2002. "Criminal proceedings generally occur after the end of hostilities. We will make it clear at that time whether these people are to be fed into the judicial process or whether they will be released." There are seven U.K. citizens held in Camp Delta.

[76] "The result of the passage of the Anti-terrorism, Crime and Security Act 2001 is once again a legislative morass. . . There was no time for considered or sustained review." C. Walker, *The Anti-Terrorist Legislation* (2002) 7.

[77] HC Debs, 15 October 2001, col 925. Similar descriptions can be seen attached to previous anti-terrorist legislation. For example, Jack Straw, when introducing the Terrorism Act 2000, stated that it was "simply protecting democracy". *The Guardian* 14 November 1999.

the ECHR to feel it necessary to derogate as a result of this particular terrorist threat. The derogation occurred despite the statement by the Home Secretary that "there is no immediate intelligence pointing to a specific threat to the UK."[78]

The speed of the Bill's passage through the House of Commons, a total of 16 hours, is reminiscent of previous emergency legislation.[79] The Bill was given its Second Reading on November 19th. A timetable motion was passed which provided that the Committee Stage and the Third Reading should be completed in a further two days. The Derogation Order was debated for 90 minutes. The Committee Stage of the full House occurred on November 21st and November 26th. It finished at 11.57 pm and was immediately followed by the Third Reading that was concluded at midnight. The Home Secretary spoke for three minutes and Oliver Letwin, the Shadow Home Secretary, responded by saying: "I shall be brief. . .". Indeed, he was. He was interrupted mid-sentence for the vote that went 323 to 79. Royal Assent to the Act was granted on December 14th.[80]

Whilst the passage of the Bill through the democratically elected House of Commons travelled at the same whirlwind speed as that of the Patriot Act through Congress, the House of Lords refused to participate in the legislative stampede. Paradoxically, it fell to the un-elected House of Lords to offer a degree of meaningful reflection and opposition to the Bill. Thus it was the liberal lords who held the line for the democratic demand for civil liberties. Lord Corbett of Castle Vale said "after the outrage of 11th September, the way to defend democracy is not to dismantle it; it is to strengthen it. Otherwise. . . the Mother of Parliaments is being asked to put its name to achieving some of the aims of those who carried out the events of September 11th."[81] The Lords made 70 amendments and although most were reversed in the Commons, several were maintained and constituted significant defeats for the government. It was the issue of indefinite detention without charge that raised major opposition. A person reasonably suspected of being an international terrorist could be detained indefinitely and without charge. It was, the Home Secretary claimed, to cover "dozens of foreign" people who could not be prosecuted for insufficiency or inadmissibility of evidence and who could not be deported if they faced either torture or death overseas. The detainee's appeal against detention is through the Special Immigration Appeal Commission [SIAC] that will sit in secret. A security-cleared special advocate appointed by the Commission will represent the detainee. The special advocate cannot take client's instructions without express permission

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[78] Hansard, House of Commons, 15 November 2001, col. 925. See, *Lawless* v *Ireland* (1960) 1 EHRR 1.

[79] The Prevention of Terrorism [Temporary Provisions] Act 1984 took the House of Commons 17 hours.

[80] The Joint committee on Human Rights stated that "many important elements of the Bill were not considered at all in the House of Commons. . . We share the view of the House of Lords Select Committee on the Constitution that the inclusion of many non-emergency measures was inappropriate in emergency legislation which was required to be considered at such speed." See, Joint Committee on Human Rights, Anti-terrorism, Crime and Security Bill: Further Report (2001-02 HL 51, 2001-02 HC 420) para 2.

[81] HL 6 December 2001, col 1005.

of the Commission. Evidence may be adduced without showing it to the detainee or special advocate. Although an appeal on a point of law could go to the Court of Appeal, there was no appeal against the Home Secretary's certificate of detention. The government amended the Bill, in the light of the Lord's opposition, by raising the status of SIAC to that of a superior court of record; thereby ensuring its decision was not subject to judicial review!

In December and January 2002, several arrests were made in London and Leicester. Detainees, who have not been charged, are in the London high security prison, Belmarsh. They are locked up for 22 hours a day and do not see daylight. On detention they were not given access to lawyers or to their families. They cannot speak to families without the presence of an approved translator who visits once a week. They have been denied prayer facilities apart from 15 minutes on Friday but in the absence of an imam. Gareth Pierce, a solicitor who represents several of them, stated that: "these men have been buried alive in concrete coffins and have been told the legislation provides for their detention for life without trial". In July, the appeal of nine of the interned foreigners was allowed by SIAC and two others left the country voluntarily. Neither was arrested in the receiving country.[82] The Home Secretary appealed against the decision of SIAC. On 25th October the Court of Appeal, lead by the Lord Chief Justice, Lord Woolf, overturned SIAC and held that those men who are subject to indefinite detention without charge are detained lawfully and the detention does not contravene the European Convention on Human Rights.[83]

Wide-scale trawling, retention and availability of data were other highly charged concerns. Currently there are over 50 statutes that allow a number of public authorities to disclose information in the light of criminal proceedings. Oliver Letwin complained: "the Home Secretary is saying that to catch terrorists, he has to allow 81 government agencies – from the BBC to the NHS – to reveal somebody's records, even if they are being investigated for a traffic offence in the USA. I find that a difficult chain of logic to follow." The Bill sought to extend 'criminal proceedings' to include general 'investigations', both within the UK and abroad. The Lords attempted to limit this power and succeeded in so far as the government finally agreed that the Act would carry an express requirement that any such disclosure would be limited by the Human Rights Act. This requires that disclosure be proportionate to what was sought to be achieved by the disclosure. The human rights lawyer, Lord Lester, described this amendment as mere "window dressing".

Serious disagreements also arose over the retention of data. The proposal to adopt criminal justice measures under Title V1 of the Treaty on European Union [known as the Third Pillar], including the proposed European arrest warrant, resulted in a defeat for the government. The government agreed that such changes would be introduced through primary legislation and via

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[82] See, J. Wadham and S. Chakrabarti, 'Indefinite Detention without Trial' *New Law Journal* (2001) 1564.

[83] *A, X and Y, and Ors* v *Secretary of State for the Home Department* [2002] EWCA Civ 1502, and *The Guardian*, 26th October 2002. Once again, the evidence put forward by the government to back its argument remained secret on the grounds of national security. The Court of Appeal did not consider this 'closed' evidence.

the backdoor through negative resolution procedure. Nevertheless, the new anti-terrorism measures developed by the Justice and Home Affairs Council [JHAC] and the European Council after September 11th will be introduced through powers in the Act.[84]

The Bill was also attacked for carrying irrelevant legislative baggage, some of which is controversial. These were not issues requiring immediate attention and it was felt that the Home Office had enjoyed the opportunity to clear its shelves by adding entitlement cards[85] as well as matters of religious hatred, police powers, asylum, immigration, corruption and bribery. D. Hogg stated that "most of the Bill has simply come out of the Home Office back lobby. It has a lot of stuff that it wants to put before Parliament and it has attached it to this Bill."[86]

Finally, the Lords successfully introduced expanded sunset clauses and reviews into the Bill. Thus, the provisions for detention without charge will lapse after five years unless renewed by primary legislation. In the meantime the provisions will be reviewed after 15 months and thereafter, annually. The entire Act is to be reviewed by a body of Privy Councillors within two years of Royal Assent. However, the Home Secretary announced that the review body will have no access to the detailed cases that have gone through SIAC, nor to the evidence that was presented in private.

The Bill is a classic example of legislation drafted too quickly, too loosely and thereafter passed too hastily.[87] Nevertheless, concerns voiced by judges and legal experts over the scope and likely efficiency of the Act did little to cool the government's ardour. The Lord Chief Justice, Lord Woolf took the unusual step of expressing concern about the passage of the Act, writing: "In previous wars, things have happened which, with hindsight, are now know to have been wrong. We have to be astute to avoid that happening, so far as possible."[88] Michael Zander noted that "this was complex and controversial legislation rushed through Parliament at breakneck speed. We are unlikely to know whether it contributes to making this country a safer place".[89]

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[84] See T. Mathiesen, "Expanding the Concept of Terrorism" in *Beyond September 11th: An Anthology of Dissent*, ed P. Scraton, (2002).

[85] In May 1993, Earl Ferrers stated in the House of Lords that he could not think of a single terrorist offence that would have been avoided had terrorists been obliged to carry identity cards, and that the government was reviewing "every conceivable method of trying to prevent terrorism but ID cards do not feature high on the list." HL Debs 18th May, cols 1555-56. Lord Lloyd also rejected ID cards as a useful tool in the fight against terrorism. Inquiry into Legislation against Terrorism, Cm 3420, 1996, para 16.31. P. A. Thomas "Identity Cards" 58 *Modern Law Review* (1995) 702.

[86] Hansard, House of Commons, 19 November 2001, col 94.

[87] O. Letwin MP: "I want to say a word about process. I have discerned across the house, as everyone here must have done, a strong feeling that a few days – three days, in the case of this House, are not enough fully to scrutinize the Bill." Hansard, 19 November 2001, col. 39. Lord Dixon-Smith: "The Bill has achieved three day's discussion, pretty nearly on the trot, in another place. That is not sufficient time to consider a measure of this significance." Hansard, House of Lords, 13 November 2001, col 155.

[88] *Daily Telegraph*, 17 December 2001.

[89] "The Anti Terrorism Bill: What Happened?" *New Law Journal* (2001) 1880. However, Lord McIntosh of Haringay, did feel that the Bill would be of some

Zander questions the efficacy of the legislation, but considers that there is a lack of evidence that would allow us to make an informed judgment. However, some evidence does exist and this paper moves to consider this point.

Does Anti-Terrorism Legislation Work?

There are strong reasons and powerful interests promoting the expansion and continuation of legislation reputed to defeat terrorism. Whilst the widely promoted arguments of 'warfare' and 'balance' do not justify the powers found within the most recent legislation, nevertheless, history shows that civil rights consistently come out second best when terrorism dominates the political agenda.[90] Terms such as 'national security' and 'public safety' trump the vocabulary of civil rights. The courts display reluctance in challenging the state's decision in such cases;[91] the media becomes an uncritical supporter of executive action[92] and the general public are encouraged to see the terrorist as demonic, unstable and a random threat to each and everyone.

Given that civil rights arguments are relatively unsuccessful within the context of the response to terrorism, a more fruitful argument might be via a functional, rational account based upon the review of results. Does this legislation work and if so for whom? A set of practical questions, which seek to isolate issues, classify responses and 'de-terrorise' the political atmosphere, may help in promoting a rational account of the efficiency and effects of this corpus of law. There is a range of questions which could be addressed, such as 'how many people have been successfully charged under anti-terrorist legislation'; 'does it have deterrent value';[93] 'do politicians really believe in the legislation'; 'what unintended harm has occurred'; 'how is terrorism defined'?

The Prevention of Terrorism [Temporary Provisions] Act 1974 [PTA] was described by the then Home Secretary, Roy Jenkins, as a 'draconian measure'.[94] During the debate on the ATCSA, Roy Jenkins, now Lord

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value when he claimed that it "would be a significant help in combating *television*." Hansard, House of Lords, 28 November 2001, col. 417. [itals added].

90 E. P. Thompson, *Writing By Candlelight*, (1985) argues that the greatest thief of civil liberties is the state.

91 The classic case is *Liversidge* v *Anderson*, n 1.

92 N.Chomsky, *The Irrepressible Chomsky* [2001]. See also, the Russian State Duma voted in November 2002 to impose broad limitations on media coverage of terrorism. *Guardian Weekly*, 13 November 2002.

93 For example, Faith Mitchell of the National Research Council, National Academy of Science, USA, is reported as saying "during the Cold War, at least in retrospect, it was simpler. You threatened to bomb the Soviet Union to death and they didn't want that and that effectively deterred them from bombing us. This approach would not work with groups such as Osama bin Laden's al-Qaeda network. It is more complicated than that because the adversaries are more elusive." www.nap.edu and New Sunday Times, 25 August 2002. The President's National Security Strategy for the United States, published in September 2002, states "Traditional concepts of deterrence will not work against a terrorist enemy whose avowed tactics are wanton destruction and the targeting of innocents."

94 HC 25 November 1974, col 35.

Jenkins of Hillhead, returned to the original Bill and stated: "I think that it helped to steady a febrile state of opinion at the time and to provide some limited additional protection. However, I doubt it frustrated any determined terrorist. . . If I had been told at that time that the Act could still be on the statute book 20 years later, I would have been horrified. . . It is not one of the legislative measures of which I can be most proud."[95]

The ATCSA re-introduces a discredited power to 'intern'. Part 4 of the legislation allows for the indefinite detention, without charge of certain foreign nationals suspected of terrorism, based on executive decision. This differs from the Northern Ireland internment power in scale but not in principle. Internment was introduced in 1971 when 27 people were killed in the first eight months of that year. In the following four months, after bringing in that power, 147 people were killed. It has been suggested that the over-reaction of the state fuelled a violent response.[96] During the Parliament debate on the Northern Ireland (Emergency Provisions) Bill, 1998, Frank Dubs stated: "In this Bill, the decision has been taken to get rid of the power of internment. Frankly it has not worked. . . we believe that the use of internment would strengthen the terrorists."[97] More recently, in the House of Commons debate on the ATCSA, Douglas Hogg claimed that "the general arguments against internment without trial are very powerful. We normally get the wrong people; it is unjust; we depart from the moral high ground and we alienate folk. It is a jolly bad policy to pursue."[98] As is noted, the exercise of the 'internment' power in the ATCSA was successfully challenged in the SIAC, although not on the grounds of 'over-reaction'.[99]

Defining 'terrorism' is difficult.[100] Definitions of 'good' and 'evil' are also confusing.[101] For example, Werner von Braun was considered by western states to be evil for inventing the V2 bombers that were used against London but became good when he used his knowledge on behalf of the Americans. Saddam Hussein was described by the USA as good when fighting Iran but was subsequently redefined as evil. Osama bin Laden was also good when,

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[95] Hansard, House of Lords, 27 November 2001, col 199.

[96] N. Whitty, T. Murphy and S. Livingstone, *Civil Liberties Law: The Human Rights Act Era (2001) 122*.

[97] Hansard, House of Commons, 12 January 1998, col. 909. Section 3 repealed the power of internment. However, see *Chahal* v *UK* (1997) 23 EHRR 413.

[98] Hansard, House of Commons, 19 November 2001, col 95.

[99] See, n 83.

[100] One study considered 109 definitions and concluded that "the search for an adequate definition is still on." A. Schmid and A. Jongman, *Political Terrorism: A new guide to actors, authors, concepts, data bases, theories and literature* (1988). "The latest British legisation seems to draw the definition so wide as to be somewhat meaningless". D. Meltzer, "Al Qa'ida: terrorists or irregulars?" in *Law After Ground Zero*, 71, *supra*. See also, www.statewatch.org/news for an account of European Union attempts to define 'terrorism'. P. A. Thomas and T. Standley "Re-Defining Terrorism" *Australian Journal of Law and Society* 4 (1987) 61. Noam Chomsky does not agree that the definition of terrorism is hard. He keeps to the official US Code and Army Manuals. "They give definitions that are good enough for practical purposes." (Personal correspondence, 24 October 2002.)

[101] The classic and much quoted illustration is Nelson Mandela: convicted terrorist and prisoner on Robbin Island, Nobel Peace Prize winner, 1994, and President of South Africa thereafter.

supported by the CIA, he acted as a freedom fighter against communism in Afghanistan. The Taliban were also supported as friends when the US strategy towards the country changed after Afghanistan was identified as a possible pipe-line route for the oil due to come from central Asian states.[102] Perhaps the terrorist can be defined as *homo sacer*.[103] In ancient Roman law this person could be killed with impunity and whose death had no sacrificial value as he was, was already considered to be in the realm of the gods. Thus the terrorist becomes a non-person: game to be hunted and destroyed.[104]

Employing the cliché of 'one man's terrorist is another man's freedom fighter' is inappropriate and unhelpful for lawyers. An established principle of statutory interpretation is that legislation seeking to expand law beyond accepted provisions should be interpreted literally and strictly, as in criminal and tax laws.[105] Expansive definitions of extraordinary laws that stretch the rule of law are contrary to judicial rules of interpretation. Nevertheless, the statutory definition of terrorism as laid out in the Prevention of Terrorism (Temporary Provisions) Act 1989[106] has been increased dramatically by the Terrorism Act 2000[107] and this has been consolidated in the ATCSA.[108] The Terrorism Act 2000 moved away from the Northern Ireland focus and included 'religious fundamentalists' and 'individuals with fanatical leanings'.[109] The expanded definition is found in section 1 (1): "the use of threat, for the purpose of advancing a political, religious or ideological cause, of action which: (a) involves serious violence against any person or property; (b) endangers the life of any person; or (c) creates a serious risk to the health or safety of the public or a section of the public." This Act makes terrorist legislation permanent, thereby recognising the continuing existence of a terrorist threat to our society. The result is that there now exists emergency legislation against a permanent state of affairs.

Turning detentions into convictions is another sign of an efficient enforcement policy. In *Brannigan and MacBride* v *UK*[110] Judge Walsh, in a dissenting opinion concerning a terrorist case, stated "The government has not convincingly shown, in a situation where the courts operate normally, why an arrested person cannot be treated in accordance with article 5

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[102] A. Rashid, *Taliban: The Story of the Afghan Warlords* (2001) especially the chapter "Romancing the Taliban: The Battle for Pipelines". See also, M. Parenti, *The Terrorism Trap* (2002), especially, the chapter on "The Holy Crusade for Oil and Gas": P. Bergen, *Al Qaeda Holy War Inc* (2002): N. F. Ahmed, *The War on Freedom* (2002): "The Clinton administration has taken the view that a Taliban victory would act as counterweight to Iran. . . and would offer the possibility of new trade routes that could weaken Russian and Iranian influence in the region." *New York Times* 26th May 1997. Regional USA foreign policy is laid out in Z. Brzezibski, *The Grand Chessboard: American Primacy and its Strategic Imperatives* (1997).

[103] G. Agamben, *Homo Sacer: Sovereign Power and Bare Life* (1998).

[104] See, S. Zizek, "Are we in a war?" *London Review of Books*, 23 May 2002, 3.

[105] *DPP* v *Ottewell* [1970] AC 642, *Farrell* v *Alexander* [1975] 3 WLR 642, *Inland Revenue Commissioners* v *Ross and Coulter* [1948] 1 All ER 616.

[106] S 20 (1).

[107] S 1.

[108] S 21.

[109] See, *Inquiry into Legislation Against Terrorism* Cm 3420 (1996) paras 1.21-1.24.

[110] (1994) EHRR 539.

paragraph 3. The fact that out of 1,549 persons arrested in 1990 only 30 were subsequently charged, indicates a paucity of proof rather than deficiency in the operation of the judicial function." Official figures recorded by the police give an indication of the efficiency of the relevant legislation. The latest published arrest figures relating to the Terrorism Act 2000 and the ATCSA suggest that arrest patterns associated with previous anti-terrorism legislation continue today.[111] For example, the Home Secretary announced that 137 arrests have been made since September 11th under the Terrorism Act. No convictions have been achieved. 11 people have been detained under Part 4 of the ATCSA. Two of the 11 have left the UK voluntarily.[112] The nine remaining people detained since October 2001 under Part 4 of ATCSA appeared before the Special Immigration Appeals Commission. The commissioners decided that the power to detain foreign nationals only on the grounds that they posed a risk to national security was discriminatory and breached article 14 of the European Convention on Human Rights.[113] Figures on the use of the Criminal Justice (Terrorism and Conspiracy) Act 1998 similarly show that no one has been arrested or charged under that legislation.[114] A similar pattern emerges in the US. Not one of the people detained after September 11th has been charged involvement in the crimes under investigation. As of September 2002 only Zaccarias Moussaoui has been so charged and he was arrested before the round up commenced.[115]

Paddy Hillyard's authoritative study describes in detail the publicly indefensible use to which the Prevention of Terrorism [Temporary Provisions] Act was put.[116] He states that nearly nine out of every ten people detained under this statute on entering Britain were released without any further action taken against them.[117] There were 7,052 people detained under the PTA in connection with Northern Ireland affairs between November 1974 and December 1991. 6,097 were released without charge. Of the rest, 197 were charged with offences under the PTA, 411 were charged under other legislation and 349 were excluded from Britain. Of those charged under the PTA, three-quarters were found guilty. Of these, over half received non-custodial sentences and of those who went to prison the majority were sentenced to one year or less. Of those who were prosecuted under other legislation three-quarters were found guilty. Of this group, 42

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111 The official published figures from the Home Office, 'Statistics on the Operation of the Terrorism Legislation' were published in September 2001. The data in this bulletin includes the first seven weeks of 2001. The Terrorism Act 2000 commenced on 19 February 2001 and is therefore not included. The figures that follow in the body of the article are gleaned from Parliamentary Answers.

112 Hansard, House of Commons, 18 July 2002, col. 553W and Hansard, House of Lords, 7 May, col WA 160.

113 See, *A & ORS* v *Secretary of State for the Home Department*, 30th July 2002, ltl 1/8/2002 (Unreported elsewhere).

114 Hansard, House of Commons, 25 June 1999, col. 471.

115 As of April 2002, government officials stated that out of the 2,000 detainees in the US 10 or 11 may be members of Al Qaeda. D. Cole, "Enemy Aliens" supra.

116 *Suspect Community* (1993). D. Cole produces figures which show that the US authorities are using the PATRIOT Act in a similar manner: low-level intelligence gathering from the 'Suspected Community: the Arabs.

117 *Ibid* 31.

per cent received non-custodial sentences, 12 per cent were sentenced to less than one year in prison and 35 percent to over five years.[118] He concludes that the principal aim of the ordinary criminal justice system was to take some formal action against those suspected of being involved in crime. On the other hand, the main objective of the PTA was to gather intelligence.

The impact of anti-terrorist legislation on innocent people swept up by that law and those empowered to enforce it, is negative, painful and invariably alienating. Hillyard's research included interviewing 115 people about their experiences in relation to the PTA 1974. Each person has a story of grief, disillusionment, anger or frustration to tell, some more dramatic than others do. One standard illustration is that of a person detained for four days and then released without charge stated: "after the detention I was off work for six or seven weeks. I was like a wreck. . . . You always think they're watching."[119]

CONCLUSION

It is argued that the normal balance that exists between the executive, legislature and the judiciary is upset in times of national emergency. The judiciary becomes somewhat cautious about challenging the case presented by the state.[120] For example, in *Home Secretary* v *Rehman* [2001][121] Lord Hoffman said that the attacks in the USA "underline the need for the judicial arm of government to respect the decisions of ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security." The Court of Appeal followed this statement when considering the Home Secretary's ban on the leader of the Nation of Islam, Louis Farrakhan, from entering the UK. The court declared that it was a matter where it is "appropriate to accord a particularly wide margin of discretion to the Secretary of State."[122] However, the Lord Chief Justice Lord Woolf, responded directly to the events arising from September 11th. He addressed the "pressures created by the need to protect this country

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[118] *Ibid* 92.

[119] Hillyard, *supra*, 240. One of my law students was stopped in Holyhead. He was detained for four hours, questioned and searched. He was questioned about the academic reading in his bag and his 'civil liberties' syllabus was taken from him and photocopied.

[120] Professor Keane, dean of the Golden Gate University Law School, predicted that 'judges would be more willing to grant wiretap authorizations, search warrants and other types of 4th Amendment intrusions. Judges tend to be stampeded in times of danger like this.' Dolan, Maura and Weinstein 'Activist groups on the lookout for erosion of civil liberties', *Los Angeles Times* 14th September 2001. Hussein Ibish, spokesman for the American-Arab Anti-Discrimination Committee, Washington, said they had reports of Arab-American lawyers urging clients to find other lawyers 'because of the way they feel they are being perceived by judges' since 9/11. W. Glaberson, 'Arab-Americans see hazards in courtrooms' *New York Times* 3 October 2001.

[121] [2001] UKHL 47, [2002] 1 All ER 122. See also, *Korematsu* v *USA* 323 U.S. 214, 236 (1944) where the leading civil libertarian, Mr Justice Hugo Black wrote the lead Supreme Court opinion upholding the constitutionality of the relocation of Japanese Americans during World War 11.

[122] *R* v *Secretary of State for the Home Department ex parte* Louis Farrakhan [2002] EWCA Civ 606, [2002] 3 WLR 481.

from the merciless acts of international terrorists." He added that it was almost inevitable that, from time to time, under these pressures "parliament or the government will not strike the correct balance between the rights of society as a whole and the rights of the individual." He placed significant value on the power of the Human Rights Act to "strengthen our democracy by giving each member of the public the right to seek the help of the courts to protect his or her human rights in a manner that was not previously available."[123]

The legislature may be pushed into hasty and ill-considered action. In addition, legislation passed as a consequence of the reputedly short term but nevertheless altered balance has a disturbing history of creeping into the realm of political and public acceptance and ultimately becoming permanent.[124] The mindset of those employed to enforce such legislation cannot but be influenced by such radical powers. The result is an expansion and hardening of state powers in the domains of social control and criminal law.

It is argued that those at greatest personal risk from ill conceived and tightly enforced legislation are the weakest and most vulnerable in society: immigrants, asylum seekers, non-citizens, ethnic minorities, Muslims[125] and the Irish. Anti-terrorist legislation does not make us safe though it may offer a degree of comfort to 'middle England'. The price for this comfort is the establishment of dual criminal law structures of police powers, court processes and prison detentions. It also includes the possible loss of confidence in the rule of law from law-abiding people who feel victimised by an incorrectly presumed association with terrorists.

The Rule of Law, equality, proportionality and fairness are challenged by terrorists and also by ill-conceived terrorist legislation. The police and the security services cannot be allowed complete freedom through law to tackle terrorists. The European Court of Human Rights has laid down limits: "The Court, being aware of the danger such a law poses of undermining or even destroying democracy on the ground of defending it, affirms that the Contracting States may not, in the name of the struggle against terrorism, adopt what measures they deem appropriate."[126] Thus, while terrorism is a threat to democracy, so the legislative responses of nation states, and the European Union, carry similar dangers. In the particularly sensitive area of responses to terrorism it is incumbent upon politicians that their executive and legislative decisions be considered, proportionate, time restricted and

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[123] 'Human Rights: Have the Public Benefited' Thank-Offering to Britain Fund Lecture, British Academy, 15 October 2002, London. See, the dissenting judgment of Judge Pettiti in *Brannigan and McBride* v *UK*, *supra*: "If the judiciary is to continue to play its central role under the common law system in upholding the rule of law, it is crucial that it should not only be rigorously independent of the Executive, including the police, and the prosecuting authority, but that it should be seen to be independent."

[124] J. Sim and P. A. Thomas 'The Prevention of Terrorism Act: Normalising the Abnormal' *Journal of Law and Society* [1983] 71.

[125] Hate crimes surged in the US against Muslims and Arabs after 9/11. There was a jump of 1,600 per cent. The FBI stated most incidents involved assaults and intimidation. *International Herald Tribune*, 26 November 2002.

[126] *Klass* v *Germany* (1978) EHRR 214.

appropriate and also that both content and process accord with the principles of the Rule of Law. Neither the PATRIOT Act nor the Anti-Terrorism, Crime and Security Act meet these basic criteria. Should this argument fail to convince, as has been the case to date, then the alternative, supporting argument of effectiveness can be offered. There is scant evidence that anti-terrorist legislation works to control terrorism. Even the suggestion that it is merely symbolic is misleading for positive damage occurs to the fabric of society and to the rights of individuals, especially vulnerable minorities. In addition, the commitment to social justice appears hollow as is the maintenance of a single and standard legal system.

In 1993 a senior Labour politician stated in Parliament: "If we cravenly accept that any action by the government and entitled Prevention of Terrorism Act must be supported in its entirety without question we do not strengthen the fight against terrorism, we weaken it. I hope that no Honourable Member will say that we do not have the right to challenge powers, to make sure that they are in accordance with the civil liberties of our country." The speaker? The former Shadow Home Secretary, and current Prime Minister, Tony Blair.[127]

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[127] Hansard, House of Commons, 10 March 1993, col 975.

COMPARING STANDING REGIMES FROM A SEPARATION OF POWERS PERSPECTIVE

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1. INTRODUCTION

In this increasingly global legal community where jurisdictions frequently interact, the law relating to *locus standi* at first sight stands out as unfit for comparison.[1] The apparent lack of a single, defining rationale would make it hard to compare standing regimes. Different, and at times conflicting, justifications have been provided for having standing rules. Thus, it has been suggested that standing requirements protect the courts from being flooded with cases; prevent valuable court time being wasted on frivolous complaints; keep "busybodies, cranks, and other mischief-makers"[2] from abusing the proceedings; and, finally assure the adverseness necessary for a clear presentation of the arguments on which courts depend.[3]

However, these traditional justifications for having standing rules are not altogether satisfactory. The fear that lowering the standing barrier will open the flood-gates of litigation is unfounded. As Deane J has put it eloquently, it is not very realistic to assume "the existence of a shoal of officious busybodies agitatedly waiting, behind the "flood-gates", for the opportunity to institute costly litigation in which they have no legitimate interest".[4] Furthermore, the risk of an adverse cost order and the requirement of leave are far more effective deterrents to frivolous complaints than standing rules are.[5] In addition, it is highly doubtful whether standing rules can discourage those busybodies intent on crossing the threshold of the courthouse, as the Irish *Riordan* cases demonstrate. Denis Riordan is a frequent litigant who has challenged official conduct in a series of cases, in which both the High Court and the Supreme Court have consistently accorded him standing. Recently, however, the Supreme Court had had enough.[6] When Riordan challenged the impartiality of the judges who had decided a constitutional case, the Supreme Court issued an order restraining the appellant from ever bringing proceedings against officeholders, except with the prior leave of the Court. According to the Court, the reason for this rather drastic measure was

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[1] I am grateful to Gordon Anthony and Tony Bradley for their encouragement, to Peter Leyland and Phil Thomas for their helpful comments and to Alison Doherty for her valuable assistance in preparing this article. I remain responsible for any errors.

[2] As they were called by Lord Scarman in *R* v *Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at 653.

[3] This point was raised by Justice Brennan in *Baker* v *Carr* 369 US 186 (1962) at 204.

[4] *Phelps* v *Western Mining Corp Ltd* 20 ALR 183 at 189.

[5] See De Smith, Woolf and Jowell, *Judicial Review of Administrative Action* (1995), p 102.

[6] *Riordan* v *An Taoiseach*, Supreme Court, 19 October 2001, <http://www.bailii.org/ie/cases/IESC/2001/64.html>.

that he had persistently abused the standing afforded by the courts to make scandalous allegations against the defendants. Finally, as Justice Scalia has pointed out, standing is ill designed to ensure the adversarial nature of the proceedings.[7] In court, non-governmental organisations seeking to promote the common good, rather than to protect their own private interests, tend to be the most formidable opponents of government agencies. But standing rules usually discourage those organisations from initiating proceedings.

Therefore, the reasons traditionally given as justifications for having standing rules appear to be unconvincing. The aims said to be pursued by standing requirements could be achieved much more effectively by other means. It does not come as a surprise, therefore, that some have wondered whether standing is a cure in search of a disease.[8] This paper argues, however, that there is a very sound constitutional reason for laying down standing requirements, *i.e.* the concept of separation of powers. If one accepts that the separation of powers is the "single basic idea"[9] underlying the law on standing, it becomes possible to compare the existing standing regimes in different jurisdictions. A framework for such a comparison will be supplied at the end of this article. The observations made concern challenges to the validity of administrative action as well as to the constitutionality of legislation.

2. The relationship between standing and the separation of powers

The premise that standing and separation of powers are interrelated is not exactly new. The connection was first made by the United States Supreme Court in 1922, in a case called *Frottingham* v *Mellon*.[10] However, it is Antonin Scalia who deserves credit for putting the relation between standing and separation firmly on the agenda. In 1983, while still a Circuit Court Judge, Scalia delivered a lecture at Suffolk University Law School, in which he demonstrated that standing serves as an element of the separation of powers. Since his elevation to the Supreme Court bench in 1986, Scalia has played a leading role in further developing this idea, culminating in the seminal case of *Lujan* v *Defenders of Wildlife*.[11]

According to Justice Scalia, courts are expected to play the undemocratic part of protecting individuals and minorities against impositions of the majority.[12] The law of standing confines them to this traditional role. As a result, if an individual challenges a law's requirement or prohibition of which he is the very object, he ought to have standing. However, when the plaintiff is complaining of an agency's unlawful failure to impose a requirement or prohibition upon someone else, standing should be denied. Although the agency's failure harms the plaintiff in the sense that, as a

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[7] Antonin Scalia, "The Doctrine of Standing as an Essential Element of the Separation of Powers" (1983) 17 *Suffolk U. L. Rev.* 881 at 891-892.
[8] Andrew J. Roman, "Locus Standi: A Cure in Search of a Disease?" in *Environmental Rights in Canada* (Swaigen ed 1981), pp 11-59.
[9] *Allen* v *Wright* 468 US 737 (1984) at 752.
[10] 262 US 447 (1923).
[11] 504 US 555 (1992).
[12] Scalia, *op cit* n 7 at 894.

citizen, it deprives him of governmental acts which the Constitution and the laws require, such harm is majoritarian in nature. Nevertheless, it must be noted that whilst the plaintiff may have stronger views on constitutional regularity than the average citizen, it does not mean that he has also suffered more harm. All citizens have been affected to the same extent, and the issue should therefore be settled by the political process rather than by the courts.

According to Justice Scalia, that explains why "concrete injury" is the indispensable prerequisite of standing.[13] The plaintiff is expected to show that he has suffered an injury which goes beyond the mere breach of the social contract resulting from the unlawful government action. Only such injury can set the plaintiff apart from the other citizens who also claim benefit of the social contract, and entitles him to curial protection against the democratic process. Since courts are designed to protect the individual against the people, they are very ill equipped to protect the rights of the majority. According to his Honour, judges are "selected from the aristocracy of the highly educated, instructed to be governed by a body of knowledge that values abstract principle above concrete result, and (just in case any connection with the man in the street might subsist) removed from all accountability to the electorate". These characteristics enable judges to protect the individual against the majority, but make them unfit for deciding what is good for the people as a whole.[14] The bottom line of Scalia's philosophy is, that liberal standing rules will draw the courts into the areas set aside for the other two branches, *i.e.* the legislature and the executive.[15] This will inevitably lead to overjudicialisation of the process of self-governance.[16]

Justice Scalia's reservations about lowering the standing threshold may be translated into four more or less distinctive objections, which will be set out in the next paragraph.[17] This description will draw mainly on the views expressed by Justice Scalia, both on and off the bench, but will also rely on case law and other sources.

3. Liberal standing rules pose a threat to the separation of powers

3.1 Lax standing rules convert courts into political forums

The first separation of powers objection against lowering the standing barrier is that it will turn courts into political forums at the expense of the other branches. If courts may be moved by anyone to address any issue, they will end up dealing with questions that are better left to the political departments. By confining the jurisdiction of the courts to those disputes which are

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[13] *Ibid* at 895.
[14] *Ibid* at 896.
[15] *Ibid* at 882-883.
[16] *Ibid* at 881.
[17] Earlier analyses of Justice Scalia's views have been offered by Michael A. Perino, "Justice Scalia: Standing, Environmental Law, and the Supreme Court" (1987) 15 *B.C. Envtl. Aff. L. Rev.* 135, and Jonathan Poisner, "Environmental Values and Judicial Review after *Lujan*: Two Critiques of the Separation of Powers Theory of Standing" (1991) 18 *Ecology L.Q.* 335.

traditionally thought to be capable of resolution through the judicial process, the standing doctrine secures that they play a role consistent with the separation of powers.[18] In the view of Justice Scalia, the doctrine of standing acts as a constitutional principle that prevents courts from undertaking tasks assigned to the political branches:

> "It is the role of the courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm; it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution."[19]

Although from a separation of powers perspective this seems a sound proposition, it has not gone unchallenged. In *Flast* v *Cohen*, a judgment handed down in the final year of the Warren Court, the Supreme Court made it clear that one should distinguish issues from persons.[20] According to the Court, if one wants to keep issues from coming to court which are not amenable to adjudication, restricting standing is not the solution. Even those who have a clear stake in the outcome may raise issues which are not suited for curial resolution. If a court is confronted with an issue that it feels belongs to one or the other co-ordinate branch, it should rely on the political question doctrine rather than on denying standing.

Not surprisingly, Justice Scalia disagrees with this type of analysis. Although by raising the standing threshold one might not be able to avoid completely that non-justiciable issues will be raised before the court, at least one can reduce to a minimum the chance of that happening:

> "Nor is it true, as *Flast* suggests, that the doctrine of standing cannot possibly have any bearing upon the allocation of power among the branches since it only excludes *persons* and not *issues* from the courts. This analysis conveniently overlooks the fact that if all persons who could conceivably raise a particular issue are excluded, the issue is excluded as well (. . .). The degree to which the courts become converted into political forums depends not merely upon what issues they are permitted to address, but also upon *when* and *at whose instance* they are permitted to address them."[21]

Justice Scalia's approach is supported by the fact that the number of issues deemed non-justiciable by the courts is steadily declining, making the political question doctrine less relevant.[22] This development is not restricted

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[18] *Valley Forge Christian College* v *Americans United for Separation of Church and State* 454 US 464 (1982) at 472.

[19] *Lewis* v *Casey* 518 US 343 (1996) at 349; see for a similar view Judge Bork's dissent in *Barnes* v *Kline* 759 F.2d 21 (1985) at 44.

[20] 392 US 83 (1968) at 100.

[21] Scalia, *op cit* n 7 at 892; emphasis by Justice Scalia.

[22] See Rachel E. Barkow, "More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy" (2002) 102 *Colum. L. Rev.* 237.

to the United States judges elsewhere also look less inclined to reserve areas for the other branches.[23]

3.2 Lax standing rules transfer responsibility for implementing legislation from the executive to the courts

The second objection that is raised against lowering the standing threshold is that it may compromise the executive's responsibility for law enforcement. Justice Scalia has pointed out that liberal standing rules, in his view, mistakenly, allow plaintiffs to bring cases in which they complain of an agency's unlawful failure to impose a requirement or prohibition on someone else.[24] This is especially the case with statutory provisions that confer upon a private person the ability to bring an executive agency into court to compel its enforcement of the law against a third party. According to Justice Scalia, if such provisions were commonplace the role of the executive in the system of separated powers would be greatly reduced and that of the judiciary greatly expanded. In *Lujan* his Honour explained why:

> "To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed," Article II, § 3"[25]

In his dissenting opinion in *Federal Election Commission* v *Akins* his Honour elaborated on this issue:

> "A system in which the citizenry at large could sue to compel Executive compliance with the law would be a system in which the courts, rather than of the President, are given the primary responsibility to "take Care that the Laws be faithfully executed," Article II, § 3"[26]

In the Australian case of *Bateman's Bay Local Aboriginal Land Council* v *Aboriginal Community Benefit Fund Pty Ltd* Justice McHugh has made a similar point.[27] According to his Honour, an ordinary member of the general public will have standing in the civil courts only if he is able to show an interference or a threatened interference with a private legal right. Civil courts will only enforce the public law of the community or oversee the enforcement of the civil or criminal law, if necessary to protect the rights of individuals who have fallen victim to a breach of law.[28] According to his Honour, under the doctrine of separation of powers the enforcement of the

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[23] See for example *Council of Civil Service Unions* v *Minister for the Civil Service* [1985] AC 374; Conseil d' Etat 25 September 1998, *M. Mégret*, AJDA 1999, p 240; Laurence Baghestani-Perrey and Michel Verpeaux, "Un Nouvel Abandon Partiel de la Notion d'Acte de Gouvernement" (1999) 15 *RFD adm.* 345.

[24] Scalia, *op cit* n 7 at 894.

[25] 504 US 555 (1992) at 577.

[26] 524 US 11 (1998) at 36.

[27] (1998) 194 CLR 247 at 276.

[28] His Honour appears to have been inspired by the views expressed by Justice Scalia, see Mark Aronson and Bruce Dyer, *Judicial Review of Administrative Action* (2000), p 517.

public law is a responsibility of the executive. It falls to the Attorney-General to determine whether civil proceedings should be initiated to enforce the public law of the community.[29]

His Honour has pointed out that this task has been conferred on the executive because not enforcing laws has an important political dimension. First of all, at the general level, non-enforcement of legislation can be an element of social change, often preceding its repeal. Furthermore, particular circumstances of a case may make it undesirable to enforce a law even when it looks as though it has been breached. It is precisely for this reason that the Attorney-General enjoys a discretion. According to his Honour, it should therefore be up to the Attorney-General, who is answerable to the people, rather than to unelected judges to decide whether a particular law should be enforced.

However, there is another side to this coin. As Sunstein observed, the unwillingness of the executive to implement a statute amounts to rewriting it, which can be considered equally damaging to the separation of powers.[30] If the legislature has passed a particular act, the executive is not allowed to mount its opposition by not enforcing it. Perhaps surprisingly, Justice Scalia is not impressed by this kind of argument. In his view, non-enforcement of legislation enables the law to be adjusted to social change and may pave the way for its repeal:

> "Does what I have said mean that, so long as no minority interests are affected, "important legislative purposes, heralded in the halls of Congress, [can be] lost or misdirected in the vast hallways of the federal bureaucracy?" Of *course* it does – and a good thing, too. Where no peculiar harm to particular individuals or minorities is in question, lots of once-heralded programs ought to get lost or misdirected, in vast hallways or elsewhere. Yesterday's herald is today's bore – although we judges, in the seclusion of our chambers, may not be *au courant* enough to realize it. The ability to lose or misdirect laws can be said to be one of the prime engines of social change, and the prohibition against such carelessness is (believe it or not) profoundly conservative. Sunday blue laws, for example, were widely unenforced long before they were widely repealed – and had the first not been possible the second might never have occurred."[31]

3.3 Lax standing rules permit disputes to go to court which are unfit for adjudication

The fact that relaxed standing rules may cause the court's decisions to affect parties not involved in the litigation is the third concern from a separation of powers perspective. The United States Supreme Court has pointed out repeatedly that the standing requirements are meant to ensure that cases will

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[29] (1998) 194 CLR 247 at 276.

[30] Cass R. Sunstein, "What's Standing after *Lujan*? Of Citizen Suits, "Injuries", and Article III" (1992) 91 *Mich. L. Rev.* 163 at 217-218.

[31] Scalia, *op cit*, n 7 at 897; emphasis by Justice Scalia.

only be brought by those who have a direct stake in the outcome.[32] In other words, the law on standing should prevent the court's decision from affecting parties other than the litigants.

The importance of this point can be explained by using Fuller's concept of polycentricity. According to Fuller, a situation is polycentric, or 'many centred', when it concerns a number of interacting factors, *i.e.* when it involves many affected parties or a somewhat fluid state of affairs or both.[33] In getting this point across he relied on the following analogy:

> "We may visualize this kind of situation by thinking of a spider web. A pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole. Doubling the original pull will, in all likelihood, not simply double each of the resulting tensions but will rather create a different complicated pattern of tensions. This would certainly occur, for example, if the doubled pull caused one or more of the weaker strands to snap."[34]

According to Fuller, there are polycentric elements in almost all problems submitted for adjudication.[35] However, cases which are *substantially* polycentric are unsuited to solution by adjudication, because the issues are not clear-cut and because it is impossible to determine the range of persons affected by the outcome. Polycentric problems cannot, therefore, be adequately addressed by the adversarial presentation of proof and arguments by two opposing litigants, which is the essence of the adjudicative process. According to Fuller, such problems should not be left to the courts but to managerial direction or contract,[36] including the political contract, *i.e.* the deal made by lawmakers.[37] In brief, problems characterised by a significant polycentric element should be solved by the political branches rather than the courts. In a sense all public law litigation tends to be polycentric, regardless of the standing threshold. As Fuller has observed, "[T]he instinct for giving the affected citizen his "day in court" pulls powerfully towards casting exercises of governmental power in the mold of adjudication, however inappropriate that mold may turn out to be."[38] Chayes has pointed out that cases resulting in a determination of the constitutional invalidity of legislation may affect many who were not represented in the proceedings.[39] These phenomena are further amplified by the concept of *stare decisis* and similar, more informal, concepts developed in civil law systems.

Although Fuller has not pronounced himself on the relation between polycentricity and standing, it seems obvious that liberal standing rules will increase the number of disputes with a significant polycentric character

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[32] *Sierra Club* v *Morton* 405 US 727 (1972) at 740.
[33] Lon L. Fuller, "The Forms and Limits of Adjudication" (1978) 92 *Harv. L. Rev.* 353 at 395 and 397.
[34] *Ibid* at 395.
[35] *Ibid* at 397.
[36] *Ibid* at 398-399.
[37] *Ibid* at 400.
[38] *Ibid* at 400.
[39] Abram Chayes, "The Role of the Judge in Public Law Litigation" (1976) 89 *Harv. L. Rev.* 1281 at 1294.

going to court. As Justice O' Regan pointed out in the South African case of *Ferreira* v *Levin*, in litigation of a public character the relief sought is generally forward-looking and general in its application, so that it may directly affect a wide range of people.[40] A low standing threshold will attract cases brought by parties who do not have a direct stake in the outcome. Although they do not, therefore, have an exclusive interest, they are able to address the court exclusively. Many absentees who have not been heard and whose interests have not, therefore, been taken into account, will be bound by the outcome of the case. The *Lujan* case, for example, was brought by an environmental organisation which claimed that a change in U.S. law might cause harm to certain endangered species. One of the members of the organisation testified that a development project in Sri Lanka, which was funded by the U.S., threatened the habitat of the Asian elephant and the leopard. It is important to note that those benefiting from the project and those who might feel that the animals posed a threat to other species or to certain types of vegetation were not represented.

The judge will have to decide the case on the basis of the evidence put forward by the parties, and unlike those involved in drafting legislation and rulemaking, he cannot rely on a comprehensive record. He will therefore take a decision which will have ramifications for many, without being able to have regard for the bigger picture. A format devised for solving disputes between two opposing litigants is ill-equipped for dealing with broader public interest questions affecting many. These public interest cases are therefore better left to the political process in which everybody is able to participate, either directly or through his representative.

3.4 Lax standing rules convert courts into supervisors of the political branches

The fourth, and arguably most serious, separation of powers objection raised against relaxing standing requirements is, that it may confer on the judiciary a watchdog role which cannot be reconciled with its proper constitutional function. As Justice Scalia has repeatedly pointed out, structurally monitoring the lawfulness of acts by the government is not the primary function of the courts. In the lecture delivered at Suffolk University Law School, his Honour has emphasised that courts should not review the lawfulness of governmental action other than to judge a claim of injury.[41] Courts should not therefore convert the sometimes inescapable necessity of considering the validity of statutes into a continuing mission to do so, because that would contravene the concept of separation of powers.[42]

Justice Scalia's views find support in *Frothingham* v *Mellon*, a case decided in 1922 by the United States Supreme Court.[43] The Court considered that in a system of separated powers neither department may control, direct, or restrain the action of the other. It pointed out that it has no power per se to review and annul Acts of Congress on the ground that they are unconstitutional. That question will only arise when the plaintiff claims to

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[40] 1996 (1) SA 984 (CC) at 1103.
[41] Scalia, *op cit* n 7 at 884.
[42] *Moore* v *House of Representatives* 733 F 2d 946 (1984) at 964.
[43] 262 US 447 (1923) at 488-489.

have suffered some direct injury as a result of such an Act. In other words, courts should restrict themselves to deciding judicial controversies, and should not assume a position of authority over the governmental acts of another and co-equal department. In *Laird* v *Tatum* the Court again emphasised that under the separation of powers, courts are not allowed to monitor either the executive or the legislature, as it blurs the lines between the branches:

> "Carried to its logical end, this approach would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action; such a role is appropriate for the Congress acting through its committees and the "power of the purse"; it is not the role of the judiciary, absent actual present or immediately injury resulting from unlawful governmental action."[44]

As the Supreme Court pointed out in *US* v *Richardson*, this may mean that an unlawful act will go unchallenged, because nobody can claim to have suffered injury as a result of it.[45] However, the Court held that the absence of any particular individual or class to litigate an issue gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process. In its view, any other conclusion would mean that the Founding Fathers intended to set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the national government by means of lawsuits in federal courts. In his concurring opinion Justice Powell draws attention to the contradictions that would arise if a democracy were to permit general oversight of the elected branches of government by a non-representative, and in large measure insulated, judicial branch.[46]

With this view the separation of powers suffers when courts start to see it as their mission to correct constitutional and legal errors, while using cases as pretexts for doing so;[47] *i.e.*, when the plaintiff becomes a vehicle through which the courts may deal with an unlawful act, an extra rather than the lead actor.

4. Liberal standing rules serve to protect the separation of powers

But the story does not end here. Although lowering the standing threshold might be detrimental to the concept of separation of powers in one way, it may benefit it in another. In order to clarify this point we have to remind ourselves of the aim of judicial review. In the seminal case of *Marbury* v *Madison* Chief Justice Marshall made it clear that the review of the constitutionality of legislation serves to keep Congress within the powers defined and limited by the Constitution.[48] Louis Jaffe made a similar point with regard to the executive when he emphasised that we rely on the courts

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[44] 408 US 1 (1972) at 15.
[45] 418 US 166 (1974) at 179.
[46] *Ibid* at 188-189.
[47] *Valley Forge Christian College* v *Americans United for Separation of Church and State* 454 US 464 (1982) at 489.
[48] 5 US 137 (1803) at 176-177.

as the ultimate guardian of the limits set upon executive power by the constitutions and legislatures.[49] Aman and Mayton are perhaps even more to the point when they make the following observation:

> "A primary purpose of judicial review is to ensure that agencies do not go beyond their statutory powers in carrying out their tasks. If an agency could freely take actions that were *ultra vires*, that is, beyond its statutory authority, its decisions would completely undermine the separation of powers principle upon which the Constitution is based. Article I, §1, for example, vests all legislative power in the elected representatives of a bicameral legislature. Agencies are to implement these statutes and neither amend nor ignore them."[50]

One of the aims of judicial review, therefore, is to keep the executive and the legislature within the confines of their powers. Since authorities that act outwith their powers might trespass on the territory reserved for the other branches, judicial review is an important means to preserve the separation of powers. From this perspective the more opportunity there is for review, the better this aim is being pursued. Or, put differently, the lower the standing threshold, the better the separation of powers will be preserved. Liberal standing rules serve the separation of powers, because they enable courts to review whether or not the authority has acted *ultra vires* in more cases than would be possible under strict standing rules. When there is a prima facie case that an authority has acted *ultra vires*, it is immaterial who brings the action, as long as somebody does. Thus, in the Indian case of *Gupta* v *Union of India* Chief Justice Bhagwatti stated that to deny public interest standing would be to leave the observance of the law to the 'sweet will'[51] of the authority bound by it, and to render the promise of judicial review but a 'teasing illusion'.[52] His Honour made the following observation:

> "Now if breach of such public duty were allowed to go unredressed because there is no one who has received a specific legal injury or who was entitled to participate in the proceedings pertaining to the decision relating to such public duty, the failure to perform such public duty would go unchecked and it would promote disrespect for the rule of law."[53]

Similarly, the Canadian Supreme Court was prepared to recognise citizen's actions, because it felt that unlawful acts performed by government bodies ought not go unchallenged.[54]

Consequently, since the separation of powers requires unlawful acts to be corrected, the standing rules should allow for actions brought in the public

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[49] Louis L. Jaffe, *Judicial Control of Administrative Action* (1965), p 321.
[50] Alfred C. Aman, Jr. and William T. Mayton, *Administrative Law* (2001), p 445.
[51] AIR 1982 SC 149 at 190.
[52] *Ibid* at 190.
[53] *Ibid* at 191.
[54] *Thorson* v *Attorney-General of Canada* 43 DLR (3d) 1 at 7; *Minister of Justice of Canada* v *Borowski* 130 DLR (3d) 588 at 593.

interest. In paragraph 6 this proposition, together with the thesis that lax standing rules may compromise the separation of powers, will be transformed into a suitable framework for analysing standing law. However, before that some proof has to be submitted that the separation of powers angle on standing issues is not unique to the U.S., but can also be applied with some success in other jurisdictions.

5. A little local difficulty?

On the basis of the authorities presented thus far one might get the impression that the separation of powers perspective on standing is a U.S. invention that might be of questionable validity to other jurisdictions. Tribe has even gone so far as to suggest that the separation of powers angle is a recent invention by the Supreme Court, which is closely associated with Justice Scalia.[55] Although Justice Scalia's contribution to this concept can hardly be overestimated, Tribe appears to have overlooked the fact that the Supreme Court has linked standing to the separation of powers as early as 1922 in *Frottingham*.

But the question whether the connection can play a useful role in jurisdictions outside the U.S., which may lack a strong separation of powers tradition, is a legitimate one. For example, is the English law on standing susceptible to analysis from a separation of powers perspective? It is submitted that it does.

First of all, there is growing evidence that the concept of separation of powers plays a part in English law. There is some authority to suggest that the concept of separation of powers is part of British law. In *R.*v *Her Majesty's Treasury, ex parte Smedley*, Sir John Donaldson MR described the separation of powers as "a constitutional convention of the highest importance".[56] In *Duport Steels* v *Sirs*, Lord Diplock emphasised that the British constitution, though largely unwritten, is firmly based on the separation of powers.[57] In the same case Lord Scarman referred to "the constitution's separation of powers".[58] In addition, commentators increasingly explain elements of public law in terms of separation of powers.[59]

It has been suggested that the separation of powers implies that courts should have the power to review the constitutionality of legislation.[60] If that were to be the case, there would be no place for the principle in British constitutional law under the Sovereignty of Parliament. One could argue, on the other hand, that the Sovereignty of Parliament, by clearly indicating which line the executive and the judiciary are not allowed to cross, can be considered an important element of the separation of powers. That is the way in which the Dutch Supreme Court, which operates under a system not dissimilar to the

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55 Laurence H. Tribe, *American Constitutional Law* (volume 1; 2000), pp 388-389.
56 [1985] QB 657 at 666.
57 [1980] 1 WLR 142 at 157.
58 *Ibid* at 169.
59 See *e.g.* Ivan Hare,"The Separation of Powers and Judicial Review for Error of Law" in *The Golden Metwand and the Crooked Cord* (Forsyth and Hare ed, 1998), pp 113-139; Lord Steyn, "The Case for a Supreme Court" (2002) 118 *LQR* 382.
60 Eric Barendt, *An Introduction to Constitutional Law* (1998), pp 7 and 39.

Sovereignty of Parliament, perceives its lack of power to invalidate Acts of Parliament.[61] More importantly, however, both Sir John Donaldson in *Smedley*[62] and Lord Woolf, writing extra-judicially,[63] appear to adhere to this view.

Although close ties exist between the executive and the legislature in the United Kingdom, this does not mean that there is no role to play for the separation of powers. Frequent interaction between both branches of government has become a fact of political life in most modern democracies, even those, like the United States, with a strong commitment to the concept. But as long as it is accepted that there are boundaries between both departments which ought not to be transgressed, the separation of powers is a viable doctrine. The case of *R.* v *Secretary of State for the Home Department, ex parte Fire Brigades Union*, which concerned separation of powers in anything but name,[64] proved that the concept is still very much a live issue in the area of executive-legislative relations.

Even if one would be unwilling to accept that the separation of powers is an important characteristic of British and English law generally, it would be difficult to deny that it has a major impact on the relations between courts and administrative authorities, the area most relevant to the issue of standing. Thus, Nolan LJ (as he then was) has made the crucial observation that the proper constitutional relationship of the executive with the courts is that courts will respect all acts of the executive within its lawful province, and that the executive will respect all decisions of the court as to what its lawful province is.[65] In addition, both Lord Scarman in *Nottinghamshire County Council* v *Secretary of State for the Environment*[66] and Leggat LJ in *R* v *Secretary of State of the Environment, ex parte Hammersmith and Fulham London Borough Council*[67] expressed the view that the question of the scope of review is closely linked to the issue of separation of powers. In an illuminating contribution on this topic, Lord Woolf has convincingly argued that the relationship between the executive and the courts is being determined by the separation of powers concept.[68]

Secondly, there is some evidence to suggest that separation of powers considerations have played a part in English discussions on standing. The idea that unlawful government conduct should not go unchallenged and that a standing lacuna should therefore be avoided, in particular has received some support. In the seminal case of *R.* v *Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses*, Lord

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61 *Harmonisatiewet* (1989) NJ 469.
62 [1985] QB 657 at 666.
63 "Separation of Powers in the United Kingdom: The Role Played by Courts in the United Kingdom" in *Courts and Policy, Checking the Balance* (Gray and McClintock ed., 1995), pp 168-182, in particular at 172.
64 [1995] 2 AC 513; the concept was referred to by one of the dissenters, Lord Mustill, at 567, but within a different context.
65 *M* v *Home Office* [1992] QB 270 at 314-315; the point had originally been made during argument by counsel, Stephen Sedley QC.
66 [1986] 1 AC 240 at 250.
67 [1991] 1 AC 521 at 543.
68 "Judicial Review – The Tensions between the Executive and the Judiciary" (1998) 114 *LQR* at 579.

Diplock stated that he would consider it "a grave lacuna in our system of law if a pressure group (. . .) or even a single public-spirited taxpayer were prevented by outdated technical rules of *locus standi* from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped".[69] Other courts have since made similar statements.[70] The issue has also been raised by commentators, like De Smith, Woolf and Jowell.[71] Hare has made the following observation:

> "One of the principal justifications for judicial review is that all citizens have an interest in the administration acting lawfully and that the rule of law is damaged if illegality is allowed to occur without challenge."[72]

In addition, Schiemann J (as he then was), has drawn attention to the consequences of lowering the standing threshold for the proper constitutional role of the courts. Writing extra-judicially, he has remarked:

> "One of the problems in these cases [*i.e.* brought by Private Attorney-Generals; TZ] is that the effects of judicial decisions rendered in administrative law litigation often go beyond the sphere of the parties actually present in the proceedings. Some of those persons affected by the final decision have not been heard by the court."[73]

In his famous judgment in *R.* v *Secretary of State for the Environment, ex parte Rose Theatre Trust Co* he expressed the following view:

> "Finally, I ought to say that I recognise the force of Mr. Sullivan's submission that since an unlawful decision in relation to scheduling either has been made (if the earlier part of my judgment be wrong) or may well be made in the future, my decision on standing may well leave an unlawful act by a minister unrebuked and indeed unrevealed since there will be those in the future who will not have the opportunity to ventilate – on this hypothesis – their well-founded complaints before the court. This submission is clearly right. The answer to it is that the law does not see it as the function of the courts to be there for every individual who is interested in having the legality of an administrative action litigated."[74]

It is by no means argued that the English law on standing has been modelled on the separation of powers. But the fact that the concept has until now played a part, albeit a modest one, in the discussion on the English law of

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[69] [1982] AC 617 at 644.

[70] See *e.g. R.* v *Secretary of State for Employment, ex parte Equal Opportunities Commission* [1993] 1 WLR 872 at 890; *R.* v *Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement Ltd* [1995] 1 WLR 386 at 395.

[71] *Judicial Review of Administrative Action* (1995), p 99.

[72] "The Law of Standing in Public Interest Adjudication" in *Judicial Review in International Perspective* (Andenas ed, 2000), p 312.

[73] "Locus Standi" [1990] *PL* 342 at 349.

[74] [1990] 1 QB 504 at 522.

standing, and it is increasingly being referred to as an element of public law, justify the assumption that such an analysis will fall on fertile ground.

6. The concept of separation of powers as an explanatory tool

As the previous discussion has shown, the law on standing can promote the concept of separation of powers in either of two ways. Strict standing requirements will benefit the separation of powers by confining the courts to their proper constitutional role. Liberal standing requirements will favour the separation of powers by allowing the courts to keep the other branches within their constitutionally defined areas. These two approaches towards standing and separation of powers can serve as the basis of a framework for analysing and comparing different standing regimes.

Each of the views described above corresponds with a particular type of review.[75] The public interest model is aimed at protecting the legal order by weeding out unlawful administrative acts, regardless of whether they have caused injury. Consequently, the standing thresholds in the public interest models are low. In the private interest model the emphasis is on the adjudication of the plaintiff's claim of injury rather than correcting the unlawfulness of the government action. The illegality of the agency's action will only be reviewed if necessary to establish the validity of the plaintiff's claim, *i.e.* as a side-effect rather than the focus of the proceedings. The private interest model is therefore characterised by relatively high standing thresholds.

These two models can be regarded as the opposing ends of a sliding scale on which all the existing standing regimes can be placed. Thus, Germany and Scotland can be found near the private interest end of the scale, while Canada and India are at the other end.[76] Most other jurisdictions are somewhere in between. By identifying each country's location on the scale a valid comparison can be made between them. Although the sliding scale is a very helpful tool to analyse standing regimes from a comparative perspective, it does not imply that the underlying separation of powers concept played a major part in the development of those regimes. Often standing rules were not made by design but emerged as the result of gradual, incremental, development. If at all, separation of powers considerations usually start to play their part late in the day. However, the fact that most judges and legislators did not have the separation of powers issue on their

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[75] This distinction has been inspired by German public law, *i.e.* objective review of lawfulness and protection of subjective rights, see Walter Krebs, "Subjektiver Rechtsschutz und Objektive Rechtskontrolle" in *System des Verwaltungsgerichtlichen Rechtsschutzes* (Erichsen, Hoppe and von Mutius ed, 1985) pp 192-194.

[76] See O. Kopp and W. Schenke, *Verwaltungsgerichtsordnung* (2000), pp 212-356; A.W. Bradley and C.M.G. Himsworth, "Administrative Law" in *The Laws of Scotland: Stair Memorial Encyclopaedia* (Black ed, 2000), pp 122-155; Lord Hope of Craighead, "Mike Tyson Comes to Glasgow – A Question of Standing" [2001] *PL* 294; Peter W. Hogg, *Constitutional law of Canada* (1997), pp 1365-1376; David J. Mullan, *Administrative Law* (2001), pp 445-460; S. P. Sateh, *Judicial Activism in India* (2002), pp 195-248.

minds when they devised the standing rules, should not detract from the usefulness of the model.

In theory, the public interest model and the private interest model appear to be mutually exclusive; one cannot raise the standing threshold and lower it at the same time. This does not preclude countries from adopting a standing regime in which both models are combined. That is exactly what has happened in South Africa, it mixes a public interest model in human rights cases with a more traditional private interest model in all other areas. At first sight in English law things are exactly the other way around: a combination of liberal standing requirements in general and a strict victim requirement under the Human Rights Act, 1998. However, it is argued that the restrictive interpretation usually ascribed to the victim requirement laid down in Section 7 of the Human Rights Act[77] does not necessarily flow from the case law of the European Court on Human Rights. Although most cases have been brought by petitioners who could claim a direct and personal stake in the outcome, the Strasbourg organs have also allowed actions of a public interest nature. In the *Kjeldsen* case, for example, two parents objected, on behalf of their daughter, to legislative and administrative matters which would make sex education a compulsory part of the curriculum in Danish state schools.[78] The Commission found that the victim-requirement had been met, although the girl had not taken part in the classes. In *Brüggemann and Scheuten*, two women alleged that the German Law on abortion contravened Article 8 of the Convention.[79] The Commission took the view that the applicants were entitled to claim to be victims, despite the fact that they did not claim to be pregnant, nor had they been refused a pregnancy termination, nor had they been prosecuted for unlawful abortion. The case of *Open Door and Dublin Well Woman* was brought by two organisations counselling pregnant women in Ireland, two trained counsellors working for one of the organisations, and two women.[80] The applicants complained of an injunction which had been imposed by the Irish courts on the two organisations restraining them from providing information to pregnant women concerning abortion facilities outside the Irish jurisdiction. The State party argued that the complaints submitted by the two women amounted to an *actio popularis* since they could not claim to be victims of an infringement of their Convention rights. The majority of the Court did not share this view and pointed out that, although it had not been asserted that the women were pregnant, it was not disputed that they belonged to a class of women of childbearing age which could be adversely affected by the restrictions imposed by the injunction.

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[77] See *e.g.* Joanna Miles, "Standing under the Human Rights Act 1998: Theories of Rights Enforcement & the Nature of Public Law Adjudication" (2000) 59 *CLJ* 133; Jane Marriott and Danny Nicol, "The Human Rights Act, Representative Standing and the Victim Culture" [1998] *EHRLR* 730; Michael Supperstone and Jason Coppel, "Judicial Review after the Human Rights Act" [1999] *EHRLR* 301 at 306-309; Stephen Grosz, Jack Beatson and Peter Duffy, *Human Rights* (2000), pp 75-88.

[78] Application No. 5095/71, Yearbook 15, pp 482-508.

[79] Application No. 6959/74, Yearbook 19, p 414; D. R. 5, p 115.

[80] A 246, para 44 (1992).

These and other examples[81] make clear that the Strasbourg organs have allowed the occasional public interest case.

Although the location of a particular standing regime on this sliding scale will usually be the result of an incremental development, the considerations that have played a part can sometimes be made visible. Courts may, for example, be induced to lower the standing threshold when litigation costs are high, when leave is required or when remedies are discretionary.[82] In India public interest actions were introduced in order to accommodate litigants with limited resources.[83]

Sometimes these factors themselves are closely related to the concept of separation of powers. In Germany the high standing threshold has been associated with the intensity of the review exercised by the courts. Because their review is rather probing, courts try to maintain the proper balance by limiting access to it.[84] Lowering the standing barrier may also act as a substitute for checks and balances which are no longer effective. The Australian High Court has made it clear in *Bateman's Bay Local Aboriginal Land Council* v *Aboriginal Community Benefit Fund Pty Ltd* that citizens can no longer be expected to rely upon the grant of the Attorney-General's fiat for challenging unlawful government action. This is caused by the fact that in Australia the Attorney-General is a member of the Cabinet who will be reluctant to put his ministerial colleagues in the dock. As a result, the standing rules should not be interpreted in too a restrictive way.[85] In *Truth about Motorways Pty Ltd* v *Macquarie Infrastructure Investment Management Ltd* Justices Kirby and Callinan have identified some circumstances in which it is appropriate to rely on the enforcement of the law at the initiative of a private individual rather than the action of the responsible agency.[86] Inadequate resources and the fact that the agency has become too close to those officials against whom it should be enforcing the law, belong to this category. Finally, the 'chain-theory' developed by Lord Woolf prescribes that if other restraints on the executive are failing, the courts should compensate for that by scrutinising its actions. This implies that under these circumstances they should relax the standing requirements.[87]

7. CONCLUSION

At first sight the multifarious functions attributed to *locus standi* make this area unfit for comparison. However, if one accepts the proposition that the concept of separation of powers serves as the exclusive rationale of standing, a useful comparison can be made between different standing regimes. On

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81 See Tom Zwart, *The Admissibility of Human Rights Petitions* (1994), pp 50-71.

82 *Bateman's Bay Local Aboriginal Land Council* v *Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 263.

83 Sateh, *op cit* n 74 at 202.

84 Schmidt-Assman, "Die Kontrolldichte der Verwaltungsgerichte: Verfassungsrechtliche Vorgaben und Perpektiven" (1997) *DVBl* 281 at 285.

85 (1998) 194 CLR 247 at 263.

86 (2000) 200 CLR 591 at 653-654 and 668-669.

87 It is no coincidence that Lord Woolf mentions the *Gouriet* decision taken by the Court of Appeal as an example. That judgment was characterised by a very liberal approach towards standing (although see also the House of Lords' much restrictive approach on appeal at [1978] AC 435).

the basis of this premise a sliding scale can be developed with the public interest model and the private interest model serving as opposing ends. All the existing standing regimes are located on this sliding scale.

DEVOLUTION, THE BRITISH CONSTITUTION AND THE DISTRIBUTION OF POWER

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INTRODUCTION

This article provides a critical discussion of important aspects of the UK devolution arrangements which came into effect in 1999. There will only be brief mention of the main characteristics, as the principal concern is not to map the functions that have been devolved, but to focus on the immediate implications of the arrangements. The first sections consider some of the most obvious deficiencies in the legislation in relation to the way power has been distributed, especially in regard to funding arrangements, sovereignty and political representation, while the remainder of the discussion attempts to consider devolution in a broader context, namely, in terms of the manner in which power is exercised more widely in the modern state. The objective here is to concentrate on some of the questions of governance that arise beneath the surface of the main institutional provisions. Four areas have been selected for discussion: concordats, compacts, regulation and deregulation, and the EU representation of the UK post devolution.

The current devolution arrangements are both a realisation of long held aspirations of advocates of devolved government in Scotland, Wales and Northern Ireland and a political reaction to the centralising tendencies of government that were particularly noticeable during the 1980's and 1990's. For the most part UK devolution, which has been on and off the political agenda for the last thirty years, can be viewed as a settlement (for the time being at least) which has been "made to measure" for each of the nations. Nevertheless, rough parallels have frequently been drawn with Spain which likewise has nationalism confined to particular geographical regions and has therefore taken an asymmetrical approach to redistributing power.[1] On the other hand, the UK legislation, even in the case of Scotland, stops significantly short of introducing anything approaching a federal system on the German model. There are certain affinities with the European Union principle of subsidiarity which was incorporated as a check to any centralising initiatives resulting in a European super state.[2] However, viewed from a wider European context, these changes do not appear to be directly connected to other emerging demands for local self determination. For example the resurgence of the many local national movements that were

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1 See *e.g.* J. Hopkins *Devolution in Context: Regional, Federal and Devolved Government in the European Union*, (2002) at p 46 and p 120ff; R. Hazell and B. O'Leary 'A Rolling Programme of Devolution: Slippery Slope or Safeguard of the Union' in R. Hazell *Constitutional Futures: A History of the Next Ten Years*, (1999) at pp 24-27.

2 See P. Craig and G. De Burca *EU Law: Text, Cases and Materials*, 2nd ed (1998) at p 124ff.

given impetus by the demise of the former Soviet Union and the collapse of Yugoslavia.[3]

For the purposes of this analysis there will be emphasis on the contrast between the apparent exercise of political power and the impact of devolution on the wider process of policy making and administration. Clearly, the devolution measures were a pragmatic response by a pragmatic government and it turns out to be not one but a series of plays. Each one carefully plotted to include a set of reforms which have been calculated at a political level to placate dissatisfaction with the ever more centralising tendencies of the state. But some would argue that it goes beyond what even its architects envisaged. It has been suggested that the legislation is so comprehensive in its provisions, especially those dealing with the electoral system and the functions of Parliament/Assembly, that each statute can be regarded as equivalent to a constitution for its respective part of the UK.[4]

On the other hand, it could be argued that devolution merely sets a democratic seal on a governmental and administrative formation that had already been largely set in place. For instance, this is particularly true in regard to Scotland which has never been wholly incorporated into the UK and always retained its own distinctive church, legal and educational system[5]. To allow for this, Westminster legislation intended for Scotland (and also Wales) followed a different procedure.[6] But also at the level of policy implementation the growth of executive devolution was a feature of the system of government of the twentieth century.[7] Power in many policy fields had come to be exercised by officials under the direction of a Secretary of State for Scotland, Wales or Northern Ireland. In the light of the executive changes alluded to, it might be observed that the powers that have been devolved are predictable. For the most part in Scotland and Wales these powers correspond to the remit and responsibilities of the previous departments of state. Thus there has been a history of the accretion of powers to the Scottish and Welsh Offices with the growth of the administrative state and that these powers now rest with the newly formed executives. While in the case of Northern Ireland it was the devolved powers that had been vested in the Stormont system of government that reverted to the Northern Ireland Office following the collapse of the system in 1972.[8]

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[3] See *e.g.* E. Hobsbawm *Age of Extremes: The Short Twentieth Century 1914-1991*, (1994) chapter 16 'End of Socialism'.

[4] AJ Ward 'Devolution: Labour's Strange Constitutional Design', in Jowell J & Oliver D *The Changing Constitution*, (2000) at p 112.

[5] See *e.g.* the Treaty of Union 1707 Articles 18 guaranteed Scottish private law. Scottish Act of Security 1706 secured the protestant religion and the Presbyterian Church.

[6] The role of the Scottish/Welsh Grand Committee. See A Bradley & K Ewing *Constitutional and Administrative Law*, 12th ed (1997) at p 201.

[7] 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.

[8] V. Bogdanor *Devolution in the United Kingdom*, (1999), at p 99.

One 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.[9] In an important sense the significance of devolution is that by establishing elected assemblies with powers of scrutiny through new subject committees, it supplies greatly improved mechanisms of accountability that involve an increased political participation.[10] Indeed, a further effect of conferring power locally has been to throw open the question of regional government for England which in terms of political representation is now treated less favourably to Scotland, Wales and Northern Ireland.[11] Finally, it should also be recognised that in constitutional terms devolution has a special kind of status. Although the doctrine of sovereignty prevents any entrenchment in the same sense as there is in the USA or other written constitutions the device of the referendum as a democratic seal of approval (*e.g.* as with the EU) – would make the dismantling of these arrangements much more difficult than with other legislation.[12]

So, in summary, devolution provides a new level of government subordinate to Westminster on an asymmetrical basis. It establishes a democratically elected Scottish Parliament with the power to pass primary legislation. It sets up power sharing arrangements in Northern Ireland, also based on a different PR system of elections with the power to pass primary legislation and an elected Welsh Assembly with no power to pass primary legislation.[13] Moreover, the mechanisms of accountability that have been set in place as part of devolution are in many ways superior to those at Westminster. The Labour party claimed that it would bring democracy closer to the people by introducing these reforms. Devolution not only provides the electorate in each nation with the right to vote on the basis of proportional representation but each piece of legislation successfully introduces democratic institutions and processes.

(1) The Democratic Politics of Devolution

We shall see that the view that there has been a substantial shift of power can be supported, in part at least, by some of the evidence of the political

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[9] This was 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.

[10] In Northern Ireland this is achieved by a system of power sharing at every level. An impressive feature in Scotland is the proportion of women in the Scottish Parliament (37% SMPs).

[11] For example, the West Lothian question discussed later. According to many experts England does relatively badly out of the Barnett formula. See note 24 below. The introduction of an elected Mayor and Assembly for London is closely related to these measures and might also be viewed as part of a commitment to redress a perceived 'democratic deficit'. See Greater London Authority Act 1999.

[12] M. Loughlin *Sword & Scales: An Examination between Law and Politics*, (2000) notes at p 154, 'And although the Scotland Act 1998 takes the form of a devolution of legislative authority to a subordinate body, it is inconceivable that the courts would rule that powers conferred on the Scottish Parliament cannot lawfully be withdrawn without the consent of that institution?'

[13] For an in depth contextual discussion of Welsh Devolution see 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.

tensions that have emerged following the activation of the legislation.[14] For example, it is already very evident that a new political force has been unleashed by the devolution process. It may even be suggested that it is the case of the tail wagging the dog with Scotland forcing the pace in regard to English policy on student grants, free personal care for the elderly, freedom of information and producing a more streamlined industrial culture. The introduction of coalition government, with each party having to respond to local demands already indicates that national political parties are ceasing to be monolithic institutions that can be readily controlled from the centre[15]. In some areas policies have been pursued by a Labour dominated administration in Scotland and Wales which conflict with the policy of the Westminster government. This tendency has the potential to influence national policy making. For example, take the decision by the Labour government to introduce tuition fees for university students which faced more intense opposition in Scotland.[16] Education is an area that falls under the responsibility of the Scottish Parliament and the imposition of student tuition fees and loans was an important issue at the Scottish general election held in May 1999. The Scottish Nationalists and Liberal Democrats in Scotland declared support for the restoration of a subsistence allowance for poorer students in Scotland. As part of the post-election coalition deal between the Labour and the Liberal Democrats the Cubie Committee was set up to look into this matter. Following the publication of the committee's report[17] the Labour and Liberal Democrat coalition agreed to partly abolish tuition fees for Scottish students and replace them with a tuition endowment.[18] Since students from England, Scotland, Wales and Northern Ireland can choose to be educated at universities anywhere in the UK, this means that the arrangements for students in Scotland call into question the Westminster government's system of means tested tuition fees and means tested loans, as this results in Scottish students being treated more favourably than other students.

Also, the national Labour party based in London has failed to successfully exert pressure on its Scottish counterpart to fall into line on this question. Indeed, the changes to student fees and funding in Scotland may have an impact on the policy that is adopted in this area by the government in England and Wales. But more generally it would seem likely that disputes of this kind will tend to fragment the existing party system. Ultimate accountability to a different electorate will result in the gradual abandonment

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[14] For a summary of the initial political impact of devolution see E. Bort 'Devolution and the end of Britain' *Politics Review,* February 2001, pp 28-30.

[15] M. Laffin, A. Thomas and A. Webb 'Intergovernmental Relations after Devolution: The National Assembly for Wales' *Political Quarterly* [2000] pp 223-233 at p 225. The replacement of Alun Michael by Rhodri Morgan in February 2000 illustrates the emerging tension between Cardiff and London. The last straw that prompted Michael's resignation was his inability as first minister to secure additional EU funding for Wales.

[16] See Education Act 1997.

[17] The Independent Committee of Inquiry into Student Finance; http://www.studentfinance.org.uk /final/

[18] See *e.g. The Sunday Herald* 16th January 2000.

of old party loyalties.[19] In one sense this might be regarded as a vindication of devolution – it supports the case that having an elected Parliament/Assembly with divergent views can lead to a real choice of policy, tailored to meet local demands expressed through a more democratic process.

This has not been a one-way process. To stem the tide of dissent and re-assert power from the centre the Labour party hierarchy have striven to quite blatantly manipulate the selection process of candidates.[20] This has been to secure the leadership's preferred choice for the most prestigious posts of Scottish First Minister, Welsh First Secretary and London Mayor. However, the attempts to keep a tight reign have not been very successful.[21] Rhodri Morgan succeeded Alun Michael as Welsh Secretary after a no confidence vote in the Welsh Assembly confirmed the lack of support for his leadership and Ken Livingstone (though excluded from the party) was elected as London Mayor on an independent ticket.[22] The Scottish Conservative party is also showing signs of branding itself distinctively from its English counterpart. The combination of having to appeal to a distinctive electorate and the use of proportional representation has changed the complexion of existing political parties at the local level, fragmenting the existing system. And given more time this may also encourage the formation of new political parties.[23]

(2) Constitutional Limitations

Devolution is significant because it has led to a formal division and delegation of aspects of the political process and it marks a major departure in that the UK is arguably no longer a unitary state. However, viewed from the standpoint of constitutional design, the devolution legislation has a number of obvious weaknesses. For instance, these are not only that both the purse strings and sovereignty remain in the hands of Westminster but the new arrangements fail to address the issue of inequality of representation in the Westminster Parliament.

(i) The Funding of Devolution

The most obvious way in which devolution might be regarded as illusory as a meaningful conferment of power and again in which the arrangements stop well short of federalism is that the economic parameters have been largely untouched by the arrangements.[24] For the Labour government a prime

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[19] Political difficulties for Labour also arose in Wales with the forced resignation of the Welsh First Secretary on 10th February 2000.

[20] See L. Baston 'The Party System' in A. Seldon (ed.) *The Blair Effect: The Blair Government 1997-2001,* (2001) pp 162-167.

[21] Dennis Canavan, former MP for Falkirk West, was not selected on the basis of his left wing credentials but proceeded to win a seat for the Scottish Parliament as an independent candidate.

[22] Ken Livingstone was elected Mayor in May 2000.

[23] See *The Guardian* Editorial 15th December 1999 which comments on the effectiveness of the opposition parties in Scotland and the increasing independence of the political newcomers in the Scottish Parliament.

[24] For a detailed discussion of the background to these funding arrangements see V. Bogdanor 1999 *op cit* n 8 above p 235 ff. This question is also addressed in some

advantage of their preferred solution in each of its manifestations (this also includes London) is that it provides a revised framework for democratic involvement and direct accountability to elected institutions but it does so with only marginal changes to resource allocation. Crucially, the Barnett formula which determines the overall budget for each part of the UK remains untouched. Of course – within the relevant areas of competency for each executive the devolution arrangements allow the budgetary amounts allocated to the respective areas of policy to be determined at a local level. But only Scotland and the London Mayor are granted any revenue raising power and this is strictly limited to a small fraction in terms of the overall budget.[25] The Scottish provision is also regarded as a potential electoral suicide note for any party standing on a ticket of higher taxation. (The burgeoning costs of the new Holyrood Parliament building which have spiralled to an estimated £280 million are already regarded as a liability with the Scottish electorate). The devolution arrangements rest on questionable foundations by having democratically elected institutions with responsibility for spending but not for the raising of revenue. Westminster remains in a position where, after a process of consultation, it can vary the allocations of funding.[26]

(ii) Sovereignty and law making powers

Although there is no doubt that in constitutional terms the devolution legislation has a special status, the supreme law making capacity of Westminster remains intact.[27] Formal limits and restraints on the devolved institutions are contained in the legislation. The sovereignty of the UK Parliament is deliberately preserved.[28] This is particularly significant in relation to Scotland and Northern Ireland because the Scottish Parliament and the Northern Ireland Assembly are granted the most extensive powers to pass a form of primary legislation.[29] For example, in Scotland there are procedures in place to guarantee conformity with the Scotland Act. Pre-enactment scrutiny requires the Scottish Minister and the Presiding Officer to confirm that in their view the bill falls within the Parliament's legislative

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depth in *New Economy* 2000 No 7 Vol 2 64-86. See J. McConnell 'Funding Devolution: Why Barnett Remains Better than the Alternative' J. Barnett (Lord) 'The Barnett Formula: How a temporary expedient became Permanent'; Midwinter A 'The Barnett Formula: Why replacing it would be a mistake' I. McLean 'Getting and spending: can (or should the Barnett Formula Survive?'. See also R. Wilson 'Private Partners and Public Good' in this issue of the *NILQ* at p 454 for discussion of aspects of funding implications for Northern Ireland.

25 See Scotland Act 1998 Part IV ss 73-80.

26 A. Midwinter 'The New Accountability? Devolution and Expenditure Politics in Scotland' *Public Money & Management*, July September 2001 p 47.

27 Scotland Act 1998 Section 28(7).

28 See Scotland Act 1998 Section 29 (1) which states that 'An Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Scottish Parliament'. Schedule 5 (about 16 pages of reserved matters).

29 See B. Winetrobe 'Scottish devolved legislation and the courts' [2002] *Public Law* 31-39 at p 32 where it is pointed out that although subsidiary in UK terms the legislative power can be regarded as primary when falling within the scope of the Parliament's competence.

competence.[30] Following the passage of the bill, but prior to the Royal Assent there is a pause to allow Law Officers in London or Edinburgh to, if necessary, obtain a judicial decision on *vires* from the Judicial Committee of the Privy Council. The Secretary of State for Scotland is also empowered to prevent the Presiding Officer from submitting the bill for the Royal Assent by presenting reasons why a measure might conflict with international obligations, national security or matters reserved under the Act.[31] In regard to Wales which has an Assembly without primary law making powers the device of a transfer order has been used to transfer the former functions of the Secretary of State for Wales contained in numerous statutes to the Assembly.

Nevertheless, it was predicted that following devolution the supremacy of Parliament would have a "different and attenuated" meaning so that "instead of enjoying a regular and continuous exercise of supremacy, [Westminster] will possess merely a nebulous right of supervision . . . ".[32] The point being that post devolution Westminster would find it difficult to legislate against the wishes of the Scottish Parliament or the Northern Ireland Assembly. Moreover, there was an expectation that a convention would be established whereby the UK Parliament would not normally legislate over devolved matters and that this would be an unusual occurrence which would take place with the agreement of the devolved legislature.[33] However, a detailed review of the legislative record reveals that in fact Westminster legislation applying to Scotland has abounded since 1999.[34] This has been to a much greater extent than anticipated. To some degree this can be accounted for by the fact that the same party is in power in Westminster with a commitment to common policy objectives. Further, there is a need to comply with international obligations on a nationwide basis[35] and for participation in particular UK wide initiatives.[36] Also, in certain areas there may be an advantage to having common regulatory measures.[37] Page and Batey suggest that there are straightforward practical reasons for the continuing dominance of UK departments in promoting legislation across borders. For example,

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[30] Under the Scotland Act 1998 the Presiding Officer is elected by the MSPs (with two deputies) to perform a number of parliamentary functions, some of which are similar to those of the Speaker of the House of Commons.

[31] See Scotland Act 1998 s 35; R. Rawlings 'The Shock of the New: Devolution in the United Kingdom' in E. Riedel (ed.) *Aufgabenverteilung and Finanzregimes in Verhältnis zwischen dem Zentralstaat and seinem Untereinheiten*, (2001) 65-93 at p 78.

[32] V. Bogdanor, 1999 n 8 above at p 291.

[33] This is referred to as the Sewell Convention. It acknowledges that three types of legislation require the consent of the Scottish Parliament to be proceeded with: Westminster legislation for devolved purposes; Westminster legislation altering legislative competence; and Westminster legislation altering executive competence.

[34] See generally A. Page and A. Batey 'Scotland's Other Parliament: Westminster Legislation about Devolved Matters in Scotland since Devolution' 2002, *Public Law* 501-524.

[35] The Political Parties, Elections and Referendums Act 2000. See Page and Batey 2002 *op cit* p 511.

[36] Food Standards Act. See Page and Batey above at n 34 p 511.

[37] Regulation of Investigatory Powers Act and the Financial Services and Markets Act. Page and Batey above at p 512.

seeing legislation enacted on a UK basis prevents unacceptable delay in the introduction of measures likely to be popular with the electorate in Scotland while leaving more time for the Scottish executive to pursue its own agenda of reform. It is also clear that legislation from the Westminster Parliament is less susceptible to challenges in the courts.[38] Nonetheless, this evidence suggests that the Scottish Parliament and Scottish executive have assumed a much less prominent legislative role than seemed likely given the powers granted under the Scotland Act. It also confirms that there is a continuing pull to uniformity in the devolved system of government.[39]

(iii) Inequality of political representation

The so-called West Lothian question has long been recognised and it will simply be referred to here as a substantial defect in the arrangements. In essence it has been argued that establishing a powerful Scottish Parliament plays havoc with the notion of representative government in the United Kingdom. MPs representing English, Welsh and Northern Irish constituencies no longer 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. 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 affairs is through their Scottish representatives.[40] Of course the other related question is the lack of any equivalent level of representation for England. This is an emerging issue which has not been adequately addressed.[41] Labour went into the 2001 election arguing that "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". At the Westminster election Labour maintained its support in Scotland and Wales and so could have a great deal to lose from any further re-distribution of seats that might arise from the creation of an English Parliament.

It would seem that economic development has been the driving force behind Labour's English regional policy.[42] For example, an extra tier of government opens up the opportunity of attracting more of the European Unions structural funds designated for the regions.[43] Recently, the government has published proposals for English regional government which build on the existing structures, in particular the Regional Development Agencies. The proposals will allow a referendum to be held in the 9 existing English regions

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[38] Page and Batey 2002 above at n 34 pp 514-517.

[39] *Ibid* p 502.

[40] The significance of Westminster legislation over devolved matters requires Westminster's Scottish MP's to continue to be the guardians of Scottish interests. See A. Page and A. Batey 'Scotland's Other Parliament: Westminster Legislation about Devolved Matters in Scotland since Devolution' 2002, *Public Law* 501-524 at p 522.

[41] The Regional Development Act 1998 introduces a new policy for economic regeneration by dividing England into 9 regions.

[42] See for example, *Ambitions for Britain*, Labour Party Manifesto, 2001, pp 34-35.

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

to test public support. A vote in favour will result in an assembly elected by proportional representation which will consist of between 25 and 30 members.[44] The newly formed regional assemblies are not intended to add an extra tier of government or introduce any additional bureaucracy. In particular, they will not duplicate the work of either the UK Parliament or existing local authorities. In the first place, this is because the majority of functions will come from existing central government bodies and thus this is presented as representing a significant decentralisation of power. Secondly, this is because before a referendum is held on the desirability of a Regional Assembly a review will take place to ascertain the best method for a unitary structure of local government for that region. In sum, this is an attempt to improve policy delivery by extending democratic accountability and ensuring better co-ordinated government at a regional level.[45] From one perspective it would appear that the White Paper proposes to put in place a system which seeks to compensate the English regions for some of the potentially adverse economic effects of devolution. However, the powers of the proposed assemblies appear modest in comparison with those given to the devolved institutions in Scotland, Wales and Northern Ireland. Moreover, the fact that any actual change is contingent on a number of regional as opposed to one national referendum is likely to lead to an even more asymmetrical distribution of competences.

(3) Devolution and the Limits of Power

The many positive features of devolution are not to be underestimated. We have seen that these changes introduce a new level of government which is more politically accountable in certain ways than Westminster. The aspirations of a substantial proportion of the local electorate have been satisfied and in the case of Wales possibly exceeded.[46] Nevertheless, the question remains as to whether measures of this kind can provide an effective system of government for the devolved parts of the UK and for England. It appears that there are important arguments to consider around the potential of constitutional reform and also the potential of administrative changes of the sort alluded to. To put it simply the question might be stated thus: are constitutional modifications at the level of the nation state capable of coping with the kind of problems that are now presenting themselves at a national and sub-national level. It is not so much whether appropriate powers have been devolved, or indeed whether sufficient power has been devolved, but whether such arrangements are likely to make the delivery of policy worse rather than better, given the complexity of the mechanisms for implementation in the contemporary state.

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[44] See *Your Region, Your Choice: Revitalising the English Regions*, 2002, Cm 5511.

[45] The assembly will be given control over areas such as: economic development, housing, health improvement and culture which are currently under county councils and district councils. Social services, education and other local services will remain with existing local authorities.

[46] See J. Barry Jones 'The First Welsh National Assembly Elections' 1999, *Government and Opposition* 323-332 at p 326 who states 'Before the referendum, in September 1997, devolution was an abstract idea of little relevance for ordinary voters, more concerned with real issues that vague notions of constitutional reform'.

At one level it can be argued that the ideas associated with the functionalist approach to public law and administration remain important as a means of assessing the measures under consideration.[47] Such a view regards law as a sophisticated form of political discourse and considers not only legal decisions but laws themselves as an expression of political will. This might appear to be relevant in regard to the political considerations lying behind devolution which have already been touched upon in this article, but functionalism further rests on a belief that the state has a pro-active role in providing social welfare out of general taxation and holds that public law has a special importance because it becomes *the* medium which determines the delivery of certain types of universal goods such as health, education, pensions, housing and so on. It does this by providing a framework of legislation which serves as the mechanism for implementation of policy.[48] In a somewhat different sense and one particularly apposite to the discussion on regulation and deregulation that follows, law also has a crucial function in protecting the general public interest by providing a layer of regulation across both the public and private sector.[49] By doing this, it stands between the individual and the unmitigated effects of market forces. The potential of law in facilitating the efficient and equitable delivery of public services is recognised and encouraged by functionalists while the routine intervention of the courts into the administrative process is strongly resisted. Indeed, the objective from this standpoint is instrumental and pragmatic. It is to enhance rather than diminish the potential for good administration by designing *intra vires* mechanisms to achieve efficient operation of services which are at the same time democratically accountable.[50] Further still, there is an assumption that universal access to benefits and services is at least as important as promoting individual rights under the ECHR or for that matter rights to national self determination. The key is to ". . . address the issues of social power at national and trans-national level which increasingly mark out the subordination of individuals".[51]

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[47] See *e.g.* C. Harlow 'Changing the Mindset: The Place of Theory in English Administrative Law' 1994 *OJLS* 419-434 at p 424 who refers to the functionalist method which seeks to identify the goals of particular administrative systems and evaluate performance within the framework of these objectives. It is described by Cohen as questioning 'the effectiveness of various possible legal rules and arrangements'.

[48] M. Loughlin *Public Law and Political Theory*, Oxford, OUP, 1992 see *e.g.*, p 168ff. In his more recent work *Sword & Scales: An Examination between Law and Politics*, Hart, 2000 Loughlin pursues this theme further.

[49] Allison JWF *A Continental Distinction in the Common Law*,1999 provides a comparative historical account and which shows how (at p 87) 'The emerging theory of the state and its administration affected the justification of public law and the application of the distinction between public and private law'. He proceeds to note that Laski distrusted legal controls and emphasised parliamentary controls and citizen participation. Of course, since the 1980's the distinction between public and private law has become blurred in many areas.

[50] C. Harlow and R. Rawlings *Law and Administration*, 2nd ed, (1997), see *e.g.* pp 75-78. It has already noted there are important ways in which devolution provides enhanced mechanisms of accountability for the policy areas which fall under its remit.

[51] Lord Wedderburn 'Laski's Law Behind the Law. 1906 to European Labour Law' in R. Rawlings ed *Law Society and Economy*, (1997) at p 61.

However, the concern here is not so much to review the political terms of the devolution legislation, but rather to assess how these arrangements measure up as a response to the conditions of modern governance. This requires some attention to be devoted to the importance of the structural problems caused by a "hollowing out" of the state which has been subject to a loss of functions upwards to the European Union (there will be discussion of relations between the devolved governments and Europe below) and downwards towards many different bodies including agencies and the private sector[52]. To add to this already complex trend,

> "The devolution settlement has brought about a multi-layered government in the sense of creating different tiers or levels of government, but it has also compounded the trends towards a multi-textured democracy in which power is located in several levels of government at the same time. There is the possibility throughout the devolution settlement that power might simultaneously reside in one site of power or in multiple sites".[53]

Thus it can be proposed that "transformations of public administration have made more transparent the dense networks of accountability within which power is exercised".[54] Indeed, given this tendency it has been persuasively argued by a number of commentators that too much faith has been placed in an "old constitutionalism" based upon reviving the role of Parliaments. Such ideas can be questioned as too closely wedded to a "liberal, individualist version of democracy".[55] At the same time exposing the inadequacy of institutionalised liberal models which attempt to "guarantee an essentially non-political common good by the satisfaction of private preferences".[56]

It is suggested that while constitutional solutions can address certain questions reasonably effectively, there is a micro-political arena at which they fail to adequately engage. If we first take a conventional view of a constitution, it would appear that apart from setting out the rights and duties of citizens and providing the ground rules for the organisation of government, this is seen as *the* mechanism for laws to be rationalised in terms of legal subjectivity. It is the constitution which describes a set of institutions which will resolve the contradiction between the need for coercive political action and the equally important need to guarantee personal freedom. In practice, we see that as part of the political process programmes will be introduced in Parliament to obtain certain given policy objectives, which may then be legitimated. Assuming legitimation is

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[52] J. Morison 'The Case Against Constitutional Reform' [1998] *Journal of Law and Society* pp 510-535 at p 517. See also: Morison J & Livingstone S *Reshaping Public Power* (1995). These ideas are further developed in J. Morison 'The Government-Voluntary Sector Compacts: Governance, Governmentality, and Civil Society' [2000] *Journal of Law and Society*, Vol 27, No 1 pp 98-132; and J. Morison 'Democracy, Governance and Governmentality: Civic Public Space and Constitutional Renewal in Northern Ireland' *OJLS*, Vol 21, No 2 (2001), 287-310.

[53] N. Burrows *Devolution*, (2000), p 116.

[54] See C. Scott 'Accountability in the Regulatory State' *Journal of Law and Society* [2000] p 38 at p 40.

[55] Morison, 1998 n 52 above p 525.

[56] Habermas quoted in Morison 1998, n 52 above p 531.

achieved, the resulting law will have to be implemented by the machinery of government within certain bounds set out in the legislation. This traditional view of constitutional law is "contingent upon the presence of a single administrative system which only it has the authority to recognise".[57]

In essence, it is argued that this type of analysis rests on the questionable assumption that in all areas the government and the state, operating under the constitution, have an exclusive and proactive role. More specifically, we will shortly see in regard to devolution that such a view fails to account for the way power is actually exercised in the modern state. Foucault wrote that:

> "the analysis of power relations within a society cannot be reduced to the study of a series of institutions, not even to the study of all those institutions which would merit the name "political." Power relations are rooted in the system of social networks".[58]

This has a particular resonance in a contemporary context which has seen numerous attempts to relate the performance of government to the human subject. Under these arrangements it is the individual's ability to reorganise and contest power in many different sites which becomes crucial and this recognises that there has been a profound disordering process. In turn, this is a situation that requires a new politics, more concerned with individual subjectivity as individuals become more pro-actively engaged in the management of their own government.[59] Such a redistribution of power occurs "not so much from one process trumping the other but from the operational tension between the administrative mechanisms for shared rule and the administrative mechanisms for self-rule". Ultimately this process leads to an operational redistribution of administrative power.[60]

Further, we will see that it has become apparent that "governmentalization" as a process is at once both internal and external to the state. Thus the task of those governing is no longer merely about imposing sovereign will through legislation and becomes more about engaging with the many networks and alliances that make up a chain of networks which translates power from one locale to another.[61] Moreover, as the monolithic state dissolves into these complex webs of relationships we find exposed and challenged any clear distinction between the public and private sphere. The issue at the micro-level becomes one of the exercises of the bio political technologies of power within a particular domain, be it public or private, and

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[57] D. Chalmers 'Post-Nationalism and the Quest for Constitutional Substitutes' *Journal of Law and Society* [2000] pp 178-217 at p 192 and see generally.

[58] M. Foucault 'Afterword, The Subject and Power' in H. Dreyfuss and P. Rabinow *Beyond Structuralism and Hermeneutic*s, (1982), p 224.

[59] Chalmers [2000] n 57 above p 196.

[60] *Ibid* p 202.

[61] J. Morison 'The Government-Voluntary Sector Compacts: Governance, Governmentality, and Civil Society' *Journal of Law and Society*, Vol 27, No.1 March 2000 pp 98-132 at p 122. Morison discusses Foucault's later work on "governmentalization" and considers how the proper subject of an analysis of contemporary forms of government should be those networks and alliances which exercise "government at a distance". See further M. Foucault 'Governmentality' in G.Burchell, C. Gordon and P. Miller *The Foucault Effect: Studies in Governmentality*, (1991).

the task now is to investigate how this can be constructed from the base level of the human subject.[62] For example in relation to public law, this investigation might include examining the emergence of compacts, the resort to soft law techniques such as concordats and a recognition of the importance of strategies of new public management.

This is not the place to further develop this discussion at a theoretical level but awareness of these considerations highlights the fact that the conventional constitution is increasingly unable to exercise its co-ordinatory function or to fulfil its role as a meaning-generating process.[63] We will now proceed from this brief discussion of power in the modern state to attempt a more concrete level of engagement with some of these issues in relation to devolution. In particular, four areas will be considered: concordats, compacts, regulation and deregulation, and dealings with the European Union.

(i) Concordats and Soft Law

The first question is whether the implementational strategies adopted for devolution have had the effect of undermining some of its fundamental objectives. Devolution had to be somehow plumbed into the existing uncodified constitutional arrangements and it is no surprise that this has been proceeded with in an unsystematic fashion. In part, as we have already noted, this has been engineered by statutory provisions, but also it has been managed by mechanisms that exist and work outside the formal legislative framework. Intergovernmental relations call for a different and less formal process. Rather than the more familiar device in the UK of conventions, concordats and other less formal arrangements emerged fairly late in the process and "represent a further step down the road of juridification in the form of 'bureaucratic law'".[64] 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.

It has been pointed out that "all complex, multi-level constitutional systems have had to develop tools to co-ordinate the exercise of powers distributed amongst various decision-making entities".[65] Although the overall process in the UK has lacked any formal structuring there is a general Memorandum of Understanding (MOU) containing a set of principles. These include: good

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[62] Foucault's work has a distinctive conceptualisation of power which sees domination in the 'form of a combination or structure of knowledge and power which is not external to the subject, but still unintelligible from his or her perspective'. According to this view domination is not in any simple sense caused by subjects. See M. Poster *Foucault, Marxism & History*, (1984) p 80.

[63] Chalmers [2000] n 57 above at p 183-4.

[64] See R. Rawlings 'Concordats of the Constitution' [2000] *LQR* 256-286 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' *Political Quarterly*, [2000] 223-245.

[65] J. Poirier 'The Functions of Intergovernmental Agreements: Post-Devolution Concordats in a Comparative Perspective' [2001] *Public Law* 134-157 at p 135. This is a comparative study which refers to the various roles of informal agreements in *e.g.*, Canada, Australia, Germany and Belgium, as well as describing the part played by concordats in the UK devolution arrangements.

communication and information-sharing, early warning of policy proposals, co-operation on matters of mutual interest and rules of confidentiality to be applied within the workings of the post-devolutionary system of government.[66] The MOU is supported by a (still) increasing number of bilateral and multilateral agreements[67] between the recently devolved executives and Whitehall departments which have been drawn up behind the scenes by senior departmental officials.[68] The status of concordats varies markedly from inter-governmental agreements to more subject specific arrangements, with some set out in much greater detail than others.[69] Further, the memorandum specifies that these are procedural rather than substantive agreements[70] but nevertheless some contain significant substantive rules "indicat[ing] not only how things are to be done, but who must do them". For example, the Concordat on European Structural Funds specifies that responsibilities for implementation will be carried out by the Scottish executive and not the Scottish Office.[71] The concordats have been referred to as "a form of codification of the processes of government"[72] and it is widely acknowledged that the concordats are of considerable practical importance for the administrative implementation of devolution. They have not only contributed significantly to continuity and smooth transition of policy but have also helped facilitate policy co-ordination between the many overlapping levels of modern governance.[73]

Certain aspects of these loosely drawn up arrangements are a cause of concern. First, the concordats have been introduced in a way that has contributed to a lack of openness and transparency and this in turn raises issues of political accountability.[74] Despite the fact that the MOU and Concordats have been published and the information concerning their operation is placed in the public domain.[75] The key point is that under the MOU the information exchange between the various players is made strictly subject to rules of confidentiality. Furthermore, the concordats fall under an

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[66] See *Memorandum of Understanding and Supplementary Agreements*, Cm 4806, July 2000.

[67] See Poirier [2001] n 65 above p 146. Initially, there were 20 bilateral agreements between Westminster departments and Scottish Executive and five supplementary multilateral agreements between UK government, Scottish Ministers and Cabinet of the Welsh Assembly. The latest additions to the list are the Concordats between the DTLR (now office of Deputy Prime Minister) and the Scottish Executive and the DTLR the Northern Ireland Department of the Environment, published 27/2/02.

[68] Some of the more sensitive Concordats have been signed by ministers (Poirier n 65 above p 148).

[69] Rawlings 2000 n 64 above p 263; Poirier 2001 n 65 above, p 135.

[70] This emphasis on procedure is clear from the guidance notes: 'They will set down common processes and the main features of good working relationships, rather than specify substantive outcomes'. *Guidance Notes on Common Working Arrangements: Annex A: Concordats.*

[71] Poirier [2001] n 65 above p 150.

[72] Rawlings [2001] n 31 above at p 84.

[73] Rawlings [2000] n 64 above p 276.

[74] In much the same way as with other forms of quasi-contractual governance.

[75] The concordats have been drawn up under a veil of civil service secrecy although later published.

excluded category under the Freedom of Information Act[76] and this allows the routine meetings and dealings between officials that take place as part of these agreements to remain out of bounds. Thus a lack of transparency extends to a crucial aspect of the implementation of the entire process. The multifaceted inputs to the policy process are regarded as too sensitive to come under public scrutiny. Such an emphasis on confidentiality is hard to reconcile with New Labour's apparent commitment to openness and inclusiveness[77] but more seriously this conflicts with the wider task of scrutiny of the process of government resting with the parliamentary accountability mechanisms.[78] For example, the continuing secrecy interferes with the effectiveness of the relevant subject committees forming part of the Scottish Parliament and Welsh and Northern Ireland Assemblies and obstructs the work of the departmental select committees for Scotland, Wales and Northern Ireland.

Turning secondly to legal controls, it will be remembered that it was explained in the introduction to this section that adherents to the functionalist view have always been resistant to dragging the law courts into the administrative process[79] and it would appear at first glance that reliance on this form of soft law demonstrates the high value placed in the devolution arrangements on alternative or co-corporate forms of dispute resolution.[80] A preference for non-contractually binding concordats relying on flexibility and co-operation as the main technique for resolving administrative problems has the advantage of keeping the judges in the civil courts at bay, but the difficulty is that the alternative procedures for routine dispute resolution are insufficiently open and participatory. The concordats are very wide ranging

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[76] Freedom of Information Act 2000, Part II Section 28 (1) 'Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice relations between any administration in the United Kingdom and any other such administration'. It should be noted that the act will only fully come into force in 2005.

[77] Rawlings 2000 n 49 above p 279. See *Modernising Government* (Cm 4310 1999). In contrast to other examples such as the decision to release the minutes of the meetings of the Monetary Policy committee of the Bank of England.

[78] It is worth noting on this point that the Scottish legislation on freedom of information is more robust in comparison with England and has included a 'substantial prejudice' test for excluding information from release into the public domain. See Freedom of Information (Scotland) Act 2002 ss 27 and 28 and P. Birkinshaw *Freedom of Information*, 3rd ed (2001) at p 327.

[79] See M. Loughlin *Public Law and Political Theory*, (1992) p 168ff "In general public law should ensure that the legal framework within which government operated provided an effective and equitable structure for the implementation of the public good, as expressed in the positive functions of the state". This approach 'also stressed the need for a rational system of administration' and regarded the courts as 'ill-equipped for this task'. Further, there has been a familiar critique of the 'political' nature of decisions taken by unrepresentative judges. See *e.g.* Griffith JAG *The Politics of the Judiciary*, 5th ed (1997) at p 336.

[80] In this can be identified certain affinities between the principle of federal comity/loyalty and having concern for the interest of other orders of government which in encourages a spirit of co-operation. See *e.g.* Poirier 2001 n 65 above p 152.

and touch upon numerous areas of sensitivity and difficulty.[81] And so it is surprising that elected representatives from the devolved legislatures have no role in the process at an early stage. At present any wider involvement depends upon reference of a dispute to the Joint Ministerial Committee. While recourse to private law has been limited, it would appear that in the current climate of judicial activism public law intervention remains a possibility. This would be the case if the failure to adhere to the terms of a concordat could be argued to fall under one or more of the grounds of judicial review.[82]

In addition, there are some important concerns which relate to the sense in which the network of concordats have been, in effect, used as a means of setting an unofficial seal on an existing bureaucratic culture centred upon the influence of Whitehall and the Cabinet Office. It has been suggested that in order to achieve "continuity in a changed constitutional landscape" there has been "a failure of constitutional vision, with the custom and practice of Whitehall being too often regenerated in the modalities of intergovernmental relations".[83] There is strong evidence to suggest that these concordats have been formulated in a spirit that reinforces an unequal partnership that permits domination from the centre. This domination has been illustrated by reference to the operation of the Joint Ministerial Committee. At a political level not only do UK Ministers and departments represent the interests of England on all matters, but the task of chairing meetings is granted exclusively to UK ministers. At a bureaucratic level, the Cabinet Office is in a position of hegemony retaining a grip on the shaping of the arrangements as a whole. Another aspect of the undeclared agenda seems to be an interest in retaining a unified home civil service.[84] This has obvious advantages in facilitating smooth transitional arrangements and in permitting mobility between administrations. The drawbacks are equally obvious. For as long as officialdom operates under established rules the existing Whitehall culture is likely to continue to prevail.[85] The political implications are that these internal working are put outside of the reach of the democratic process, since the civil servants are placed in a position of being able to by-pass Parliament when operating under these arrangements.[86]

(ii) Compacts and Governance

At a sub-governmental level and one that is to some extent addressed by devolution we can see how the idea of "compacts" have developed. These amount to a collaboration between government and parts of the voluntary

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[81] The relationship between the devolved executives and the EU discussed below is a good example of this.

[82] See Rawlings 2000 n 64 above at p 283. For example, should there be a failure to consult, or if they give rise to a procedural legitimate expectation.

[83] *Ibid* p 276, p 26 1and p 278.

[84] Although Northern Ireland has a devolved civil service.

[85] Rawlings 2000 n 64 above p 270 and 278; Piorier above n 65 at p 154.

[86] In some cases the concordats fall outside the remit of Westminster departmental select committees. Michael Ancram was highly critical in Parliament of the tendency to undermine Parliamentary Sovereignty and popular sovereignty by by-passing Parliament through the use of concordats. This criticism was further elaborated Ancram M 'The Dictatorship of the Concordat' *The Times*, March 4, 1998.

sector and also partnerships between the business sector, government and the voluntary sector. A theme here is of the voluntary sector mediating between the state and the market.[87] Such arrangements are becoming more prevalent and represent one example of how power is actually exercised in and beyond the modern state.[88] They not only demonstrate that power is dispersed throughout society, but also that the formal limits between civil society and state are in reality traversed by networks which operate across constitutional boundaries.[89] This tendency can be identified in a new language which finds its way through a process of negotiation into codes of practice. Thus it has been claimed that ". . . the compact process provides a mechanism for facilitating the translation between the moralities, epistemologies, and idioms of political power of the two broad groups, and the further development of the relationship".[90] It might then be concluded that government perhaps in pursuit of a "third way", is seeking to operationalise "a particular, ultimately managerially driven programme by influencing, allying with, and co-opting the voluntary sector as a resource that they do not directly control".[91] The compacts share certain common features and there have been attempts towards achieving best practice and establishing accounting mechanisms to secure the most efficient use of resources. But if, as seems likely, these compacts become increasingly important in the delivery of policy the fact that they are locally negotiated under different ground rules in each part of the United Kingdom is likely to further emphasise the diverse and asymmetrical effects of the devolution arrangements.[92]

(iii) Regulation and Deregulation

The next area concerns regulation of the public private sector monopolies and utilities and deregulation as it effects the business sector more generally. Regulation is a matter that the devolution legislation itself hardly touches upon directly.[93] This means that the changes in administration have not been

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87 *Modernising Government* (Cm 4310 1999); *Getting it Right Together: Compact on Relations between Government and the Voluntary Sector and Community Sector in England* (1998: Cm 4100); *The Scottish Compact: The Principles Underpinning the relationship between Government and the Voluntary Sector in Scotland* (1998; Cm 4083); *Building Real Partnership: Compact Between Government and the Voluntary Sector in Northern Ireland* (1998: Cm 4167)

88 See: s 114 Government of Wales Act 1998 which states that the Assembly must set out how it proposes in exercising its functions, to promote the interests of relevant voluntary sector organisations; s 56 of the Northern Ireland Act which requires the First Minister and Deputy First Minister to consult the views of the Northern Ireland civic forum (consisting of representatives of business, trade unions and the voluntary sectors) on social economic and cultural matters. The compacts do not specifically feature as part of the Scotland Act but codes of good practice have been drawn up by the Scottish executive in conjunction with leading voluntary sector bodies.

89 J. Morison 'The Government Voluntary Sector Compacts: Governance, Governmentality, and Civil Society', *Journal of Law and Society*, 2000, 98-132 at p 124.

90 *Ibid* p 127.

91 *Ibid* p 131.

92 *Ibid* p 114-117 and p 130.

93 See the Scotland Act 1998 Sch 5 which lists energy and transport under reserved matters. For an up to date overview of regulation see T. Prosser 'Regulation,

linked to any discernible strategy for the containment of functions and powers that are exercised across borders and within the UK.[94] In the realm of transport, energy and the utilities an intersection of power relationships takes place at both a sub and supra national level. Furthermore, it is widely recognised that the need for regulation has not declined post privatization[95] and that accountability[96] under current conditions of governance has to be related to the effectiveness of regulation which has been one of the chief instruments of government for the achievement of important policy objectives.[97] To this end, there has been a proliferation of new forms of secondary regulation by government of privatised industry outside of Parliament and the courts which has become "more formal, complex and specialised". By the mid 1990's in the UK there were 135 regulatory bodies costing £770 million.[98] Of course, regulation continued with the Labour government[99] but although there has been an emphasis increasingly on co-ordination the devolution arrangements fail to adequately address the issue of cross border regulation.[100]

Although space precludes any detailed discussion here, the regulation of the public utilities of water, gas and electricity demonstrates the added complexity of the regulatory task since devolution. There are significant

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Markets and Legitimacy' in J. Jowell and D. Oliver *The Changing Constitution*, 4th ed, (2000).

94 For topical in depth discussion of the issue of accountability and regulation see *e.g.*, G. Majone 'The Regulatory State and Its Legitimacy Problems' *Western European Politic*s, Vol 22, No.1, January 1999 pp 1-24; Scott C 'Accountability in the Regulatory State' *Journal of Law and Society*, Vol 27 No 1, March 2000, pp 38-60 particularly at p 48ff.

95 The failure to set in place regulation following bus privatisation has meant an unchecked decline in standard and frequency of service delivery and in safety. See W. Hutton *The State to Come*, London, Verso, 1997 p 20. However, note that Part I of the Transport (Scotland) Act 2001 introduces a new regime of regulation for bus services in Scotland.

96 Accountability in this context can be broadly defined as 'an obligation for a person or organisation to justify actions to another body in terms of some authorisation for the activity given by that body including assignment of duties or purposes, answerability, overseeing performance – incentives for good performance and penalties for inadequate performance. See O. James 'Regulation Inside Government: Public Interest Justifications and Regulatory Failures' [2000] *Public Administration* 327-343 at p 328.

97 C. Harlow C & R. Rawlings *Law and Administration*, 2nd ed. (1997) p 295.

98 C. Hood, O. James, and C. Scott 'Regulation of Government: Has it Increased, Is it Increasing, Should it be Diminished' [2000] *Public Administration* 283-304 at p 285. See also A. Midwinter and N. Garvey 'In Search of the Regulatory State: Evidence from Scotland' *Public Administration* Vol 79 No 4, 2001 825-849 for a discussion of regulation inside government rather than economic regulation.

99 The reform the Post Office is the latest example of this. See *Post Office Reform: A World Class Service for the 21st Century*, 1999 Cm 4340 and *The Postal Services Act 2000*. Postcomm, the industry regulator under the Postal Services Act, published its decision on the introduction of competition for the UK postal market on 29 May 2002. See also T. 'Prosser Regulating Public Enterprises' *Public Law* [2001] 505-527 at p 506ff.

100 *Modernising Government* (White Paper) Cm 4310, 1999. Regulation continues as a priority in latest UK government thinking with an emphasis upon comparing the performance of public bodies against 'quality' systems in the private sector.

differences in local conditions of ownership and operation of these industries to those prevailing in England. This is partly as a result of there being less privatisation in Scotland, Wales and Northern Ireland but the situation has been compounded by devolution. First, this is because legislative competence to regulate has been devolved for some industries while in others a UK regime of regulation remains in place.[101] Second, this is because of the engagement of different layers of regulation. For example, the utility sector necessarily involves the overlapping and integrally related question of environmental policy and economic regulation. It is important to note that only responsibility for environmental regulation has been devolved.[102] The obvious point is that this added complexity presents new challenges for co-ordination of regulatory agencies across both territorial and policy boundaries.

If we take another high profile area, namely, the regulation of the performance of the rail industry and particularly of Railtrack post privatisation. This has called attention to the inadequacy of the original regime of rail regulation and it is clear from a functionalist standpoint that legislative solutions were required in this field. In fact, under the Transport Act 2000 the government decided to improve the regulatory framework by increasing the powers of the regulators and by establishing a Strategic Rail Authority (SRA) which amounts to an additional layer of regulation.[103] This path was preferred to fully or partially returning Railtrack to public ownership. Transport is a policy area that has been partly devolved[104] and it is important to note that the Transport Act 2000 makes overtures towards recognising the interests of Scotland and Wales by specifying that membership of the SRA must include a person nominated by a Scottish Minister and the Welsh Assembly, and it provides that in formulating strategies Scottish Ministers and the Welsh Assembly must be consulted[105]. Further, Section 208 (1)(a) provides that Scottish ministers can provide the Strategic Rail Authority with directions and guidance in respect to services under a franchise agreement that end in Scotland. However, the remit of the Office of Rail Regulation (ORR) whose principal function as an independent regulator was to oversee Railtrack's stewardship of the national rail network has not been significantly modified to take account of devolution. The

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[101] Contrast the economic regulation of the Water industry in Scotland which is devolved with gas and electricity which is not.

[102] See C. Graham *Regulating Public Utilities: A Constitutional Approach*, (2000), chapter 6; P. Leyland 'UK Utility Regulation in an Age of Governance' in N. Bamforth and P. Leyland (eds) *Public Law in a Multi-Layered Constitution*, Oxford, Hart Publishing, forthcoming 2003.

[103] The Strategic Rail Authority officially commenced operation in February 2001 and it is under a duty to promote and develop the rail network and promote integration. Also, through the re-negotiation of the next round of rail franchises the SRA will be able to have a role in regulating fares.

[104] Scotland has a minister for Transport and Planning, Wales a minister for the Environment which includes transport and Northern Ireland a Minister for Environment (with only a limited transport brief).

[105] See Transport Act 2000 s 202 and s 206. A 'Stakeholder Relations Manager' (Mike Connelly) for the Strategic Rail Authority was appointed in June 2002 and has been given responsibility for 'the effective delivery of train services in Scotland'.

changes fall short of tailoring rail regulation to the special needs of Scotland and Wales.[106] Most notably, there has been a continued reliance on Railtrack for investment in the infrastructure of the system and since the role of the ORR and now the SRA have not been directly related to the aspirations of the devolved governments their own published objectives will be difficult to achieve.[107] The Scottish Executive in issuing its Directions and Guidance in 2002 for new franchises that will operate from 2004 has set out its broad objectives for an improved rail network in Scotland, including tougher conditions on franchises and projected new lines but any such plans will be heavily dependent on the level of investment that is available following the collapse of Railtrack in 2001 and its replacement in 2002 by a not-for-profit company called Network Rail.[108]

Deregulation is an issue which has been very much on the agenda of the Scottish Executive as well as the Westminster government.[109] The amount of red tape and the level of business rates have been perceived as a matter of prime concern especially for small businesses. The Scottish executive is committed to decisive action calling on the forces of 'joined up' government with the involvement of several departments to tackle the problem. It has recognised that in order for Scotland to become more attractive to investors decisive action must be taken in this field. To this end, the Enterprise and Lifelong Leaning department of the Scottish Executive have established a unit called "Improving regulation in Scotland", referred to as IRIS.[110] The better regulation strategy has been presented as a ground breaking departure from previous practice and has a number of notable features. For example, all Scottish regulation which impacts significantly upon business will now be subjected to a "regulatory MOT" within 10 years to ensure that each regulation remains fit for purpose; a micro business test will be employed to assess the possible impact of any regulation on businesses employing up to 5 people; a new requirement that any proposal for additional regulation must

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[106] The Transport Act 2000 s 249(1) require the Scottish Ministers and the Welsh Assembly to be informed about any scheme for improvement and development while 249(2) Allows Scottish Ministers and the Welsh Assembly to enter agreements for improvement or development of services for the carriage of goods.

[107] Such goals are set out in: *Travel Choices for Scotland: The Scottish Integrated Transport White Paper*, (Cm 40 July 1998): Following a rail audit conducted in November 1999 *The Assembly Vision for Rail Services in Wales and the Borders: A Guide for Franchise Bidders* looks forward to a coherent network of rail services as part of a coherent transport network and considers route strategies and service levels.

[108] Scottish Executive press release 12/06/02 'Executive Outlines Scottish Rail Plans'. For example, T. Bolden and R. Harman 'Realising the New Opportunity for Railways' *Public Money and Management* April-June 2002 61-66 at 63 point out that the the SRA's strategic plan leaves unanswered the crucial question of how the investment capital needed will be raised. A court order allowing Railtrack to be taken out of administration was issued on 2 October 2002.

[109] See the Concordat between the Cabinet of the National Assembly of Wales and the Department of Trade and Industry, December 1999, Annex D deals with cost sharing for regulatory impact appraisals of legislation.

[110] There has been a similar initiative in England with the Cabinet Office Regulatory Impact Unit, the Better Regulation Task force and the provisions of the Regulatory Reform Act 2001.

by accompanied by a regulatory impact assessment to consider whether it is really necessary; there will be regulatory summits bringing together regulators and regulated; and there will be test runs for business forms before they are introduced.[111] One issue is whether such developments will lead to problems in synchronising policy in this area with other parts of the United Kingdom.[112] It should be remembered that although deregulation may benefit commercial interests controls may often be essential in the wider public interest and it has been recognised that the consequences of removing regulation or inadequate regulation can have a devastating impact.[113] Thus any deregulation strategy needs to establish a balance between such considerations and be co-ordinated throughout the UK.[114]

(iv) Dealing with Europe

This final section considers the sensitive question of how the measures themselves attempt to reconcile the interests of the UK and the devolved nations in regard to the EU. This is likely to be a matter of steadily increasing importance and failure on this front may lead to increasing instability. For example, nationalists (particularly in Scotland) regard the present settlement as simply a staging post prior to outright independence and argue that Scotland would be better off as an independent state within the European Union. The Irish Republic serves as one obvious model[115] and on Scotland's doorstep are several small independent nation states benefiting from their status in the European Union (Belgium, Holland, Luxembourg, Denmark). Whatever the merits of the more general case for independence, an obvious shortcoming is that the UK devolution project fails to adequately address the complexity of the European issue.[116] This is especially problematic because Brussels legislates in the same fields to those over

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[111] Press release entitled 'Ground breaking package to boost small business' launched by Henry McLeish, the then Scottish First Minister, 15th February 2001. This is linked to the IRIS initiative (improving regulation in Scotland). Guidelines have been set out in a Scottish Executive publication entitled 'Good Policy Making: A Guide to Regulatory Impact Assessment'.

[112] The Concordat between the Cabinet Office and the Scottish Administration has a paragraph (24) on regulatory impact which merely states the need to work together to identify good regulatory practice.

[113] See *The BSE Inquiry Report*: http://www.bseinquiry.gov.uk/report which links the emergence of new variant CJD to changes in farming practices. This was allowed by a relaxation in the ban on ruminant cattle feed.

[114] It is important to recognise that there has been a parallel initiative towards deregulation in England. The Deregulation and Contracting Out Act 1994 and now the Regulatory Reform Act 2001 gives ministers powers to reduce the burden of regulation on industry and the Public Sector Team operating from the Cabinet Office is aimed at reducing public sector bureaucracy and red tape. The work of this team has been concentrated on certain specified policy areas *e.g.*, health, police forces, schools and local government.

[115] Although Scotland's relationship with Europe may be a significant aspect in any case for full independence, it should be recognised that re-negotiated economic arrangements between England and Scotland would be of crucial importance too.

[116] See G. Clark 'Scottish Devolution and the European Union', [1999] *PL* 504 who at p 508 stresses the importance of gaining influence at the Council of Ministers and points out that Scottish Office ministers would attend meetings of the Council of Ministers with the agreement of the "lead" department.

which power has been devolved,[117] for example, economic development, agriculture and fisheries, the environment, training and enterprise.

In Scotland and Northern Ireland the implementation of community law within the jurisdiction is made a matter for the devolved executives.[118] However, the legislation is bewilderingly complex by also establishing a concurrent power for the implementation of European law. The legislation further provides that where Scottish/Northern Irish Ministers are empowered to use section 2(2) of the European Communities Act 1972 to implement obligations under Community law, a Minister of the Crown also retains power to use section 2(2) for the same purpose. This introduces an element of ambiguity concerning compliance with EU law. This can be resolved by reference to the Concordat on Co-ordination of European Union Policy Issues. The UK government is ultimately responsible for ensuring that community law is enforced and thus the provisions in the legislation and the Concordat as the preferred mechanism for co-ordination emphasises financial penalties which will apply to a devolved administration for failing to act on time. This approach can be contrasted with the situation in Germany where the Federal Government is prevented from interfering where the issue comes under the remit of a Länder.[119] A strong case can be made for modifying the devolution legislation to clarify this position by removing these overlapping powers and placing responsibility for implementation of EU law on the devolved administrations.

On the other hand, responsibility for dealing with the EU is a reserved area for Westminster.[120] This means that Scotland, Wales and Northern Ireland's role in Europe at the Council of Ministers is negotiated and represented by British and not by ministers from the devolved executives.[121] The legislation confirms a division of power that reflects the basic constitutional position of the UK and all other nations that are members of the Europe Union. It is member states that are responsible for forming agreements on policy matters and this requires them to reach a common negotiating position in advance.[122] We have already observed that engagement with Europe has not been overlooked by devolution. At an executive level there is provision for involvement of the devolved nations through the Concordat on Co-ordination

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[117] Members of the European Parliament are now elected by PR and this allows the full range of political parties to be represented at a European level (*e.g.*, there are two Scottish Nationalist members) but the European Parliament only has limited powers over legislation.

[118] Scotland Act 1998 s 57 and Northern Ireland Act 1998 s 6(2)(d).

[119] A. Cygan 'Scotland's Parliament and European Affairs: some lessons from Germany, 1999 *European Law Review* 483-499 at p 495.

[120] See Scotland Act 1998 Schedule 5 (7). See also V. Bogdanor 1999 *op cit* n 8 above p 276ff who explains the constitutional implications in regard to Europe.

[121] *The Concordat on Co-ordination of European Union Policy Issues* is the preferred pseudo-contractual mechanism for dealing with European affairs. See Rawlings [2000] n 64 above at p 272-274. It is pointed out that the ground rules have been drawn up to favour a 'UK team' approach with composition determined by the UK minister.

[122] The Treaty of Nice 2000 looks forward to a greatly expanded European Union in which the voting rights of individual nations will be adjusted and where qualified majority voting is extended to more areas, but there is no suggestion of allowing national votes to be split.

of European Policy Issues. This is an important move towards allowing genuine consultation with an emphasis on working as a team but an obvious problem arises when English interests strongly diverge from those of Scotland, Wales or Northern Ireland thus making agreement on a matter impossible. Where any such disputes cannot be resolved, the English position is likely to predominate and the votes for the UK at the Council will then by cast in accordance with the UK position. This process has been regarded as unsatisfactory by representatives of devolved nations throughout Europe. In response to pressure from the German Länder it is well known that European Union rules were amended by Article 203 (formerly 146) Treaty of the European Union. The revised arrangement allows representation at a sub-national level on the Council of Ministers[123] but there seems little immediate prospect of the UK following this example.[124] Furthermore, at an operational level there has been no real attempt to ensure that the interests of the devolved nations are represented on the world stage.[125]

Turning more specifically to Scotland, we find that there has been progress in promoting Scotland's cause in Europe. First, it is highly significant that the Scottish executive set up an EU office in Brussels in 1999 to further Scotland's interests.[126] The office aims to achieve this by providing the executive with operational support, by information gathering, by assisting and influencing policy and by raising the profile of Scotland in the EU. It reports directly to the Head of the Scottish Executive secretariat.[127] Second, the executive has been given responsibility for implementing programmes for European structural funds as the managing authority. These were previously administered by the Scottish Office.[128] The structural fund is the second largest item of European expenditure which is directed at correcting disparities between the European regions and it is expected that the next round will result in more than £1 billion of European money finding its way

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123 In contrast, the German Federal system provides constitutional safeguards under Article 23 to insure involvement and representation, but this is only a limited gesture which provides a voice to sub-national interests. Under current arrangements the voting power still remains with the German Federal Government. See Cygan [1999] n 119 above at p 489.

124 This anomaly was again pointed out by Roseanne Cunningham of the SNP in a recent debate in the Scottish Parliament with reference to the Scottish fishing industry. There is currently no Scottish ministerial representation in Europe for this very substantial industry which employs up to 26,000 people in Scotland. It was pointed out by her that Belgium which also has fishing mainly in the Flemish part of the country will have a Flemish minister to represent Belgium on European Fisheries councils from 2002. Scottish Parliament, European Debate, 9th May 2001, Vol 3, No 72.

125 Scottish interests in regard to the exploitation of North Sea oil is an area where such representation could be important.

126 For analysis of the main thrust of Scottish Executive involvement in Europe at number of different levels (Council of Ministers, Commission, Committee of the Regions) see A. Sloat 'Reconfiguring Scottish Politics: Domestic Governance vs European Influence' in this issue at pp 435.

127 R. Hazell R and D. Sinclair 'The British Constitution in 1997-98' [1999] *Parliamentary Affairs* 161 at p 164.

128 See the *Concordat on European Structural Funds*, art.12. Poirier 2001 n 65 above p 150.

to Scotland.[129] Third, the Scottish Parliament takes an active part in Europe through its European Committee which is responsible for scrutinising documents and proposals emanating from Brussels. This includes a process of continuous review on the manner in which the executive manages the structural fund.[130] The European Committee has a general role in developing the Parliament's approach to EU matters.[131] Europe has a wide impact on the work of the Scottish Parliament and it has been suggested that other committees should be able to develop the European aspects of matters within their remits.[132]

CONCLUSION

At this point it is worth considering whether the devolution initiative is capable of addressing the pressing contemporary problems facing the nation state which is on the defensive against a world economy it appears unable or unwilling to control.[133] It has been argued that wider globalising tendencies mean that,

> ". . . the locus of effective political power can no longer be assumed to be national governments – effective power is shared, bartered and struggled over by diverse forces and agencies at national, regional and global levels . . . political power is being repositioned, recontextualized and, to a degree transformed by the growing importance of other less territorially based power systems".[134]

Although this battery of devolution legislation can be regarded as a significant stride towards a written constitution for the United Kingdom[135] the key question is whether there is a general fitness for purpose, whether these new forms of constitutionalism proposed as an alternative way forward *are* based upon an understanding of the different levels at which power now operates. Chalmers maintains that constitutions or constitutional substitutes will continue to perform a role in subjecting all political and legal action within this context to processes of co-ordination, assimilation, recognition and rational self-critique. This is task which is achieved through strong steering mechanisms[136] and a "pluralisation of regulatory authority". While

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[129] The situation in Wales in regard to Europe is in some respects similar. The Assembly has an office in Brussels and a standing committee on European Affairs to ensure that the Assembly takes a coherent strategic approach to Europe and support the subject committees. The Welsh European Funding Office was set up as an executive agency by the Assembly in July 2000. From April 2001 the Office took over responsibility for administering the European Social Fund in Wales.

[130] European Committee 1st Report 2001, SP paper 259.

[131] The remit of Scottish Parliament's European Committee is to consider and report on: (a) proposals for European Communities legislation, (b) the implementation of European Communities legislation, (c) any European Communities or European Union Issue.

[132] Scottish Parliament press release 19th February 2001; Burrows [2000] n 53 above at p 132ff.

[133] E. Hobsbawn *Age of Extremes: The Short Twentieth Century*, (1995) p 576.

[134] D. Held et al *Global Transformations*, (1999) at p 447.

[135] Rawlings [2001] n 31 above p 90.

[136] Chalmers [2000] n 57 above at p 206

for Morison the revised constitutionalism will enable 'radical communicative and participatory ideas of democracy' to challenge the limits of traditional liberal individualistic democracy' and it is suggested that a new technology of constitutional control is required 'to capture fugitive power'.[137] This will also achieve "more and better democratic deliberation". In time we must come to rely on a concept of "participatory or dialogic democracy" which calls for "the public sphere [to] be rendered genuinely public as a place where discourse opinion forming and, indeed, decision taking can take place on a basis of real equality and participation. . .".[138]

Such proposals may have some appeal as a general objective and there are aspects here that mirror the language of a New Labour discussion document but the practical implications are hardly a substitute for conventional constitutional and legal norms. It must be remembered that this discussion takes place against a background of growing voter apathy throughout the United Kingdom. In fact, this kind of approach mainly boils down to "more imaginative ways of assessing [voter] preferences" (citizen juries, surveys, preferenda, consensus conferences and focus groups are among the options mentioned) and more to the point for us here, there is a lack of any practical alternative proposals for reformulating and restructuring the intermediate stratas of governance that have been the main concern of this article. Something that can best be achieved by improved legislative initiatives. Lastly, on this point, it is worth remembering that, in theory at least, the New Labour project to renew social democracy is based on a new democratic state "recast on an active and participatory basis" where there is "no authority without democracy".[139] To some extent we have already noted that participation, consultation and openness are features of the devolution measures that have been introduced.[140] But how far does this accountability extend given that no direct relationship between the power to raise revenue and the power to spend it is included in the new arrangements? With the rather marginal exception of Scottish tax raising powers devolution fails to address *the* central requirement of democratic control.[141]

We have observed in the discussion of concordats, compacts and regulation that the kind of bottom up approach which examines the exercise of power in the modern state from the perspective of the human subject reveals the complexity of policy networks and shows that these cut across any previous public private distinction. In another sense, the European principle of subsidiarity suggests that policy implementation should, where possible, take place at the most local level. Indeed, as we have just noted, it seems to be fashionable in political and academic circles to propose that a solution lies in moving power closer to the citizen by further dividing up the delivery of

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137 Morison, [1998] n 52 above at p 533.

138 *Ibid* p 532.

139 A. Giddens *The Third Way*, (1998) at p 66. Morison, [2000] n 52 above p 113 considers Labours 'Compacts' which in Scotland, Wales, Northern Ireland and England seek to build a new relationship between government and the voluntary sector 'as genuinely baffling documents . . . made up mainly of warm words, platitudes and generalities'.

140 See *e.g.* SA, GWA, Part VII Northern Ireland Act.

141 J. McEldowney 'The Control of Public Expenditure' in J. Jowell & D. Oliver *The Changing Constitution*, 4th ed (2000) at p 212.

policy and by encouraging consultation, democratic participation and placing greater emphasis on individual rights.[142] But can such vaguely conceived initiatives really offer a viable way forward? It is pretty evident that policy networks which were already protracted and complex have become even more so with devolution. Thus a major problem is fragmentation of the administrative structure. At the same time it is very apparent that we have devolution which is secured by convention and political agreement and not by ". . . legally binding and justiciable constitutional norms. What is missing is a constitutional principle to bind the devolution settlement together and provide a legal guarantee of devolved autonomy".[143] The main formal device which has been put in place to co-ordinate central regional relations is the Joint Ministerial Committee (JMC) which meets annually in plenary session and includes the PM, deputy PM and the first ministers of Scotland, Wales and Northern Ireland. But it appears that given the asymmetrical basis of devolution this is unlikely to evolve into a multilateral mechanism on the Austrian model and will be mainly concerned with the limited number of disputes that cannot be resolved bilaterally.[144]

Devolution has been regarded as an irrevocable constitutional departure. Following approval by referenda the legislation has set in place a fresh governmental structure, with a mainly new line up of politicians and leaders elected to perform specified roles and the administrative framework has been re-organised. Yet within the first two years the Westminster government has suspended the Northern Ireland assembly on several occasions and power has been returned to the Northern Ireland Office.[145] Despite this, the administration in Northern Ireland continued to implement policy without the contribution of the assembly and the power sharing government. Civil

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[142] Jack Straw, the British Foreign Secretary has recently called for the introduction of a European Constitution in a speech to the Edinburgh Chamber of Commerce, August 27 2002. His first proposal recognises the need to enforce the principle of subsidiarity on a community wide basis to ensure that decision making takes place at a local level. This would involve a new type of enforcement mechanism or watchdog to be created. His second proposal recognises the need for a codification of principles: 'a case for a constitution which enshrines a simple set of principles, sets out in plain language what the EU is for and how it can add value, and reassures the public that national governments will remain the primary source of political legitimacy. This would not only improve the EU's capacity to act; it would help to reconnect European voters with the institutions which act in their name'.

[143] Burrows 2000, n 53 above at p 120.

[144] M. Laffin, A. Thomas and A. Webb 'Intergovernmental Relations After Devolution' [2000] *Political Quarterly*, [2000] 223-245. At p 228 it is pointed out that these arrangements allow for further functional meetings of ministers in particular policy areas to sort out specific problems.

[145] See Northern Ireland Act 2000 and devolved government was restored in May 2000. A new Memorandum of Understanding CM 4806 was published to coincide with this. Once again, the Secretary of State, John Reid decided to suspend the NI Assembly on the 9th August 2001 faced with a break down of negotiations. See *e.g.*, Patrick Wintour 'What the on-off Assembly means for Ulster ' and Comment, *The Guardian* 10th August 2001. The Assembly was again suspended in October 2002. Despite Loughlin's remarks (see n 12 above) about a reversal of the measures being inconceivable without a referendum, this is precisely what has twice taken place in Ulster.

servants and the full range of other institutional mechanisms at all other levels continued with the processes of government, where necessary, taking their cue from the Northern Ireland Office. It is true that Northern Ireland has exceptional political problems but this capacity to virtually carry on regardless suggests that the new democratic institutions remain in an important sense peripheral to the exercise of power and to the administrative process itself.

Finally, it is remarkable that there has been no co-ordinated plan lying behind recent constitutional reform as it is clear that devolution, together with the Human Rights Act, House of Lords reform and freedom of information legislation are shaking the foundations of the informal constitutional arrangements that have been relied upon for many generations. This is a cause for concern not because these areas ought to be regarded as out of bounds for reform but because change opens the way for further change and with the UK constitution there is no braking mechanism. At this stage it might seem logical to propose that the situation requires the stabilising influence of a codified constitution which also tackles devolution from the perspective of the UK as a whole and gives comparable powers to the English regions. However, while revised constitutional measures through devolving power might provide an appropriate channel for policy initiatives to be developed at a more local level, it is evident that constitutional reforms have limitations. This is especially true when it comes to resolving questions of resource allocation and tackling the deep seated problems in many high profile areas of policy that apply to the United Kingdom as a whole.[146]

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[146] See *e.g.*, W. Hutton *The State We're In*, (1996) and W. Hutton *The World We're In*, (2002) p 358ff.

RECONFIGURING SCOTTISH POLITICS: DOMESTIC GOVERNANCE v EUROPEAN INFLUENCE

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After winning a landslide victory in the 1997 general election, the new Labour government quickly made its mark on the political landscape of the United Kingdom (UK) by initiating a wide-ranging programme of constitutional reform. Under the leadership of Prime Minister Tony Blair the government reconfigured domestic politics by devolving power to the 'regions' (Scotland, Wales, Northern Ireland), restoring the London mayor, and reforming the House of Lords. This article focuses on the early days of the Scottish Parliament, which was established in November 1998, held its first elections on 6 May 1999, and was officially opened by the Queen on 1 July. The 129-member, unicameral legislature has authority over most domestic policies (*e.g.*, education, health, local government), which are scrutinised by an effective system of cross-cutting committees. Although European affairs remain 'reserved' to Westminster, the Scottish Parliament is responsible for implementing European directives in devolved areas and over half its workload originates in the European Community (EC). Thus, Scotland must work within a system of multi-level governance as a large proportion of its legislative agenda is shaped in London and decided in Brussels.

As the parliament approaches its second elections in May 2003, political observers are beginning to evaluate how well the new legislature has performed during its first term. This article seeks to provide a comparative reference for such analyses by recalling what Scotland's political elites expected from the parliament during the six months preceding its establishment. It uses the conceptual framework of multi-level governance (MLG), which is loosely defined as negotiation among supranational, national, and sub-national governments "as the result of a broad process of institutional creation and decisional reallocation that has pulled some previously centralized functions of the state up to the supranational level and some down to the local/regional level."[1] Most supporters of MLG[2] dispute the state-centric separation between domestic and international politics, believing instead that EC policy-making authority is shared among an

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[1] G Marks, 'Structural Policy and Multilevel Governance in the EC' in A Cafruny and G Rosenthal (eds), *The State of the European Community: The Maastricht Debates and Beyond* (1993) Vol 2, p 392.

[2] See L Hooghe, 'Subnational Mobilisation in the European Union' (1995) 18(3) *West European Politics* 175; G Marks, L Hooghe and K Blank, 'European Integration from the 1980s: *State-Centric* v *Multi-Level Governance'* (1996) 34 *Journal of Common Market Studies* 341; S. Hix, 'The Study of the European Union II: The "New Governance" Agenda and Its Rival' (1998) 5(1) *Journal of European Public Policy* 38; and I Tömmel, 'Transformation of Governance: The European Commission's Strategy for Creating a "Europe of the Regions"' (1998) 8(2) *Regional and Federal Studies* 52.

increasing number of participants ranging from governments to non-state actors.

This study seeks to better understand the meaning and operation of multi-level governance by examining its constituent parts. First, while pre-devolution Scotland was included in EC discussions as part of the UK, the study considers elite opinions about the extent to which Scottish politicians and officials participated in the creation of the UK negotiating line and ensured that Scottish interests were represented in Brussels by the UK government. Furthermore, it asks whether they expected the Scottish Parliament to make an identifiable difference by swaying policy outcomes through domestic and European channels. Second, while many elites believed the parliament would adopt a more holistic approach to policy-making by including civic interests, the study queries this perceived consensus about the meaning of governance under new constitutional arrangements.

The article begins by introducing the elites whose opinions were considered, namely, members of civic organisations, civil servants, and politicians. It develops a typology to assess elite views, using an actor-centred approach to multi-level governance. It then describes how elites expected the Scottish Parliament and Executive to affect EC policy-making at a domestic level, before turning to their views about Scotland's likely relationship with EC institutions. Next, the article explores elites' understanding of governance and suggests their domestic conception of this approach to policy-making has relevance at European level. The concluding section summarises the research findings and draws lessons for the future of Europe's youngest parliament.

Actor Typology

This analysis of expectations about Scotland's role in Europe draws from qualitative research.[3] It focuses on interviews with 60 'elites' conducted between November 1998 (following the publication of the Scotland Act to ensure equal knowledge about new structures) and May 1999 (preceding the first election to prevent partisan bias). Elites are understood here as influential, prominent, and well-informed "people in important or exposed positions."[4] The sample of interviewees was carefully chosen to include all levels and aspects of government and society,[5] enabling a comparison of opinions within and between groups. During interviews lasting between one and two hours, elites were asked the same series of open-ended questions designed to gauge their expectations and to identify key vocabulary. These 'privately stated' views were compared with opinions put forward in documents (*e.g.*, civic publications, civil service working papers, party manifestos) and stated publicly at over 60 conferences and events.

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[3] For more information about research methods and conclusions, see A Sloat, *Scotland in Europe: A Study of Multi-Level Governance* (2002).

[4] L A Dexter, *Elite and Specialized Interviewing* (1970) p 5.

[5] F Devine, 'Qualitative Analysis' D Marsh and G Stoker (eds) *Theory and Methods in Political Science* (1995) p 142.

The study assesses *what* elites believe about Scotland's role in Europe, but also seeks to analyse *why* they hold certain views. It accepts that "we can make progress if we focus on policy actor behaviour – as well as on institutions and institutional relationships – in order to begin our search for a better understanding of the EU as a policy system or series of policy sub-systems."[6] It draws from the academic literature on New Institutionalism,[7] which asserts that the behaviour of political elites is shaped by institutional norms. In other words, institutions "serve to structure the individual and collective choices faced by member governments, and thereby influence policy choices in ways that cannot be predicted from the preferences and relative power of the member states alone."[8] It also uses the insights of Multi-Level Governance, which suggests that elite expectations are affected by the political level at which they work. For example, Hix draws on a rational choice approach that focuses "on the interests and strategies of actors in the EU policy process" and conceives of "individuals as utility-maximizing and independent from social and political forces."[9] However, this article argues that these two approaches do not pay sufficient attention to actors' previous experiences – particularly their involvement in the devolution process.

To test this hypothesis the study builds on the actor-centred approach developed by Marks, which views "actors as agents of decision making in both international and domestic contexts."[10] Marks defines institutions as "sets of commonly accepted formal and informal norms that constrain political actors (individuals and groups of individuals) who are the only agents capable of goal-oriented action,"[11] but he argues that actors may change them in favour of more appropriate ones. Thus, this study examines the correlation between actors' expectations and the norms of their institution, political level of employment, and individual experiences (including proximity to the devolution process). It develops a typology of actors who are involved in the legislative process, including members of Scottish civil society, officials, and politicians. Within each typology, opinions are assessed according to the political level – Edinburgh, London, Brussels – of an actor's employment. The typologies also include elites with varying degrees of involvement in the parliament's establishment, enabling consideration of how proximity to the devolution process affects the expectations of actors within and between categories. While this article will highlight areas of agreement between the typologies, it will also suggest that

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[6] J Richardson, 'Policy-Making in the EU: Interests, Ideas and Garbage Cans of Primeval Soups' J Richardson (ed), *European Union: Power and Policy-Making* (1996) p 20.

[7] See S Bulmer, 'The Governance of the EU: A New Institutional Approach' (1994) 13 *Journal of Public Policy* 351; V Lowndes, 'Varieties of New Institutionalism: A Critical Appraisal' (1996) 74(2) *Public Administration* 181; K Armstrong and S Bulmer, *The Governance of the Single European Market* (1998).

[8] M Pollack, 'The New Institutionalism and EC Governance: The Promise and Limits of Institutional Analysis' (1996) 9 *Governance: An International Journal of Policy and Administration* 429 at 430.

[9] S. Hix, *op cit* n 2 at 48.

[10] G. Marks, 'An Actor Centred Approach to Multilevel Governance' C Jeffery (ed), *The Regional Dimension of the European Union* (1997) p 34.

[11] *Ibid* p 22.

some differences may stem from varying involvement in the process of constitutional change. The remainder of this section will describe the three actor typologies, which are summarised below in Table 1.

The first category includes members of Scottish civil society, who can be viewed as the parliament's *architects*. Several campaigned for devolution, participated in the Constitutional Convention, and 'represented' civic Scotland in the absence of a legislature (*e.g.*, Church of Scotland, Scottish Council of Voluntary Organisations, Scottish Trades Union Congress). Other key players include Scotland's European representatives in the Convention of Scottish Local Authorities (COSLA) and Scotland Europa. The collaborative efforts of many elites in the Constitutional Convention – civic organisations, with Labour and Liberal Democrat politicians, lobbied for a parliament and proposed its design – and the Consultative Steering Group (CSG) – a civic and cross-party group that drafted standing orders for the new legislature – provided terms of reference for devolution discussions. Many of these proposals were incorporated into the parliament's final design. Their views are contrasted with those of civic members who were less involved in the parliament's establishment but remain affected by its operation (*e.g.*, Scottish industries, umbrella business organisations, academics). Architects may have the hardest time post-devolution, as their designs may be altered and as the new legislature changes their role from 'spokespersons of' to 'contributors toward'.

Next, the *builders* represent officials in the Scottish Office and some Whitehall departments (the study examined the Cabinet and Foreign Offices). Their main task was to combine the architects' plans (CSG report) with government legislation (Scotland Act) to devise a devolution settlement that was an operational success and retained the unity of the UK. They focused on the promotion of the government line and the creation of an effective method of policy-making. Their work is recorded in the Memorandum of Understanding and concordats, which are non-legally binding agreements between the executives that cover aspects of policy-making (including European issues) and dispute resolution. Their role as political 'insiders' gave them more knowledge than other groups about the intricacies of devolution, while their neutrality as civil servants enabled them to assess the operation of pre-devolution procedures and make predictions about the anticipated strengths and weaknesses of the new settlement. Many of those who helped design the new structures are involved in the parliament's early operation, providing continuity while also retaining vital links between officials north and south of the border. This category also includes officials in EC institutions who articulated views about Europe's newest parliament; although they are removed from the process of its establishment, they work with its officials and provide a 'European' perspective.

Finally, the parliament's *tenants* are the first group of politicians to inhabit the structure constructed by the architects and builders. They brought their own expectations about their new home, particularly as some were involved with the Convention or inhabited houses of a different construction in Westminster or local government. This first group is determining working practices in the parliament, which may become institutional norms. The tenants' main tasks include representing their constituents and making policy for Scotland, which is being documented in legislation, speeches, and media

reports. Candidates for the European Parliament and Westminster also fall within this category, as their respective levels of government interact with the Scottish Parliament. Their inclusion enables consideration of whether politicians in Scotland had different aspirations for the parliament than their counterparts in Strasbourg and London.

Table 1: Actor Typologies

	ARCHITECTS	BUILDERS	TENANTS
Members	Civil society	Officials	Politicians
Task	Devolution Procedures	Operational success	Policy-making Representation
Record	Convention CSG	Scotland Act Concordats	Legislation Speeches
Current Role	Monitor Lobby	Policy Execution	Policy-Making Representation
Future	Lose rep. role Evaluation	Changeable	Changeable

Table 1 synthesises the actor typologies. Because many elites in Scotland wear multiple hats, it is difficult to place them within a single category. For example, several Labour and Liberal Democrat politicians were members of the Constitutional Convention; thus, some architects became tenants while others now lack direct involvement. Relationships also developed pre-devolution between actors in various categories and have evolved during the parliament's early years. These blurred boundaries, which illustrate the importance of an actor-centred approach that considers the numerous factors shaping expectations, are represented in the table by an absence of vertical lines separating the categories.

Scotland's Domestic Influence

Research found that most elites in all categories believed Scotland's European involvement would have predominantly domestic effects.[12] They did not expect the parliament or executive to exert significant influence on UK or EC policy *outcomes*, and some questioned whether domestic legislation would differ from that produced by the old Scottish Office. Instead, most focused on the potential for a more participative and transparent policy-making *process*. Despite general agreement among elites,

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[12] For a more detailed analysis see A Sloat, 'An Actor-Centred Approach to Multi-Level Governance: Expectations of Scotland's Role in Europe' (2002) 12(3) *Regional and Federal Studies* 156.

their varying attitudes toward constitutional change between actor categories caused some divergent opinions of Scotland's European role. Other differences stemmed from their proximity to the devolution process, creating contrary views within categories and shared aspirations between them. This section compares their views of domestic channels of influence, while the following section will assess their expectations about European channels.

Representation

The study began by considering whether elites believed Scotland was adequately involved pre-devolution in the UK's formation of EC negotiating lines. Most elites in all categories said Scotland was represented as part of the UK as a whole, but they disputed the UK government's handling of 'distinct Scottish interests'. While it remains unclear whether this dispute stemmed from frustration with the policy stances of the Conservative government (1979-97) or a flaw in the mechanisms used to create the UK position, the former seems more likely given the satisfaction expressed by some (particularly non-political) actors. When elites were asked whether Scotland's policy objectives differ substantially from England's, they nearly unanimously cited policies that are devolved or of statistically disproportionate interest. In particular, they named agriculture, fishing, and structural funds. These areas do not differ from English priorities in *substance*, but Scotland places a certain *emphasis* on particular aspects due to its distinct history, geography, and institutions. While elites did not expect the Scottish Executive to promote a radically different stance on EC policies from England, they believed it could accommodate more subtle needs by implementing directives, lobbying Whitehall, and promoting views to other regions and Commission officials.

Evaluation of Scotland's pre-devolution involvement differed according to elites' proximity to the legislative process, as many cited the dominant role of the civil service and said the lack of transparency hindered accurate assessment. There was a correlation between actors' inside knowledge of the political process and their conclusions about its effectiveness. Most architects, some European builders, and tenants from 'opposition' parties had little personal experience of government procedures and believed Scotland was badly represented. In contrast, architects with European experience (representatives of Scottish industries, COSLA, Scotland Europa), UK builders, and tenants whose parties had recently served in government reported adequate Scottish involvement. When asked what difference the devolution settlement would make to Scotland's role in EC policy-making, most elites emphasised its handling of domestic affairs and ability to implement directives in devolved areas. Although the Scottish Office occasionally implemented differently from England in the past, UK builders thought this would increase post-devolution as the existence of a domestic legislature enables more time for thorough consideration. Architects expected the parliament to become a focus for interests, involving civic actors in pre-legislative scrutiny and consultation.

Despite hopes for a new style of policy-making, the majority of elites in all categories expected the internal machinery to remain the same as most negotiations between the Scottish and UK governments will continue through existing civil service channels. On one hand, devolution may *change* the legislative process in Scotland by making it more transparent and

accountable; this reflects the expectation that the parliament will 'democratise the Scottish Office'. On the other hand, elites anticipated *continuity* through the work of a unified civil service; this raises questions about the effectiveness of the parliament's new operating practices and may lead to calls for civil service reform. Most elites expected devolution to make Scotland's views known more widely at home and abroad: in the UK, the parliament provides another tool for Scotland to lobby Westminster; in Europe, it confers democratic authority on the assertion of Scottish interests. Such visibility introduces greater accountability into the policy-making system, enabling the Scottish electorate and other European states to judge whether the UK government has incorporated Scottish views.

However, it is questionable whether Scotland will actually win more battles as transparency does not necessarily equal increased political persuasiveness. Elites who remained sceptical about the devolution settlement expressed concern about *decreased* representation. Conservative and SNP politicians predicted less interaction between Scottish and Whitehall departments, the loss of Cabinet links, and a weaker (or eventually no) Secretary of State. The latter were particularly worried that the devolution settlement is premised upon Labour administrations in London and Edinburgh, and questioned the ability of an SNP administration to participate actively in EC policy-making. Several architects predicted that officials could lose information through civil service channels, ministers may be marginalised as decisions are taken in London, tensions between the executives could hamper Scottish involvement, and formerly Scottish-run issues such as forestries will be handled by UK ministers. There were also fears that Scotland may become either too insular in an attempt to solve all problems itself or too independent by repeatedly bypassing Westminster.

Because most post-devolution discussions about EU policy continue to occur within the unified civil service or between ministers on a confidential basis as per the concordats, it remains difficult to evaluate the extent to which Scotland has gained additional political authority in making its case to the UK government. However, recent research suggests these elite expectations were fairly accurate.[13] Some Scottish Executive officials question whether Whitehall treats Scotland any differently, suggesting the biggest change is more active civic involvement in the legislative process. The European Committee and Executive have been effective at scrutinising European proposals, involving civic organisations in the consultation process, and publicising issues under consideration. Politically active organisations have enjoyed accessible politicians and a legislature closer to home, but the parliament seems to have made little impact on individual citizens and disaffected groups.[14] Perhaps most surprising is the limited use the Scottish Executive has made of its ability to implement EC directives differently from the rest of the UK, though its implementation of the Water Framework Directive through primary legislation is a notable exception.

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[13] A Sloat, 'Scotland and the European Union: A Contribution to EU Governance Debates' (2001) in Scottish Parliament European Committee**,** *Report on the Governance of the European Union and the Future of Europe: What Role for Scotland?* Ninth Report, Volume 1 – Main Report, 11 December.

[14] See J Curtice, D McCrone, A Park and L Paterson, *New Scotland, New Society? Are Social and Political Ties Fragmenting?* (2002)

Channels of Influence

Despite a mixed appraisal of the UK's past representation of Scottish interests in Europe, nearly all elites in the original study stressed the continued importance of domestic negotiations after the parliament's establishment. They cited officials as the most effective pre- and post-devolution channel for relaying Scottish views to Whitehall, as the UK civil service remains unified and ministers become involved only when problems arise. UK builders, who have the greatest knowledge of past and present procedures, did not expect devolution to affect Scotland's level of representation or input into UK deliberations; they said Scottish officials already participate in areas of interest and this process will simply be formalised. However, elites coupled their recognition of continuity with an emphasis on likely change. Unlike the internal handling of disputes during 'administrative devolution', many elites expected the parliament to publicise the existence of different opinions from England.

Elites also stressed the importance of co-operation between politicians on different political tiers. UK builders were the most effusive about such connections. Some architects and tenants (particularly MEP hopefuls) envisioned a greater role for MEPs, who can provide an early warning about forthcoming legislation, information about other states' position, and a Scottish voice in the European Parliament. These actors said MPs can focus on reserved matters, pressure the government, and ask parliamentary questions. Although uncertain about relations between the parliaments and their committees, they highlighted partisan links and personal connections (*e.g.*, Scottish chairman of the Commons' European Committee).

While the parliament's first term saw no direct links and relatively little contact between the Scottish and UK European Committees, officials servicing the committees have developed liaison mechanisms. Politicians are co-operating through the EMILE forum (European Elected Members Information and Liaison Exchange), whose twice-yearly meetings are attended by the Europe minister, European Committee MSPs (Members of the Scottish Parliament), Scottish MEPs (Members of the European Parliament), and Scottish members of COR. In addition, the Memorandum of Understanding[15] established the Joint Ministerial Committee (JMC) to enable senior officials and/or ministers from the relevant ministries of devolved administrations and Whitehall departments to discuss UK positions on European matters and to resolve disputes between administrations over devolved issues. The original study was unable to assess expectations about the JMC given little publicly available information, though there were documented concerns about its potential for UK interference.[16] The effectiveness of the JMC as a decision-making forum seems limited, as it only met once in the parliament's first two years to discuss European matters.

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[15] Scottish Executive, *Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government, Scottish Ministers and the National Assembly for Wales* (1999).

[16] See, *e.g.*, A Barnett, 'Corporate Control' (1999) *Prospect*, Feb, p 24.

Although elites emphasised domestic co-operation, the original study questioned whether they expected the UK government to restrain Scotland's autonomy. When asked about the likelihood of parliamentary debates on reserved policies, the majority of elites said the new legislature would want to consider all relevant issues but warned about the need to prioritise devolved areas. Elites were more concerned about the concordats, as their ability to regulate certain channels of participation confirmed the belief of many that officials would control the legislative process. While some architects hoped these informal guidelines would guarantee increased Scottish participation, most tenants (except Conservatives) suspected they would restrict Scottish involvement. Although all UK builders said the concordats were not legally binding and could be amended, Whitehall officials repeated the need for a unified UK line while Scottish Office officials feared their southern colleagues would have difficulty surrendering their legislative dominance.

During their first term the Scottish Parliament and Executive have enjoyed significant autonomy, though they have not utilised this freedom to enact radical policy initiatives or deviate from the UK line when implementing EC directives. Despite initial fears about the concordats' ability to restrict Scottish activities, they are rarely used in practice and officials suggest they are only referred to as a last resort for clarification. While there is increasing awareness of ways in which Scotland could act differently on EU matters from the rest of the UK, Scottish officials cite a desire in some Whitehall departments to retain GB- or UK-wide implementation.[17] Limited financial and staff resources have kept Scottish officials dependant on their Whitehall colleagues for scientific expertise and legal drafting. There are also battles to be fought with the Scottish Executive: many of their discussions with the UK government occur behind closed doors and hinder committee scrutiny, while efforts are made by Labour-dominated executives in Edinburgh and London to retain a unified UK position.

Scotland's European Influence

Having considered elite expectations about the domestic effectiveness of the Scottish Parliament and Executive, the study looked at Scotland's ability to 'bypass' Westminster by promoting its views directly in Brussels. Most elites agreed that Scotland could pursue autonomous action, but concluded that co-operation is more effective than opposition (especially as the UK may not support Scotland in the future). The views of certain actors reflected their attitudes toward the devolution settlement: some builders (Whitehall officials) and tenants (Conservative politicians) were fearful about the implications of autonomous Scottish action for the union, while architects with government experience said the bypass occurs already. Attitudes also differed within and between categories. Several tenants (SNP and Labour candidates) said the strategy should be used if the UK government fails to incorporate Scottish views on important policies, while other architects (COSLA officials) and builders (Scottish Office officials) said Scotland could highlight distinct needs that are supported but not prioritised by the UK.

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[17] A Sloat, *op cit* n 13.

The rest of this section focuses more specifically on elite expectations about Scottish involvement in EC institutions, including the Executive's European office, the Council of Ministers, the Commission, and the Committee of the Regions. Few elites expected these channels to enable the Scottish Executive to exert more *influence* on EC legislative outcomes than the Scottish Office did. But most believed devolution would alter the nature of Scottish *participation*: the parliament will create a higher profile for Scotland, while the executive can speak with democratic authority and build relations with other sub-national actors.

Scottish Executive European Office

The main 'non-institutionalised' channel used by sub-national authorities to promote views in Brussels is a regional information office. Before devolution Scotland was represented by Scotland Europa, a subsidiary of Scottish Enterprise and membership organisation that provided a Scottish presence in Brussels given the absence of parliamentary representation. Most elites praised the office for creating a profile, building networks, and providing a platform for lobbyists. They also supported the creation of the Scottish Executive's European Office, which is now co-located with Scotland Europa under the umbrella of Scotland House, to monitor EC policy developments and provide Scottish information to the Commission. Interviewees did not expect it to exert greater influence than Scotland Europa, but thought it would raise Scotland's profile, co-ordinate activity among political actors, and enable more active participation in networks of regions with similar legislative powers.

The study measured the potential autonomy of the Executive office by considering the prospect of conflict with the UK Permanent Representation (UKRep) to the EU.[18] The majority of architects and tenants expected the offices to co-operate and have few problems. Those with proximity to the EC policy-making process (COSLA and Scotland Europa officials) were more hopeful, recalling healthy relations between UKRep and Scotland Europa and predicting that strain would only be part of a larger domestic dispute or driven by partisan differences. However, builders held divergent views. Scottish Office officials in Edinburgh predicted little conflict, citing the need for co-operation and expecting most disputes to be handled domestically. Their Brussels-based counterparts were more assertive, expressing a willingness to fight for Scottish interests while acknowledging the possibility of subsequent tension and domestic repercussions. In contrast, Foreign Office officials warned against independent action and voiced concern about the location of the Executive's office outwith UKRep.

Since opening in October 1999, the Scottish Executive European Office has hosted 6500 delegates (*e.g.* European Committee, COSLA delegation), arranged 36 ministerial visits (including 29 by Scottish ministers), and

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[18] For more information on the relationship between regional information offices and member states' permanent representations, see C Jeffery, 'Regional Information Offices in Brussels and Multi-Level Governance in the EU: A UK-German Comparison' C Jeffery (ed), *The Regional Dimension of the European Union* (1997) p 183.

assisted 1100 other visitors on business.[19] It held conferences on EC/EU policies relevant to Scotland, improved co-operation with other regions, monitored the EC legislative process, and reported developments to Scottish decision-makers. While its officials cite an increase in Scotland's European profile and good working relations in Brussels, it is unclear whether Scottish views are more influential post-devolution. There is little reported tension with UKRep, which may be attributable to the Executive's initial caution, the unified civil service, and Labour-led governments in Edinburgh and London.

Council of Ministers

Although the Council of Ministers is dominated by member states by design, documents produced during the 1990s by the Scottish Constitutional Convention[20] and the four main political parties[21] emphasised the importance of Scottish participation in meetings. Most interviewees, however, admitted this would be limited and dependent upon good relations between the Executives. They hoped Scottish ministers would continue pre-devolution practices of attending Council meetings in areas of disproportionate interest, and expected them to speak occasionally on behalf of the UK and according to a pre-arranged stance.

Elites disagreed about the ability of Scottish ministers to lead a UK delegation. London-based officials were adamant that UK ministers alone will lead and decide whether to include their Scottish counterparts, while Scottish officials admitted that Scottish ministers were unlikely to lead but may in areas of exclusive competence. A few architects with little government knowledge, primarily businessmen, expected Scottish ministers to lead in areas of distinct interest; in contrast, a law professor said this was legally impossible. Tenants also held opposing views: SNP politicians said Scots could lead but questioned its occurrence, while Conservative politicians emphasised the domestic and European repercussions of such action.

Scottish participation in Council meetings has steadily increased during the parliament's first term, but remains a target of criticism by the SNP opposition. From July 1999 to mid-March 2001, Scottish ministers attended 18 meetings dealing with fisheries, agriculture, the environment, and education – all policies of disproportionate interest to Scotland. Scottish Executive officials attended 32 Council working groups from July to December 1999 and 67 during 2000, with a concentration on the same four

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[19] Scottish Executive European Office, 'Scotland House 1999–2000: One Year On' (2000), available at www.scotland.gov.uk/euoffice/shr2000.asp

[20] Scottish Constitutional Convention, *Towards Scotland's Parliament* (1990); Scottish Constitutional Convention, *Scotland's Parliament, Scotland's Right* (1995).

[21] See, for example, Scottish Conservative and Unionist Policy Commission, 'Scotland's Future' (1998); Scottish Labour Party, 'Scotland's Parliament: Labour Proposals for the Scottish Parliament' (1997); Scottish Liberal Democrat Party, 'Sovereignty and Integration: The Case for a Scottish Parliament' (1992); Scottish Liberal Democrat Party, 'Raising the Standard: Scottish Parliament Manifesto 1999' (1999); Scottish National Party, 'Rejoining the World: External Affairs and the Scottish Parliament' (1999).

policy sectors.[22] During March 2001 to March 2002 officials attended 95 meetings, of which 26 involved civil law and 34 on fisheries. From March 2000 to December 2001 ministers attended 21 meetings (12.8% of those held), primarily on the same subjects.[23] In addition, the European Committee has sought to conduct greater pre- and post-Council scrutiny of the Executive's position; structures are now in place to enable the committee to receive timely information from the Executive, be better informed about the direction of EU policies, and pursue further intervention as required.[24]

Commission

Scottish documents and interviewees said relatively little in the original study about the Commission's utility to Scottish involvement in EC policy-making, though there was a link between elites' views and experiences of the institution. Many architects and tenants failed to recognise its potential: some businessmen and members of Scottish industries questioned whether the Commission would respond to one of many sub-national governments, while several politicians emphasised Scottish participation in the more visible but less easily influenced Council. In contrast, those architects (Scotland Europa, COSLA) and builders (EC officials) with Brussels experience cited its accessibility to sub-national authorities with special concerns. They also stressed the need for Scotland to replicate its strong domestic links in the European policy arena and develop a partnership approach across all levels of government.

Scottish officials had developed good links with their Commission counterparts pre-devolution, which have been advantageous during post-devolution discussions about potential problems with proposed directives.[25] The Scottish European Committee welcomed the Commission's recent *White Paper on European Governance*, particularly its proposals to develop relations and consult more systematically with Europe's regions. The committee's own report on governance recognised the importance of timely Commission consultation:

> "It is of critical importance that this is done at the pre-legislative stage, in advance of the adoption by the College of Commissioners and is on a preferential basis for regions/nations with legislative power. From the point of

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[22] Answer by Jack McConnell MSP to questions raised in the Scottish Parliament on 29 March and 2 May 2001.

[23] Answer by Jim Wallace MSP to questions raised in the Scottish Parliament on 25 February 2002.

[24] Scottish Parliament European Committee, 'Briefing/Reporting by the Executive pre- and post-European Council and Council of the EU Meetings: an issues paper' (2002) EU/02/03/1, 5 Feb; Scottish Parliament European Committee, 'Briefing/Reporting by the Executive pre- and post-European Council, Council of the EU Meetings, Joint Ministerial Committees and MINICOR: proposed arrangements' (2002), EU/02/05/1, 20 March; Scottish Parliament European Committee 'Pre- and Post-European Council, Council of the EU, Joint Ministerial Committee and MINECOR Scrutiny' (2002), EU/02/09/8, 24 May.

[25] A Sloat, *op cit* n 13.

> adoption by the Commission, the debate in the EU is one of 'negotiation' and not one of 'formulation'."[26]

Committee of the Regions

The most accessible 'institutionalised' channel for sub-national authorities is the Committee of the Regions (COR), of which Scotland has four (of the UK's twenty-four) representatives and four alternates. Scotland's members were formerly local councillors, two of whom became MSPs and subsequent conveners of the European Committee. The concordats enable the Parliament to nominate members, who are currently split between the Parliament (1 full and 1 alternate member), Executive (1 full and 1 alternate), and local councillors (2 full and 2 alternates).

The majority of actors in all categories lacked knowledge about COR and assumed it was ineffective. They doubted its ability to enable Scottish politicians to sway policy discussions, criticised its limited authority and diverse membership, and faulted its tendency to express opinions on numerous subjects. However, architects (COSLA officials) and tenants (a former Labour member) with direct knowledge of the institution presented more favourable assessments, praising its representation of local government and regional interests. Continued frustration with COR's weaknesses has led constitutional regions to seek alternative channels of influence.[27] For example, in May 2001 Scotland joined Catalonia and five other European regions (Salzburg, Rhineland-Westphalia, Bavaria, Wallonia, and Flanders) to sign the Political Declaration of the Constitutional Regions in the EU; it demanded a greater role for regions in the preparatory work for the 2004 Inter-Governmental Conference (IGC) and the future of the EU generally.

Governance

Because Scotland's political elites emphasised the Scottish Parliament's impact on domestic over European policy-making, it is worth examining how elites expected the devolved government to work differently from Westminster and to involve civic interests more effectively.[28] Through frequent interaction during the 1990s, many elites developed shared ideas about governance based on the ideals of transparency and democratic accountability. For example, the CSG report established guiding principles of power-sharing, accessibility, responsiveness, and equal opportunities.[29] Similarly, COSLA called for the parliament to "develop a distinctively Scottish approach to public policy by engaging in the policy process a wide range of stakeholders who are directly involved in the implementation of

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[26] Scottish Parliament European Committee, *Report on the Governance of the European Union and the Future of Europe: What Role for Scotland?* (2001) Ninth Report, Volume 1 – Main Report, 11 December.

[27] E Roller and A Sloat, 'The Impact of Europeanisation on Regional Governance: A Study of Catalonia and Scotland' (2002) 17(2) *Public Policy and Administration* 68.

[28] For a more detailed analysis of research findings see A Sloat, 'Governance: Contested Perceptions of Civic Participation' (2002) 39 *Scottish Affairs* 103.

[29] Consultative Steering Group, *Shaping Scotland's Parliament: Report of the Consultative Steering Group on Scotland's Parliament* (1998).

policy."[30] While many elites think they share similar visions of policy-making, this section will explain how the various words they use to define 'governance' reflect divergent – and sometimes conflicting – views.

Definition of Governance

The study evaluated elite opinions about the European Committee to understand their definitions of governance. There was nearly unanimous support for the committee's CSG-proposed holistic structure, which is a potential tool for fostering new forms of governance, and for its efforts to 'mainstream' European affairs into the parliament's work. While most believed the committee would scrutinise and filter EC legislation, their emphasis on its additional tasks derived from their organisations' needs. Only architects expected the committee to play a significant role in implementation and, consequently, wanted to be involved in discussions about the most appropriate methods. Builders stressed the logistical process of handling legislation, citing the need to filter documents and liaise with officials and politicians at other government levels. Many tenants expected the European Committee to pass topical issues to other committees, while it could focus instead on macro issues.

At the beginning of the parliament's first term, the European Committee operated according to this CSG proposal by considering every EC/EU document at all stages of the legislative process, trying to prioritise them, and referring them – where necessary – to other committees. However, the committee found this system to be time-consuming and ineffective. It has since initiated new procedures whereby it classifies the list of documents received, distributes the list to other committees, and encourages them to inquire into relevant issues. The European Committee has refocused its efforts on scrutinising the Executive pre- and post-Council meetings.

There were similar divisions of opinion, which are summarised below in Table 2, when elites were asked about the involvement of non-MSPs on the European Committee as briefly considered by the CSG. The parliament's architects, some of whom participated in the Constitutional Convention and worked for organisations that 'spoke' for Scotland in the absence of a legislature, understood governance as civic *participation* in policy-making. While they all desired direct involvement with politicians, this defining process ranged from giving evidence (consultation) to joining parliamentary committees (direct participation). These preferences related primarily to the nature of their institution: members of civic organisations saw involvement as symbolic and desirable in itself; those affected by legislation, such as the COSLA and the National Farmers Union – Scotland, desired an inside voice in policy-making; and businessmen, whose industries were more affected by reserved areas, wished to be consulted but placed less emphasis on extensive involvement.

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[30] Convention of Scottish Local Authorities, 'COSLA, Local Government, and the Scottish Parliament: A Consultation Paper' (1998) p 1.

Table 2: Understanding of Governance

	ARCHITECTS	**BUILDERS**	**TENANTS**
Defining Principle	Participation	Co-Operation	Partnership
Defining Relation	Civic-Politician	Official-Official, Politician-Politician	Politician-Civic
Defining Process	Involvement	Liaison	Consultation

The other two categories articulated slightly different conceptions of governance. The parliament's builders were more concerned about Scotland's task of producing quality legislation within a UK structure than with incorporating civil society more closely into that process. Although officials supported a holistic approach to policy-making, many were cynical about the civic desire for a more participative democracy and questioned proposed consultation mechanisms. Their definition of governance focused on *co-operation,* especially among Scotland's three tiers of politicians and officials. They made few references to a legislative role for civil society, preferring that civic organisations promote rather than shape policies. Builders emphasised liaison as the defining process of interaction: they expected guidance from the concordats, cited goodwill between civil servants, and stressed the importance of information exchange among politicians.

Finally, the parliament's tenants used the rhetoric of governance most frequently. Focusing less on structures and links with other politicians, they articulated the civic desire for 'joined-up' government and collaboration with policy users. They defined governance as *partnership,* an understanding that was particularly evident in pre-election policy documents produced by all four parties[31] and emphasised defining relations with 'the people' and civic organisations. Although tenants shared the architects' hope for greater interaction, they emphasised civic 'consultation' rather than more extensive 'involvement'. In particular, there was debate between parties with varying degrees of government experience: 'opposition' parties (SNP, Liberal Democrats) held 'people's assemblies' before the elections to ascertain the public view and their members tentatively supported including non-MSPs on committees, while candidates from parties with recent government experience (Labour, Conservatives) were more reluctant about radical mechanisms and cited their role as elected representatives.

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[31] Scottish Conservative and Unionist Policy Commission, *op cit* n 21; Scottish New Labour Party, 'A Lifetime of Opportunity' (1998); Scottish New Labour Party, 'Building Scotland's Future' (1999); Scottish Liberal Democrat Party, 'How the Scottish Parliament Should Work: the Scottish Liberal Democrat Response to the Consultative Steering Group' (1998); Scottish Liberal Democrat Party, *op cit* n 21; Scottish National Party, 'Towards the Scottish Parliament: Policy Intentions for the 1999 Elections' (1998).

Analysis

The most contentious issue in discussions about new forms of governance concerns the nature and extent of civic involvement. Expectations were the closest between architects and tenants, partially due to co-operation in the Constitutional Convention and CSG, some overlapping membership between categories, and a similar understanding of the electorate's needs. Builders' scepticism may present the most serious obstacle to reform, particularly as most elites expected officials to retain significant control over the internal policy-making process. However, the difficulty of reaching an acceptable compromise could be compounded by tension within – as well as between – actor categories as architects and tenants disagreed amongst themselves about the desired role for civil society.

Another aspect of the 'Scottish' conception of governance is the prevalence of informal relations within a small elite. Close and frequent contact enabled the development of a common language, shared goals, and civic trust. It may also explain the consensus among actors about the parliament's likely operation and effect on policy-making. The House of Commons' Scottish Affairs Committee, which examined the implications of devolution, made a similar observation:

> "The Scottish model offers an exciting opportunity to experiment with new methods of government and new and more equal relationships between government and the governed. . . . Scotland has a major advantage in achieving this in that it is a relatively small country where the rest of the major players tend to know each other already so that the contacts have already been made."[32]

Although established networks and shared experiences may help the creation of new forms of governance, the dominance of key individuals raises concerns about the potential exclusivity of Scotland's political elite. 'Outsiders' may struggle to find a niche, and there is a danger of (perhaps unintentional) clientelism as people utilise connections to obtain a political voice. The challenge in Scotland is devising a system that retains the benefits of close contacts while remaining open to interested – and previously uninvolved or excluded – participants.

Elites are increasingly cognizant about the importance of governance within the UK, as most supported interaction between Scottish politicians and officials at three tiers of government to exchange information and exert influence on multiple levels. They recognised the lack of co-operation in the past, calling for more cordial relations between MEPs and MSPs than had been experienced with MPs. They also acknowledged the dominant role of officials in pre-devolution negotiations between Scotland and the UK, and wanted to preserve good working relationships north and south of the border. Yet the 'Scottish' view of governance remains a primarily domestic concept that has yet to incorporate fully the European dimension. Although elites realised that overlapping policy competences must be shared by multiple

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[32] House of Commons Scottish Affairs Committee, *The Operation of Multi-Layer Democracy* (1998), Second Report, Volumes 1, 18 November, p ix.

levels of government, some seemed uncertain how to operate on several tiers simultaneously and instead emphasised their primary tasks: those in Brussels said all regions face this overlap; Whitehall officials stressed the need to maintain a unified UK line; and Scottish-based interviewees highlighted the parliament's ability to implement legislation. Many also cited potential domestic problems, fearing that partisan conflict between Scottish and UK governments of differing political complexions could hinder participation and representation.

This discussion of conflicting understandings of governance has particular relevance following the publication of the European Commission's *White Paper on European Governance*.[33] Scotland was an active participant in this debate, sharing many of its recent experiences.[34] The preliminary working programme of the governance exercise reflects key principles identified by Scottish elites, defining governance as "rules, processes, and behaviour that affect the way in which powers are exercised at European level, particularly as regards accountability, clarity, transparency, coherence, efficiency and effectiveness."[35] The White Paper identified the need for greater civic and regional participation in policy-making, but was vague about detailed mechanisms. It emphasised *consultation* as a guiding principle, stating: "Participation is not about institutionalising protest. It is about more effective policy shaping based on early consultation and past experience. . . . Better consultation complements, and does not replace, decision-making by the Institutions."[36] The challenge for both Scotland and the EU is, therefore, developing practical ways of implementing these generally supported concepts and clarifying the meaning of civic participation.

CONCLUSIONS

In conclusion, research found that most elites expected substantial *continuity* in Scottish policy-making post-devolution: the majority of civil service procedures stay in place, while many policy *outcomes* are likely to remain the same. But they expected a *change* in the legislative *process* according to new forms of governance, including more transparent and accountable policy-making, the visibility of distinct Scottish views that may contradict those of Westminster, and the creation of a democratic profile at home and abroad. In terms of Scotland's role in Europe, the majority of elites did not expect Scotland to exert greater *influence* on legislative outcomes. Rather, they highlighted the opportunity for more democratically legitimate and

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[33] European Commission, *European Governance: A White Paper* (2001), COM 428, 25 July.

[34] The European Committee visited the Commission's Governance Team in March 2001, invited COR members to a wide-ranging debate about governance in May 2001, and held its own inquiry to examine how Scotland's new constitutional arrangements relate to EU issues. The Scottish Executive and COSLA submitted a 'Joint Discussion Paper on European Governance' to the Commission's inquiry, while Jack McConnell MSP (as Minister for Europe) addressed a hearing organised by the Commission's governance team in Brussels.

[35] European Commission, 'White Paper on European Governance: Enhancing Democracy in the European Union, Work Programme, Commission Staff Working Document' (2000), SEC 1547/7, 11 October, p 4.

[36] European Commission, *op cit* n 33, pp 15-16.

discernible *participation*. They expected the parliament to provide a focus for Scottish interests, while the executive can implement EC legislation in a suitable manner, lobby Westminster, and speak in Brussels with greater authority.

Although elites held many similar opinions about Scotland's European role, some disagreement between categories stemmed from divergent attitudes toward governance and devolution. *Architects* were the most enthused about 'new politics', but remained pragmatic about the opportunities for and limits of their new legislature. They emphasised the parliament's ability to foster new working practices over its ability to sway decisions in London or Brussels, stressing the involvement of civic organisations in creating and implementing legislation. *Builders* did not expect devolution to increase Scotland's participation in EC policy-making or affect legislative outcomes, but focused instead on co-operating to maintain efficient policy-making. They also highlighted the novel visibility of Scottish views within a unified UK system. Finally, *tenants'* expectations fell between those of the other actor typologies: some were involved with the Constitutional Convention and sympathised with the civic desire for greater involvement, while others emphasised their status as elected representatives and the need to preserve the union. In general, they highlighted the parliament's ability to focus attention on Scottish issues, consult civil society more extensively, and implement EC legislation in an appropriate manner.

There was a correlation between individuals' expectations and their proximity to the devolution process. Elites who were involved in the parliament's establishment – as campaigners, CSG members, MSP candidates, or Scottish officials – appeared more knowledgeable about its operation, optimistic about its ability to forge a new style of politics, and aware of the implications of devolution. Their views differed from those of actors who were further removed from the devolution process (UK and EU politicians, SNP and Conservative MSP candidates, some English and European officials, businessmen affected by reserved areas). Proximity to UK and EC policy-making also appeared to make some actors more hopeful about Scotland's ability to achieve satisfactory legislative outcomes; for example, UK builders were emphatic about Scotland's pre-devolution involvement in the UK's formulation of an EC negotiating line, while those with personal experience in Brussels were optimistic about Scotland's ability to make its voice heard. Policy-makers could apply the lessons of this actor-centred approach to the legislative process: as individuals with personal experience of an institution or process were more supportive than those who lacked first-hand knowledge, it would seem that actively including such actors should make them more supportive of the resulting legislation. In other words, policy-makers should adhere to civic calls for a shift from solely *representative government* to more *participative governance*.

There is evidence in Scotland that the government and civic organisations are beginning to develop new methods of governance, with committees taking the most active role in increasing legislative scrutiny and including civil society more directly in the policy process. The jury is still out in the case of Europe, as Scottish politicians and officials seek to increase their influence on EC policy-making while the European Commission struggles to determine the best mechanisms to encourage regional participation. The ongoing Convention on the Future of Europe, which was established by the

Laeken European Summit in December 2001, is an attempt by the EU to involve civic organisations and politicians in discussions following the governance debate and preceding the 2004 IGC on pre-enlargement institutional reforms. While it is questionable whether this unwieldy forum will reach a meaningful consensus on issues such as the division of competences and treaty simplification, it is essential that politicians, civil servants, and members of civic organisations develop a meaningful dialogue that enables successful policy-making on multiple levels and the practice of good governance.

PRIVATE PARTNERS AND THE PUBLIC GOOD

Robin Wilson, Director of Democratic Dialogue, Northern Ireland.*

INTRODUCTION

The Problem

The current Programme for Government of the devolved administration, like the first, sets out starkly the fiscal constraints confronting it:

> "The resources available from the taxpayer are finite and in particular are stretched by the need to provide services for a higher proportion of young people and to tackle higher levels of social disadvantage than the UK average. We have a major need for significant investment, in particular in some of our infrastructure such as transportation, water and sewerage. However, the many other pressures on the Northern Ireland Block are such that the levels of required investment are unlikely to be solely achievable through public expenditure. Additional sources of investment will be secured including partnerships with the private sector as a means of tapping into expertise and new sources of finance; exploring other sources of revenue; and continuing to require developers to bear the cost of works needed to facilitate their development proposals". [1]

The programme promised that by September 2002 policy proposals on PPPs would be advanced and by October a review of rating policy would be complete. Currently, the regional rate provides the only "tax" the devolved administration can vary.

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* This paper was published originally as the first in a series of briefing papers by the Institute of Governance, Public Policy and Social Research in Queen's University Belfast. It arose out of a round table event organised in February 2000 by the Institute of Governance under the Chatham House Rule which benefited from the valued contributions of the Northern Ireland finance minister, Seán Farren; the chief economist of the Institute for Public Policy Research, Peter Robinson; Nigel Annett, an executive director of Glas Cymru (the not-for-profit now running Welsh Water); and Eamon Kearns, head of the Public-Private Partnerships Unit of the Department of Finance in the Republic of Ireland. The paper also benefits from the contributions by round-table participants, none of whom of course bears any responsibility for its contents. These included some members of a Working Group on public-private partnerships (PPPs), convened by the Office of the First Minister and Deputy First Minister, which included representatives of employers, the trade unions and the voluntary sector as well as officials. The paper is an intervention in a debate about PPPs in Northern Ireland but it is hoped that its views may have wider application.

[1] Northern Ireland Executive, *Programme for Government: Making a Difference – 2002-2005*, (2001) Belfast: Office of the First Minister and Deputy First Minister, pp 68-69.

The backdrop to these comments is a fairly bleak fiscal outlook. On the one hand, the administration is under strong pressure to "make a difference" in addressing what has come to be described as the "infrastructure deficit" in public services bequeathed by successive direct-rule administrations – for whom political crisis-management, rather than long-term policy commitments, was uppermost. On the other, it faces on the revenue side a "Barnett squeeze" in the growth of its public-expenditure allocation from Westminster.

In March 2001, the Executive Committee established a Working Group to carry out the review of PPPs promised in the first Programme for Government.[2] Its terms of reference included "to look specifically at ways of attracting private sector investment to finance the provision of infrastructure, facilities and/or premises for the purposes of services to the public, where this provides value for money and is acceptable in relation to the Executive's other policy objectives and drawing on relevant UK and international practice".[3] The group concluded: "there is a need for substantial investment in Northern Ireland's public service infrastructure, for which there is currently inadequate funding from conventional sources . . . The gross investment deficit amounts to £6.8 billion over the next decade, with investment need significantly outstripping capital baseline funding. This highlights the potential for PPPs to address investment need, and thus assist in tackling the deficit, and also the need for alternative sources of funding in order to maintain, let alone improve, service provision."[4]

The biggest single need identified, by department, is Regional Development, estimated at requiring a total of £2.6 billion more for investment over ten years, over and above current allocations projected forward. The major factors here are water and sewerage below ground, and transport above it. The other two departments, with estimated gross investment deficits of £1.06 billion and £1.4 billion respectively, are Education and Health, Social Services and Public Safety. Here schools, colleges and hospitals are the big investment costs. Between them, these three departments are estimated by the group to account for three quarters of the "gross deficit".[5] In other words, were the challenges associated with them to be successfully tackled, the financial problem would in large measure be solved.

The deficit is slightly reduced when account is taken of the cross-departmental Executive Programme Funds of the devolved administration. The group estimates this brings what it calls the "net investment deficit" down by nearly one billion to £5.9 billion over the decade.[6] But this is still alarmingly higher than an earlier draft had calculated: £4.1 billion. The latter had been the basis for ministerial speeches declaring there was a £4 billion

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[2] Northern Ireland Executive, *Programme for Government: Making a Difference – 2001-2004*, (2000) Belfast: Office of the First Minister and Deputy First Minister at p 69.

[3] Office of the First Minister and Deputy First Minister. *Review of Opportunities for Public Private Partnerships in Northern Ireland: Working Group Report*, (2000) Belfast: OFMDFM at p 2.

[4] *Supra* pp 14-15.

[5] *Supra* p 16.

[6] *Ibid*.

"infrastructure deficit" for the executive to fill, as Dr Farren repeated as late as March 22nd in Derry:

> "Unfortunately, we do not have the resources needed to rectify this problem. We will continue to utilise whatever funding is available from Europe and from other international sources, but the reality is that there will always be a gap between what we want to do and can afford to do. With a potential funding deficit already of around £4 billion we have to look beyond conventional procurement and towards Public-Private Partnerships and the Private Finance Initiative as one of the means of delivering the objectives of the Programme for Government."[7]

Dr Farren reported that 24 projects worth £167 million had been awarded under PFI in Northern Ireland, nine more worth £170 million were at various stages of procurement and 16, potentially worth £380 million, were under active consideration.

The deficit is put down to the cumulative effect of capital expenditure constraints under the Tories, but continued under New Labour – by 1999-2000 net expenditure on assets had fallen to 3.6 per cent of the Departmental Expenditure Limit – as well as increased EU regulatory requirements with regard to water and waste, technological advances such as *vis-à-vis* medical equipment and the pressures of demography and social need.[8]

It is clear from the above that the thrust towards PPPs in Northern Ireland has been as a means of financing the infrastructure deficit through PFI projects. Yet the report makes plain that finance and *funding* need to be distinguished. Following the argument of the Institute for Public Policy Research commission on PPPs,[9] (IPPR, 2001), the group recognises that, however a particular project is financed, unless charges are involved it is still funded from the public purse.

> "A key source of confusion in the debate on Public Private Partnerships is the failure to distinguish between how public service investment is funded and how public service investment is financed. Public Private Partnerships do not in themselves give rise to new or additional sources of funding (unless they are associated with the introduction of user charging) and instead a stream of resource payments has to be set aside by the public sector in order to meet the financial commitments arising from the transaction. Unless a Public Private Partnership delivers net savings through greater efficiency, the ultimate cost of a project to the taxpayer will be higher than the cost of a traditional procurement where the Treasury borrows in the capital markets." [10]

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[7] Executive Information Service, March 22nd 2002.
[8] Working Group *op cit* n 3 at pp 19-20.
[9] Institute for Public Policy Research, *Building Better Partnerships: The Final Report of the Commission on Public Private Partnerships*, (2001) London: IPPR.
[10] OFMDFM *op cit* n 3 at p 33.

Unfortunately, this very clear statement is not followed consistently in the remainder of the report. For example, later it asserts:

> "The financial modelling is predicated on three key assumptions:
>
> Traditional procurement is the preferred way of meeting investment needs;
>
> Capital budgets are used to meet investment needs through traditional procurement;
>
> Public Private Partnerships are used to meet investment needs in excess of the capital budgets (*i.e.* PPP is used to fund the investment deficit)."[11]

Not only does this restate the "something-for-nothing" fallacy about PFI. On the other hand, it also questions the repeated – though not evidence-based – assertion in the report that the private sector has "skills" which make it *inherently* more efficient than the public sector. If the latter were indeed so, far from there being a preference for "traditional procurement", there should be a preference (as under the Tories) for private-sector solutions, with no reference to public-sector comparators.

Worse still, this confusion is carried forward by ministers in their initial response to the Working Group report:

> "As stated in our Programme for Government a central aim of the Executive is that through renewed infrastructure and innovative policies, we can secure the basis for a balanced, competitive, innovative and sustainable economy. It is clear that the level of resources routinely available to us would not be sufficient to achieve this outcome. In particular, dependence alone on routine public expenditure to fund infrastructure would make it much less likely that we could secure either the range or the quality of public services we need for Northern Ireland now and in the coming years.
>
> Hence the Executive launched the Working Group on Public Private Partnerships last spring because we knew that, faced with a probable investment deficit in public services infrastructure of around £6 billion over the next 10 years, it was essential to explore vigorously all the options for bridging the gap. The use of Public Private Partnerships is one possible means of addressing the deficit . . .
>
> … We need to establish if PPPs can promote activity over and above what is possible from public spending and borrowing, and how that approach can be harnessed to serve the public interest here."[12]

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[11] *Supra* at pp 145-6.

[12] Northern Ireland Executive, *Financing our future: initial response to report of working group on review of opportunities for public private partnerships in Northern Ireland*, (2002) Belfast: Executive Information Service.

Nor are ministers' assembly colleagues any more clearly informed. The report on PPPs by the Committee for Finance and Personnel declared: "The underlying assumption made is that HM Treasury is unlikely to meet all of the financial needs of Northern Ireland from increased public expenditure in the short to medium term."[13]

This only confirms the view of Broadbent and Laughlin that "at the heart of PFI is an uncertainty about what its major public purpose is."[14] On the one hand, it is represented as a means to get round public-expenditure constraints and thus secure otherwise unaffordable investments; on the other it is described as a form of public procurement that can realise value-for-money savings and risk transfer in the public interest. They point out that two major changes have taken place under New Labour which have made the case for PFI significantly more restrictive.

The first is the adoption by the Chancellor, Mr Brown, of the "golden rule" and the "sustainable investment rule" for the public finances.[15] This has legitimised sustainable borrowing for investment by the public sector and removed the "only show in town" argument for PFI. The freeing up of the borrowing capacity of the Northern Ireland administration *via* the Reinvestment and Reform Initiative, which could in turn be enhanced by an innovative, not-for-profit, special-purpose vehicle for water, have the same macro-economic effect on a regional scale.

This point is worth underscoring. There is no longer any case for resorting to PFI to evade public-expenditure restraints (though it was always short-termist so to do). For Northern Ireland, unlike Scotland and Wales, *there is now another show in town* (apart from avoiding borrowing at all by raising revenues or reducing expenditures). There is now no excuse for there to be other than a procurement level playing-field.

This relates to the second change: the requirement, in line with National Audit Office guidance, that a public-sector comparator be designated to test the value-for-money potential of private project bids. Broadbent and Laughlin conclude: "It is now clear that if a PFI deal does not satisfy the value for money criteria in comparison with a PSC then it should not proceed."[16] PPPs *may* offer savings over conventional procurement – if efficiency gains offset the transaction costs involved in the contracting process and the higher cost of borrowing which the private sector generally faces (because companies, unlike governments, may go bankrupt). But such savings cannot be generically assumed. And they will be at the margin, compared to the very large numbers the working group has generated. The argument for PPPs, if argument there be, must therefore be made otherwise: *they will not fund the infrastructure deficit*.

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[13] Committee for Finance and Personnel, *Report on the Inquiry into the Use of Public Private Partnerships*, report 7/00, (2001) Belfast: Stationery Office at p 7.

[14] *Control and legitimation in government accountability processes: the Private Finance Initiative in the UK*, paper delivered to School of Management and Economics seminar, Queen's University Belfast, December 7th 2001.

[15] Commission on Taxation and Citizenship, *Paying for Progress: A New Politics of Tax for Public Spending*, (2000) London: Fabian Society at pp 60-1.

[16] *Op cit* n 14.

By the same token, whether PPPs are or are not pursued, the *funding* deficit still has to be addressed. There are only two ways of doing so: by increasing revenue or reducing expenditure. The revenue accruing to the devolved administration is overwhelmingly determined by UK-wide taxation and national-insurance arrangements, allied to the allocation of public monies to Northern Ireland, Scotland and Wales *via* the Barnett formula. The rates account for just 6 per cent of the regional budget.[17] The formula was the eponymous creation of the cabinet secretary, Joel (now Lord) Barnett, in the last Labour government before the long period of Conservative rule.[18] It was established in 1978 with the prospect of devolution in mind. The referendum "yes" in Scotland did not however meet the exacting requirements of the legislation of the time, while a majority in Wales voted "no". It is critical to understand that Barnett is a formula governing *increments* in expenditure, year on year, not *levels* of expenditure as such. Based on population ratios, expenditure in the devolved territories is increased in proportion to comparable programmes in England (or, in some cases in Northern Ireland, Great Britain).

The implication of this, in theory, is that *ceteris paribus* expenditure in Northern Ireland, Scotland and Wales, which all enjoy higher spending per head than England, should converge with the English level over time, as the percentage increase in English expenditure translates into "Barnett consequentials" for the devolved territories that comprise a lower proportion of their (higher) expenditure. This should be particularly so for Northern Ireland, as it is the most out of kilter – running at 42 per cent more per head than England.[19] The fact, however, over two decades on from the onset of the formula, that Northern Ireland still experiences such a high differential over other UK regions/nations (Scotland comes next) suggests that the "Barnett squeeze" has not operated quite as expected. This is partly because of "formula bypass", where monies are allocated – such as the post-agreement Chancellor's Initiative in Northern Ireland – outwith the formula. But stricter application of the formula – the change from the 1998 initiative, based on grants, to the 2002 Reinvestment and Reform Initiative, based on loans, is a signal – may reduce the scope for such bypass in future. Moreover, the 80s and 90s were a period of slow public-expenditure growth. It is when, as now, rates of growth are more ambitious that the "squeeze" becomes tightest.[20]

Yet, as indicated above, PFI does nothing to loosen it. Indeed, on the contrary, if the expectation is of a progressively more constricted financial envelope, the dangers of adopting a "buy now, pay later" approach are all the

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[17] Department of Finance and Personnel, *A Review of Public Procurement: Findings and Recommendations*, (2002) Belfast: DFP at p 9.

[18] R. Barnett, and G. Hutchinson, "Public expenditure on the eve of devolution", in Robin Wilson (ed), *Hard Choices: Policy Autonomy and Priority-setting in Public Expenditure*, (1998) Belfast: Democratic Dialogue / Eastern Health and Social Services Board / Northern Ireland Economic Council at p 49-50.

[19] HM Treasury, *Public Expenditure Statistical Analysis (PESA) 2002-03*, (2002) at p 95 (available at http://www.hm-treasury.gov.uk/Documents/Public_Spending_and_ Services/Public_Spending_Statistics/pss_pss_pesaindex.cfm)

[20] David Heald, *Beyond Barnett? Funding devolution*, paper delivered at ESRC/IPPR devolution seminar, Scottish Parliament, April 18th 2002.

more apparent. Treasury projections assumed big post-devolution increases in PFI commitments in the devolved territories, even as some central departments have been cutting back.[21] In comments delivered in Edinburgh but equally applicable to Northern Ireland, Heald has pointed out: "The standard justification offered politically in Scotland for the adoption of the PFI route is one of capital starvation and the non-availability of public funds ('only show in town'); this sits uncomfortably with concerns that the Barnett formula will in future bring convergence."[22] Moreover, there is little point in Northern Ireland ministers protesting that Barnett is "unfair", with a view to securing an even larger differential over and above the UK average. As Heald bemoans, "There is presently a remarkable amount of confusion about even basic facts, stemming in part from an apparent failure to understand the difference between relative and absolute changes."[23] It is precisely because Northern Ireland receives such *generous* funding, compared with the UK average, that absolute changes in levels translate into what can be presented as miserly relative gains. Any needs assessment, the only alternative to Barnett – based on setting levels rather than increments – would be very unlikely to find that greater social need in Northern Ireland, however severe, justified a 42 per cent spending bonus over England. Indeed, if they encouraged the Treasury to go down that road, Northern Ireland ministers might find themselves struggling to defend what they had, rather than making further advances.

A Treasury review of disparities in expenditure between English regions could potentially spill over into the devolved territories in any case. Indeed, the devolved countries and regions team at the Treasury has calculated that, even taking account of extra security costs, Northern Ireland would lose £364 per head per year – a 5.7 per cent reduction – if spending were reallocated according to need.[24] Given pressures from similarly poor but less-well-funded regions like the north-east of England, as Smyth and Delargy warn, "It is far from clear that if the cake were shared out in a different way, we would emerge as winners."[25] Nor is the "unfairness" case made any stronger by the record of the Northern Ireland departments since devolution. The fragmentation of government from six to 11 departments (including the OFMDFM) has compounded the spending-control mindset inherited from a more stringent *régime* by making it more difficult to disburse allocations. In 2000-01, the departments underspent by nearly 4 per cent.[26]

The problem, then, is not the one we started with, and not the one that is normally presented in the public domain. Northern Ireland's problem is not that it is "underfunded" by Westminster in terms of public expenditure – though, like the rest of the UK, it is under-taxed compared with the EU average, and therefore endures sub-European public services. And nor, in this context, does the private sector offer a vehicle to magic gold out of base

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21 Institute of Public Policy Research, *op cit* n 9 at p 75.
22 *Op cit* n 19.
23 *Ibid*.
24 *Guardian*, July 1st 2002.
25 Austin Smyth, and Jamie Delargy, *Bonds: A Capital Idea*, (2001) unpublished paper.
26 Heald *op cit.*

currency. Over the long run, funding the "infrastructure deficit" can only be done by diverting expenditure from elsewhere or enhancing revenue. PPPs, if they have a role, must be embraced for other reasons.

Wider Considerations

All over the world, governance is changing. Launching the Institute of Governance and Public Management at Warwick University in September 2001, its director, John Benington, presented three competing and to an extent successive, paradigms – traditional public administration, the "new public management" and emergent "citizen-centred governance" – reproduced, with acknowledgment, in Figure One below. In the first, the state both proposes and disposes; in the second, the consumer (theoretically) proposes and the market disposes; in the third, the citizen (as far as is practicable) proposes and networks / partnerships dispose.

Figure One: The Warwick model of competing paradigms of governance[27]

	Traditional public administration	New public management	Citizen-centred governance
Context	Stable	Competitive	Continuously changing
Population	Homogeneous	Atomised	Diverse
Needs/problems	Straightforward, defined by professionals	Wants, expressed through the market	Complex, volatile and prone to risk
Strategy	State- and producer-centred	Market- and consumer-centred	Shaped by civil society
Governance through …	Hierarchies	Markets	Networks and partnerships
Actors	Public servants	Purchasers and providers, clients and contractors	Civic leaders

This table is important because it is widely assumed that in fact there are only two models of governance: the first, frequently presented as obsolete, and the second, assumed to represent the only alternative. Much of the drift in Britain in the 80s and 90s from delivery of projects and services *via* the public sector towards reliance on the private sector was premised upon such

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[27] Copyright: John Benington and Jean Hartley, University of Warwick, Coventry CV4 7AL, UK.

presuppositions. This included the idea that there should be a preference for private finance, associated with the private-finance initiative.

Awareness of the third paradigm, and in particular of the role of non-governmental organisations and civil society in governance, allows of a recognition that the "public sphere" may be broader than the state and, indeed, that the latter may not represent its best embodiment. Within this model, it is at least theoretically possible that the state could contract, withdrawing from service delivery towards more strategic core functions, while the public sphere expanded, as operational control over services was devolved to a diverse range of organisations, subject to democratic regulation. An obvious example in many continental-European countries is social-insurance schemes, frequently managed by the "social partners" rather than by government itself. A Northern Ireland example would be the operation of refuges for victims of domestic violence by Women's Aid, rather than by the Department of Health, Social Services and Public Safety (which nevertheless finances them). The arrangement is allied to a regional forum on domestic violence, which brings all the relevant statutory and voluntary agencies together.

This point is particularly important in that in the UK, and especially in Northern Ireland, discussion of PPPs has taken place in a context where it has been (wrongly) assumed that they necessarily arise from public-expenditure restraint. The IPPR commission on PPPs, by contrast, called for further exploration of the potential of PPPs *and* greater commitment to public expenditure. And it pointed out that "many of the societies that see a diverse set of public service providers as a natural state of affairs have levels of public investment and social provision that . . . the UK can only envy".[28]

Understanding this third paradigm makes clearer that PFI, which has been the almost-exclusive focus of the PPP debate in Northern Ireland, represents only one instance of the kinds of partnership into which the state can enter. There is a danger that it becomes a "cuckoo in the nest", crowding out other, often more interesting, partnerships, such as in policy delivery and service provision. A broader approach can conceive of the potential benefits of not-for-profits, for example.

Glas Cymru is a not-for-profit which took over the privatised Welsh Water organisation. It is a potential model for Northern Ireland which has interested the assembly's regional-development committee. It is accountable to 50 independently-appointed "members", who carry out the corporate-governance role of shareholders without taking any dividend, and has the support of the Welsh National Assembly. This means that it operates in the public rather than private-shareholder interest and is able to borrow more cheaply than if it were a private concern, and has done so through a bond issue. It has thus been able to cut bills as well as enhance reinvestment. (Again, of course, this is only *cheaper*, not *free*, capital.) Being not-for-profit, however, does not mean Glas Cymru avoids financial disciplines: it outsources much of its work competitively on the basis of target prices based on market research and performance-linked management fees. But it retains bath-to-bay responsibility for the whole system – thereby avoiding the

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[28] IPPR *op cit* n 9 at p 253.

moral-hazard problems experienced on the railways in Britain, where the bewildering array of partners ensures everyone tries to displace responsibility on to somebody else when things go wrong.

The Working Group does consider Glas Cymru – though it underestimates the capacity of not-for-profits to be financially diligent,[29] and so is more negative about them than the voluntary sector would like.[30] But the skewing of the group's work, arising from its origins in the "infrastructure deficit", tends to narrow the focus nevertheless. The report of the Working Group recognises that one form of PPPs comprises arrangements "where the public and private sectors work together to bring about more general policy outcomes" but it says that the "nature and scale of the investment challenge" dictate a focus for the most part on the purchases of services from the private sector or the introduction of an element of private-sector ownership into state enterprises.[31]

This is unfortunate, once the something-for-nothing fallacy is understood on the one hand and the innovative potential of the third governance paradigm is appreciated on the other. For it is precisely *via* co-operation between a limited, liberal state and a wide range of NGOs (including the conventional private sector) that policy can often be best delivered in complex economic and social environments. Yet just one paragraph of the report is devoted to this potentially huge area.[32] Looking at devolved governance in particular, apart from Northern Ireland's "infrastructure deficit", a further factor encouraging all the UK devolved administrations to go down the PFI route has been Treasury rules preventing the latter from borrowing in their own right. In that sense, while PFI does not offer something for nothing, it has appeared to offer something *quicker*, by getting projects "off balance sheet". The Working Group rightly recognised that this is a poor argument for PFI projects, trumping as it will value-for-money considerations, and the group recommended a relaxation of Treasury borrowing constraints.[33]

The significance of the Reinvestment and Reform Initiative launched in May[34] is that it provides a borrowing capacity. An initial £125 million facility has been made available and from 2004 the executive will be empowered to borrow without, apparently, any limit. According to Mr Brown, "in the spirit of devolution, it will be for the Executive to decide how far and how fast to make use of this new facility".[35] As long as borrowing is to finance investment rather than recurrent expenditure, as long as the budget is such as to be able to meet the claims arising and as long as the opportunity costs are assessed, it can be justified. But, again, this is not

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[29] *Op cit* n 3 at p 60.

[30] Northern Ireland Council for Voluntary Action, *NICVA response to the draft working group report on the use of PPP/PFI in public services*, (2002) Belfast: NICVA. Pp 3-4.

[31] Working Group *op cit* at p 50.

[32] *Op cit* at p 61.

[33] *Op cit* at p 44.

[34] See *Irish Times*, May 3rd 2002.

[35] See speech by the Chancellor of the Exchequer, Gordon Brown MP, at the Odyssey Centre, Belfast – Reinvestment and Reform Package, (2002) (available at http://www.hm-treasury.gov.uk/Newsroom_and_Speeches/ speeches/Chancellor Exchequer/speech_cx_020502.cfm).

something for nothing. Indeed, borrowing can *only* be justified if it is sustainable. This can only be so if it generates, or is associated with the generation of, revenue which allows the repayment of the principal *plus* the compound interest accumulated. This is why, far from sidelining the issue, the Reinvestment and Reform Initiative stimulated debate as to how the region could contribute more on the revenue side.

If, then, the Northern Ireland administration, through the new Strategic Investment Body to be established under the initiative, can borrow in its own right, and if it can generally do so more cheaply than the public sector, why bother with exploring private partnerships at all? First, as indicated earlier and discussed further below, there are important non-financial grounds for exploring PPPs. But, secondly, PPPs *may* be more cost-effective.

The very opening up of public services to contest creates a competitive environment which incentivises the search for efficiency (which we can define as quality of service offset by cost). If the lowest-priced bid will always triumph (as under the old "compulsory competitive tendering" regime) and employee terms are not protected, this can lead to a "race to the bottom" at the expense of service quality and workforce conditions. But a focus on "best value" and safeguards for employees (see below) should ensure that the incentives direct managers to genuine efficiency improvements – by service innovation or cost reduction or both. Even if the public-sector comparator triumphs in such an environment, the contest will have demonstrated its superior efficiency or incentivised it to achieve such superiority.

The report in the Republic of Ireland of the Public-Private Advisory Group on PPPs argued that "all parties to a PPP arrangement should have regard to appropriate industry norms in terms of pay and conditions and of [sic] prevailing national and/or industry-wide agreements including health and safety regulations."[36] "Regard" is not a guarantee that existing terms and conditions will provide a floor, below which new employees will not be recruited, but the reference to wider norms and agreements provides a context in which such a floor can be constructed. The Working Group Report basically throws this issue, which continues to concern the trade unions,[37] and indeed the voluntary sector,[38] up to the executive. In terms of the correct structure of incentives, never mind Northern Ireland's much-vaunted "equality agenda", a level floor for all should be the objective.

Over and above the impact of contestability, if a PPP assumes control of a project there is a continuing financial incentive towards efficiency. This arises from the "stake" which the private partner has in the success of the project: a cost overrun, for instance, will reduce its profit stream accordingly, as long as there has been a genuine transfer of risk through a properly drawn contract. *As long as* the workforce terms-and-conditions floor is secure, this will have an effect nicely described by Audit Scotland in terms of how it "focuses the mind" (for the commissioning body as well as the contractor) on

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[36] Public-Private Advisory Group on PPPs (2001), *Framework for Public Private Partnerships*, Dublin: Department of Finance, available at http://www.ppp.gov.ie

[37] See Working Group Report *op cit* at pp 172 and 203.

[38] See NICVA response *op cit* n 30 at p 4.

how the specified outputs will be delivered to the required standards of performance. Review arrangements may be critical in this regard. Otherwise, departments may find themselves having to top-slice budgets to meet contractual commitments which the benefit of hindsight shows to have been unwise. For example, in the early 90s an albeit privatised Northern Ireland Electricity became locked into power-purchase contracts with private generating companies, stretching as far ahead as 2024. Despite the best efforts of the regulator to reduce prices, this has forced consumers – domestic and industrial – to pay dearly for energy supplies in the region.[39] The Northern Ireland Audit Office has expressed dissatisfaction with the arrangements on more than one occasion.[40] How such conflicting pressures will work out in any particular instance can not be predicted. Hence, there is a strong argument for a case-by-case approach to PPPs, assessing how value for money is distributed among competing bids, rather than adopting an ideological assumption in favour of public- or private-sector solutions.

It is also important to avoid what has become frequent practice in Britain with PFI, which is the selection of a "preferred bidder". This approach is an attempt to assuage private-sector concerns about the expense of pursuing bids to a conclusion when they may well end in failure. The European Commission recommended in a draft directive in 2000, challenged by the UK government, that preferred bidders should be outlawed in the name of competition. Shortlisting is fine but the danger of allowing a single preferred bidder to emerge is that the latter can then engage in "rent-seeking" behaviour, securing concessions in the final negotiation of the contract from the public procurer – perhaps at the expense of service quality or workforce conditions – to maximise their return.[41] The head of health policy at UCL and a long-time PFI critic, Allyson Pollock, has claimed that the first 14 PFI hospitals in Britain saw bed reductions averaging 30 per cent and cuts of 20 per cent in clinical-staff budgets.[42] It is worth underscoring in this regard the dubiousness of talismanic claims of inherent private-sector capacities as against the real economic force of competition – including in the winning of contracts and then the realisation of a surplus from the associated investment (considering its opportunity costs). If the private sector is held to possess, say, skill in developing and managing large projects that the public sector lacks, then there are two obvious alternatives to PFI. The public sector could simply poach the specialist staff from the private sector or the latter could be contracted to run projects but not finance them – for example, design-build-operate (DBO) arrangements as against design-build-finance-operate (DBFO).

It is also important to recognise that there may be sectoral specificities. The IPPR report[43] noted that in the UK there was evidence of value-for-money savings through PFI projects in roads and prisons but that this was not the case for schools and hospitals. Part of the reason for this is that privately-financed schools and hospitals are nevertheless staffed by publicly-employed teachers and medical staff. There is thus a fragmentation of management

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[39] See further Smyth and Delargy *op cit*.
[40] See further for example *Irish Times*, 15 January 2002.
[41] See further *Guardian*, 22 January 2002.
[42] See further *Guardian*, 11 December 2001.
[43] IPPR *op cit* at n 9.

arrangements and a disruption of relationships between, for instance, nursing and ancillary staff, which few would advocate solving by moving the relevant professional teams into the private sector (though the class assumptions behind who is legitimately transferred from the public sector and who is not are interesting in this regard).

The international evidence marshalled by the Working Group similarly shows that while PPPs in "physical" infrastructure – roads, transport, water – are widespread, this is not the case for education and health.[44] Notably, France, Germany and the Netherlands – as attractive as they come when it comes to public services – do not pursue PPPs in these arenas (though social-insurance schemes in health might be so described by another definition).

This is important, given the earlier point about where the "infrastructure deficit" in Northern Ireland lies. Fascinatingly, moreover, while both education and health are ministries in Sinn Féin hands, the former minister, Martin McGuinness, quickly supported PFI arrangements, while the latter, Bairbre de Brún, has hitherto been reluctant to do so. Mr McGuinness, though representing a nominally socialist – indeed "revolutionary" – party in government, has taken over projects commenced not under the centrist New Labour but the right-wing Conservative direct-rule administration. In 1996, three schools and two further-education colleges in Northern Ireland were selected for the "Education Pathfinder" PFI project. Speaking at the site of one of the schools, St Genevieve's in west Belfast, the education minister rehearsed the "something-for-nothing" fallacy:

> "Since taking up my post as Education Minister, I have been concerned about the legacy of under-funding which has left serious deficiencies in accommodation across the schools estate. I am paying particular attention to this and will continue to seek additional resources to improve the situation. PFI is an innovative procurement method which can complement conventional public sector capital investment and thereby enabling [sic] us to secure much higher levels of capital investment overall."[45]

The thrust of the evidence is that in precisely these two big-spending areas – education and health – one should not be pushed down the PFI route by the "something-for-nothing" fallacy or "only show in town" pressures to get projects "off balance sheet". The biggest single item in the third area – regional development – is water, where an approach akin to that of Glas Cymru appears to be merited in Northern Ireland. In transport, meanwhile, the emphasis in the regional transport strategy on road-building has been rightly criticised by environmentalists,[46] but there may be a residual role for PFI here. Moreover, it is worth underscoring, once the distinction between finance and funding is grasped, the limited nature of the potential PFI savings. The public policy editor of the *Financial Times*, Nicholas Timmins, has written: "Many of the models show only a marginal cost-saving of a few

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[44] Working Group *op cit* at p 73.

[45] Executive Information Service, September 14th 2000.

[46] For example, R. Wilson, "Public policies", in *Northern Ireland Devolution Monitoring Report no 10* (February 2002), available at http://www.ucl.ac.uk/constitution-unit/ .

million pounds on PFI projects that have lifetime costs of tens or hundreds of millions of pounds."[47] Interviewed in the same report, the Deputy Controller and Auditor-General at the National Audit Office warned that some comparisons against a PSC favouring a private bidder involved "pseudo-scientific mumbo-jumbo" and were "utter rubbish". The report by Audit Scotland on PFI schools there, while confirming the real incentive effects of contestability and risk transfer, also indicated that VFM savings were marginal and, given the subjectivity of many assumptions, uncertain. Meanwhile, a "building futures" group, set up by the government-funded commission for architecture and the built environment and the Royal Institute of British Architects, has warned that 30-year contracts for PFI hospitals could lock the taxpayer into paying for what the group's chair called "institutional hospital buildings that mimic those of the Victorian era and will have little to do with the healthcare needs of our children's generation", when new technology and telecommunications would allow more people to be treated at home or in community settings.[48]

All in all, then, it may be that PFI will only play a limited part in Northern Ireland. Yet, if that were to militate in favour of a broader approach to PPPs and against the "cuckoo in the nest" danger – as well as that of mortgaging the future – it might better allow the full potential of PPPs properly to be realised. Were the devolved administration to pursue a VFM approach to the pursuit of PPPs, and recognise their diversity, there would be no need to pursue the "deal flow" of which the Working Group talks in commercial language which it would be quite inappropriate for the guardian of the public interest to adopt.[49] This is, first, because VFM considerations must be case-by-case and such an approach would be prejudiced by an overall commitment to add more "deals" to the "flow". This is particularly so, given that the Working Group claims that "accelerated delivery" of projects is itself a VFM objective.[50] Mortgaging the future could, in these terms, perversely translate into value for money! Secondly, once it is clear that PFI is only one of the types of partnership arrangement that may be pursued, it is clear that the commonality between "deals" is that much less. It is critical to distil experience at the heart of government on PPPs – a unit in the finance department, as in the Republic of Ireland, is suggested by the Working Group[51] – but talk of a PPP "process" is not evidence-based and would be likely to engender unnecessary opposition. And to suggest that there is a need for a "collective political commitment" [52] to PPPs, in the abstract is, in that sense, meaningless.

In addition, it is worth stressing the "value" in the value-for-money argument. Oscar Wilde famously complained about those who understood the price of everything and the value of nothing. It is theoretically possible, for example, that the "best value" choice in a particular instance might be the most expensive, were the quality of service offered to be so high as to be felt more than to offset the cost incurred. In our daily lives, we often choose (if

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47 *Financial Times* June 5th 2002.
48 *Guardian*, June 8th 2002.
49 Working Group *op cit* at p 101.
50 *Op cit* at p 91.
51 *Op cit* at p 183.
52 Working Group *op cit* at p 117.

we enjoy the choice) not to buy the least expensive of a range of goods on offer, recognising that good value rarely comes cheaply. Many of us, indeed, do not search out the lowest prices on the supermarket shelves, out of food-safety, environmental, fair-trade or simply quality considerations. A small voluntary-sector organisation, for example, might not be able to achieve the economies of scale of corporations or the public sector, yet might be able to offer a combination of specialist expertise, flexibility, commitment and user engagement which were thought to be of overriding importance for delivery of a particular service. It is thus helpful that, again following IPPR,[53] the Working Group recognises that partners can be drawn from the voluntary sector.[54] In the light of the commitment in the Programme for Government to "building stronger partnerships with the voluntary and community sector",[55] as well as business and the trade unions, the Voluntary and Community Unit[56] of the Department for Social Development has recently called for research proposals to address, *inter alia*, "the role and contribution of the voluntary and community sector in delivery of government services and identification of options for expanding the service delivery role of the voluntary and community sector". Not only that, but "social" (as against conventional "private" or "public") providers may engender beneficial "externalities" which will not appear in the accounting of that organisation. Pursuing neighbourhood regeneration, for example, in conjunction with a local social-economy organisation would not only deliver a service (local regeneration) but have spin-off benefits (local employment maintenance). The fact that the latter would not accrue to the project in hand would not mean it was of no value from the wider public interest.

It is because of this that Stutt *et al* have recommended that government in Northern Ireland adopt a preference for social-economy providers.[57] Clearly, such a preference would have to be based on there being demonstrable positive externalities in the particular case and should not be allowed to trump all consideration of efficiency. But were such an approach *not* to be adopted, in favour of a narrowly economistic alternative, these important externalities might be unwittingly foregone.

Because the public sector looms so large in Northern Ireland, public procurement is a major lever in the hands of the devolved administration: it is estimated to account for over £1.2 billion per year.[58] The review of public procurement recognises that "wider economic, social and environmental strategies and initiatives of the devolved administration in Northern Ireland should be more closely integrated into procurement policy". [59] It does not go

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[53] IPPR *op cit* n 9.
[54] Working Group *op cit* at p 49.
[55] Northern Ireland Executive, *Programme for Government* (2001) *op cit* n 1 at p 70.
[56] Voluntary and Community Unit, *Voluntary and community sector research in Northern Ireland: guidance for submission of proposals*, (2002) Belfast: Department for Social Development.
[57] See C. Stutt, B. Murtagh and M. Campbell, *The Social Economy in Northern Ireland: A Policy Review*, (2001) available at http://www.colinstutt.com/social_economy.htm.
[58] Department of Finance and Personnel (DFP), *A Review of Public Procurement: Findings and Recommendations*, (2002) Belfast: DFP at p 4.
[59] DFP Review *op cit* at p 10.

so far as to recommend (or even discuss) the social-economy preference commended to government by Stutt *et al* but it does propose a pilot scheme where some 20 procurement projects would be linked to bidders' proposals to recruit from the unemployed. Moreover it does say that the Procurement Board envisaged should consider how social considerations could be further integrated. [60]

From a public-interest perspective – which should drive all policy, whoever delivers it – a key issue of accountability arises when activities previously carried out in the public sector are devolved to partnerships or entirely to non-governmental organisations (including enterprises). Of course, the public sector can be unaccountable itself where transparency is lacking – and the devolved administration has got off to a bad start in this regard, accepting the conservative freedom-of-information regime devised by the former home secretary, Jack Straw, rather than the more liberal arrangements adopted in the republic or those envisaged in Scotland. But the risk of governance *via* the market is that claims of "commercial confidentiality" can be used to deny the public access to information that would be embarrassing to the company concerned or that might assist its competitors.

A broader, third-paradigm, focus on governance through networks and partnerships is, however, potentially exciting in accountability terms. Accountability can become an iterative dialogue between the partner(s) and government (at whatever level), to mutual benefit in terms of performance and innovation. Partnership arrangements may also facilitate direct accountability to the citizen *via* novel forms of user participation. Accountability may become more complex than in the first paradigm (*via* officials to elected representatives) but it may be the richer for that. Robust reporting requirements and periodic review arrangements can themselves incentivise the pursuit of efficiency, in addition to – or even as a substitute for – the commitment of a financial "stake". Thus, Glas Cymru's requirement to report to its "stakeholders" acts as a proxy for the latter, while avoiding its downside skewing effect on the operation of the company. Review arrangements can also prevent an inadvertent "democratic override", where a long-term and inflexible contract prepared in one policy context provides a source of inertia against the implementation of a more up-to-date one.

Moreover, while an organisation outside government may escape accountability, in well-constructed arrangements it is more specifically accountable: its budget is separate, for example, and so cost overruns will not be submerged in a larger departmental account. This would be likely to be critical if there were to be a move towards charging for water in Northern Ireland. The evidence of the Commission on Taxation and Citizenship[61] is that citizens would be more willing to pay a discrete amount to a discrete body – particularly one with no private shareholders – than an undifferentiated rate increase to an anonymous bureaucracy. Given water is currently operated by the state, rather than privatised, in Northern Ireland, a way towards the Welsh model would be to set up a special-purpose vehicle

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[60] *Op cit* at pp 50-2 and p 53.

[61] Commission on Taxation and Citizenship, *Paying for Progress: A New Politics of Tax for Public Spending*, (2000) London: Fabian Society.

in which the existing assets would be invested and which could issue bonds, with the assembly as backstop. Plans and targets could be set by the assembly, to which the SPV would report, and periodically reviewed against performance.

Returning to the broad picture, reflecting on developments since the IPPR commission report, one of its authors, Peter Robinson, has recommended three actions by government – equally applicable at devolved level – which would reassure genuine doubters about PPPs.[62] According to Robinson, a first step should be to lay to rest the bogus argument that PPPs somehow produce "extra" investment that the country could otherwise not afford. It has not in the past, it does not now, and it will not in the future. PFI may have its merits, but loosening the resource constraints that the country faces is not one of them. Clearing up this point would help ensure that private finance is only ever used for projects when it is genuinely thought that it will outperform a publicly financed alternative. Secondly, Robinson recommends an independent review of the process of evaluating value for money and, consequently, of the performance of PFI projects as compared with the alternatives. And, thirdly, he suggests inviting the trade unions and employers themselves to come up with a solution to the fear of a "two-tier workforce".

If the executive were to adopt these three stances, it would go a long way towards clearing the air – including of much of the confusion, uncertainty and fear surrounding the subject.

The solution

Let us return to the problem as we had redefined it: the gap between funding (as against financing) and public expenditure in Northern Ireland. We have stressed throughout that PPPs do not solve that problem. But, if conceived on a broad canvas – notably their underestimated potential in policy development and delivery – PPPs may have a major role to play in new governance arrangements, which we have defined as favouring a liberal state but a large "public sphere". They therefore may not answer the question of how we fund public services to a high standard, but they may be a big part of the answer to the question as to how we deliver such services and thereby, in a devolved context, "make a difference". Indeed, far from being a means to privatise government in line with a last-century governance model, PPPs offer Northern Ireland, where scope for institutional innovation is still large, avenues – plural, not singular – for moving towards a society characterised by higher public expenditure *and* greater reliance on non-governmental partners.

The remainder of this paper explores the various aspects of a solution. First, it looks at how revenue can be enhanced, including in the context of the rates review. Secondly, it addresses the specific challenge of renewing the water system. Thirdly, it considers expenditure, including issues of efficiency. Fourthly, it tackles the accountability concerns surrounding PPPs. And, finally, it indicates the positive role that ministers can and should play in carrying forward this debate.

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[62] P. Robinson, *PPPs: the Evolving British Debate*, unpublished paper (2001).

Revenue

Take funding first. All public expenditure must be funded ultimately by taxation or charges. Given the scale of the subvention looms large in the former, the capacity of the administration to demonstrate that it is getting its own financial house in order is critical to ensuring the best envelope of provision (and it would be counter-productive to advocate the reopening of Barnett unless and until the chancellor does so).

Tax-varying powers are essential, for two reasons. The first is to help fund services and take the weight off the regressive regional rate. The second is politico-moral: it is unhealthy for any polity to have power to disburse expenditure out of all proportion to its power to collect revenue. Recommending that the power to vary income tax be extended from Scotland to all the devolved administrations (and that the revenue-raising powers of local authorities be freed up), the Commission on Taxation and Citizenship said of the current situation: "It allows politicians and governments at the sub-national level to blame their failings on the lack of money they have been given by central government. In turn it can lead devolved and local governments to become more like pressure groups seeking greater funds from the centre than bodies taking responsibility for their own decisions."[63]

The rates review simply ignores the issue of tax-varying powers, since they would require amendment of the Northern Ireland Act 1998 which implemented the Belfast Agreement. But on any objective reading of the agreement, a conference involving the parties, to review its operation, should have taken place by May 2002. The review could have addressed – and still should address – this issue, a *lacuna* which simply reflects the absence of political will. Indeed, even in the absence of the review, the assembly can legislate in "reserved" areas – such as taxation similar to that in Great Britain – with the agreement of the Northern Ireland secretary. Hitherto, only the Social Democratic and Labour Party and the Alliance Party of Northern Ireland have put their heads over the parapet in supporting tax-varying powers. Currently, council-tax payers in Britain pay some 80 per cent more than ratepayers in Northern Ireland – and they have to fork out for water/sewerage charges too. This very fact undermines regional claims for extra cash from the Treasury: Northern Ireland could enjoy £116 million more expenditure per year if it raised the regional rate to the same proportion of average household income as in England.[64] But replacing the regional rate by additional income tax in Northern Ireland, among other measures, could remove this deficit in a much fairer way. The Scotland Act gave the Scottish Parliament a power – hitherto unused, but likely to be needed eventually, given the major spending commitments entered into by the parliament – to vary income tax by up to 3p in the pound. A more egalitarian arrangement would be a general power to vary income tax. Thus, for example, it would make more sense in Northern Ireland to restore an upper band of 50 or even 60 per cent (it was 83 per cent only a generation ago, let's not forget) before

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[63] *Op cit* at p 195.

[64] See further Department of Finance and Personnel, *A Review of Rating Policy: A Consultation Paper*, (2002) Belfast: DFP.

raising the basic rate.[65] This would also be administratively simpler. An increase UK-wide in the top income-tax rate to 50 per cent for those earning over £100,000 per annum would raise an additional £3.1 billion a year. On a pro rata basis, this would raise £86 million a year in Northern Ireland. Given the region has fewer very high earners, however, the actual figure would be significantly lower.

The rating review[66] recommends a reformed property-based system. But any such system, as the review recognises, then needs to introduce a raft of adjustments to minimise anomalies – for instance, where an elderly single person is living on low income in a large property. Far better to have a simple, efficient and above all fair system that need not duplicate the existing arrangement for income-tax collection. It is, however, right to sustain a property-based system for specifically non-domestic taxation, with reliefs where appropriate. The review suggests this should move from occupation to ownership, as a disincentive to dereliction, collecting some of the £43 million a year foregone as a result. More seriously, it points out that the blanket de-rating of industrial premises, foregoing £64.3 million a year, is unique in the world and has a large "deadweight" effect: there has been no demonstrable gain in inward investment. Other, selective, easements could be considered if this were removed, as the review strongly implies it should be. Moreover, agricultural land and buildings are de-rated too, with a potential lost revenue of £215 million. An exemption would however be required for owners with an income below a reasonable threshold, which given the poor state of farm incomes in recent years would eliminate most of this figure. But a replacement of the regional rate by an income-based alternative could provide the data required to focus such a property tax on major landowners.

While a decision on revenue-raising for local government in Northern Ireland awaits the wider review of sub-regional public administration, again collection of income data within the region could provide the basis for a move to local income tax, replacing the district rate for domestic ratepayers. This would again be more progressive than current arrangements. Remarkably, almost all the debate about redistribution in Northern Ireland has focused on expenditure – a product of a mindset where only the latter is subject to regulation – via "targeting social need". This has required complex administrative exercises and tied up large amounts of resources in the public sector. It goes without saying that in "normal" societies the focus of redistributive effort is primarily on the revenue side, where it is more effectively and efficiently directed. The above measures would have a significant, direct (and measurable) effect on the income distribution in Northern Ireland – none of which applies to TSN.

Water

Water provides a particular challenge. Currently, the cost of the water service comes out of general public expenditure, without being supported by the rates or by charges as almost everywhere else in the world. The case for

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[65] See further Civic Forum, *A Regional Strategy for Social Inclusion*, (2002) Belfast: Civic Forum at p 85.

[66] *Op cit.*

charges and metering, as an incentive for conservation, is a strong one. No one, for example, would suggest that electricity should be free if we were starting from a *tabula rasa* – though, interestingly, a "consumer service corporation" has been proposed in this arena, as an alternative to the shareholder-led Northern Ireland Electricity, with a view to reducing bills.[67] The Executive Committee has decided, however, that it will not go down the metering road, because of the capital costs involved. This is worthy of a more open debate.

The Department of Finance and Personnel calculates that investment totalling £3 billion is needed over two decades to meet EU directives, respond to increasing demand and replace ageing infrastructure,[68] though it subsequently translates this into only a £50 million additional funding requirement per annum.[69] Distributed among some 620,000 households, the annual charges required to fund such investment without resort to borrowing would not be high, even for those on low incomes (some £80 per year on average, plus administration costs). Were charges to extend to cover the introduction of metering and/or to contribute towards operating costs, of course, charges would have to be higher.

Given the legitimacy issues around charging in Northern Ireland (think of TV licences in west Belfast), a vehicle would need to be established (such as a not-for-profit) that would realise the revenue with minimum hassle. Such a vehicle could also borrow or the proposed Strategic Investment Body could borrow on its behalf (either way, it would be the executive's borrowing power that was the backstop guarantee). Bonds issued would, on the Glas Cymru model, incur cheaper interest than a private alternative. But, reiterating the funding/finance distinction once more, the latter would not be an alternative to charging.

Whether one did or did not decide to introduce water charges should be based on decisions as to how much additional overall expenditure, if any, the executive felt it needed to fund *per annum* and through what combination of additional taxation and charges it intended to bring it about. Borrowing – whether *via* a private partner or a not-for-profit in the "public" sphere – principally affects the phasing of the expenditure, not the total revenue that has, one way or another, to be raised to fund it. Thus, one might want to "float off" the water service to a not-for-profit or social enterprise at arm's length from government for public-policy reasons – that it was more transparent and subject to stricter disciplines, that government should not be involved in such operational activity, and so on. Such an organisation could engage wider stakeholders, operate accountably to a high standard of performance and generate a wider sense of "social ownership" over water. And one could simultaneously be opposed to charges on the grounds that they are inherently inegalitarian, though again there could be exemptions for those on means-tested benefits were charges to be introduced.

Turning to transport, the transport company Translink has the advantages of arm's-length operation and integration across modes, yet its potential is not

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[67] See further *Irish Times* June 13th 2002.
[68] DFP, *A Review of Rating Policy op cit* n 64 at p 41.
[69] DFP, *A Review of Public Procurement op cit* n 58 at p 42.

being realised. If a modern public-transport system is to be developed, public subsidy will have to be progressively raised. There is scope for saving by less expenditure on roads, where the latter only achieves a short-term reduction in congestion to no long-term benefit. But congestion charges are the only obvious way to tackle this problem and generate income to subsidise public transport. Catching suburban travellers into Belfast, such charges would tend to bear hardest on middle-class commuters and would have positive environmental effects. There should be clear hypothecation to public-transport improvement.

Expenditure

Turning to the expenditure side, there should be no presumption in favour of public- or private-sector projects for service delivery – though there can be a preference for "social" projects where it can be demonstrated that positive "externalities" arise. Every PPP project assessment should be on a case-by-case basis, including a public-sector comparator, and made on broad value-for-money terms rather than merely accepting the lowest bid. Any talk of promoting a "deal flow", jeopardising VFM accounting, should be abandoned.

Relevant expertise should be concentrated in the heart of government, to minimise the danger of poor contract arrangements being entered into and to ensure a continuous process of lesson-learning (including from elsewhere), reflected in regularly updated dissemination of good practice. Any new unit in the Department of Finance and Personnel should nevertheless liaise closely with the Economic Policy Unit in the OFMDFM, to ensure the full policy-delivery potential of PPPs is realised and that narrowly financial considerations do not constrain it. The devolved administration should also direct greater attention to expenditure *reductions*. The corollary of saying that it is difficult to defend a 42 per cent spending differential over England is that there are inefficiencies in how money is spent in Northern Ireland.

Sectarianism and social division are obvious sources of inefficiency. Education in Northern Ireland costs 44 per cent more per head than in England.[70] This is partly to do with a more dispersed system. But the insistence of vested religious and class interests in maintaining fragmented schooling arrangements – which the recent Burns review would not fundamentally affect – comes at a heavy price in the poor quality of the school estate. It is perfectly legitimate for the guardians of the public purse – elected politicians – to indicate that they have a policy preference for shared rather than segregated policy provision, in this and other areas. For example, currently, when a new greenfield housing development is completed, the default option is to build a "controlled" (state but *de facto* Protestant) school there and await a request from the Catholic authorities that a "maintained" school be added. The default option should be an integrated school, on grounds of financial probity as much as to discourage the socialisation into enemy images that a segregated system is widely recognised as fostering.

Were the executive to adopt this broad policy approach, it would maximise devolved fiscal autonomy on the one hand and, on the other, allow genuine

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[70] HM Treasury (2002), *loc cit.*

innovation in service delivery through a plurality of arrangements while allowing the administration to concentrate on core, strategic functions. It would thus make it easier both to "sell" the need for revenue-raising and to avoid confrontations with unions or "anti-privatisation" campaigns.

Accountability

Turning to accountability, the complexity of PPPs and the associated confusion, allied to Northern Ireland's endemic culture of mistrust, mean that the rules of the game must be clearly set, they must be clearly understood and they must be clearly fair. The engagement of the social partners *via* the OFMDFM Working Group on PPPs should be sustained, particularly given the continuing reservations of the trade unions.

In the Republic of Ireland, a framework document on PPPs was only agreed after it had gone through 21 drafts *via* the PPPs advisory group there. The Public-Private Advisory Group Paper on PPPs says that the development of PPPs should take place "within the overall process and structures of social partnership".[71] The OFMDFM Working Group Paper[72] also commends a social-partnership approach, though the Working Group would need to be rebalanced towards the trade unions and voluntary sector if it were to provide the nucleus for continuing engagement, including in monitoring, evaluation and review.

Such an approach is endorsed in the Executive Committee's initial response to the working-group report,[73] but there is no tangible commitment beyond compliance with "legislative requirements". But it will be impossible to sustain social partnership over PPP contracts unless there is a willingness to go at least as far as the republic has done in endorsing the application of industry-wide norms and agreements. The UK government's new code requiring new employees to receive "comparable" wages and conditions to those of transferees is more than legislation requires but falls short of endorsing a negotiating role for trade unions.[74]

The relevant trade unions should also be given access to the outline business case for a particular project at the earliest stage. The assumptions behind value-for-money comparisons with a PSC are often contestable and these should be subject to genuine debate. Unions should also be able to suggest potential bidders and talk to those shortlisted about employment issues. Over and above legal requirements, the devolved administration should follow the Treasury Taskforce guidelines in these regards, ensuring workforce representatives are engaged at every stage.

Role of ministers

It should be made clear that policy on PPPs is evidence-based rather than ideology-based. The full range of potential partners – such as voluntary-sector organisations – should be considered in each case. Recognising the diversity of models, pilot projects and rigorous evaluation should be the

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71 Public-Private Advisory Group on PPPs *op cit* n 39.
72 *Op cit* at p 156.
73 Northern Ireland Executive, *op cit* n 12.
74 *Guardian*, March 27th 2002.

order of the day. Ministers need to make clear in public speeches that PPPs are not privatisation-by-stealth, they are not reducible to PFI and the latter is not "the only show in town". They should highlight their positive potential for service delivery with NGO partners and stress the importance of value-for-money considerations, workforce safeguards and public accountability.

Many of these issues could be addressed, and publicly debated, *via* the introduction of legislation, as in the republic, setting the framework for PPPs in a regulatory rather than constraining fashion. The potential for mutual lesson-learning across the island should be vigorously pursued, *via* relations between PPP units north and south.

The Economic Policy Unit in OFMDFM should ensure that in future iterations of the Programme for Government the discussion of PPPs is not "crowded out" by the funding argument and so by PFI. The "Working Together" chapter should be reconceived in a much broader way as a chapter on governance in the round. The third paradigm outlined above should be the inspiration for innovation. This would also help avoid the danger inherent in the PfG process of a routinisation of the annual iteration and a loss of wider public interest.

Ministers also need to show genuine collective responsibility in educating the Northern Ireland public about the "hard choices" of devolved government, when revenue is finite and demand apparently infinite. They must resist the temptation to engage in populist competition which blocks necessary revenue-raising or unrealistically inflates expenditure expectations. And they must, above all, make plain that there is no such thing as a public-expenditure "free lunch".

The blunt reality remains that if the citizens of Northern Ireland want European-level public services they must be willing – with the burden distributed equitably – to pay for them. That will mean paying more – not less, as currently – than the UK average and can only be achieved if the region has tax-varying powers. There may well not be the requisite willingness to embrace additional taxation for those who can afford it. But it would be an interesting test of those parties who profess egalitarian commitments as to whether they recommend such change. Stimulating a genuine left-right divide in politics in Northern Ireland would, in itself, be highly beneficial to its democratic health.

CONCLUSIONS

Public-private partnerships represent a challenge for the devolved administration perhaps typical of those it will face if it survives into the future. The issues are complex and it is very difficult to get a handle on this complexity in the absence of a left-right policy divide. There has been a huge debate about PPPs in Britain, but as ever distracted by other concerns little of this has been reflected in the public domain in Northern Ireland – even though Treasury assumptions about devolution were that PPPs would play a greater role in Scotland, Wales and Northern Ireland than in the UK as a whole. And the issues are tied up – or mixed up – with the hard choices the region faces in the context of finite budgetary self-management.

As a result, there is much confusion about PPPs, which risks failure to avoid their pitfalls while not capitalising on their potential. In particular, there is a

widespread tendency to assume that they are reducible to the Private Finance Initiative – whereby major capital projects are financed by the private sector – and that PFI offers something for nothing in a context of public-expenditure restraint. In fact, however projects are financed, in the absence of user charges they remain *funded* by the public purse. A naïve embrace of PFI would risk locking the public sector in Northern Ireland into long-term financial commitments offering poor value for money for the taxpayer.

It is right for government, at all levels, to look around for potential partners for the delivery of projects and services: society these days is too complicated even for a regional administration to be all-knowing and all-doing. Creating an environment of contestability keeps the public sector on its toes and a well-drawn contract with a private provider can offer efficiencies because the partner has a stake in securing them. But the transaction costs of public tendering can be high and private partners seek a profits stream. And because companies, unlike governments, can go bankrupt they pay higher interest on capital they in turn borrow to finance PFI projects. So value for money is by no means assured and has to be assessed, against a public-sector comparator, on a case-by-case basis. There should be no ideologically-driven preference for the private sector. In particular, there should be no *a priori* commitment to PFI because of the fiscal constraints on the devolved administration. This would be to fall for the something-for-nothing fallacy. Now that the Chancellor has granted Northern Ireland, unlike Scotland and Wales, borrowing powers on its own account, there should be no suggestion that PFI is "the only show in town".

Guarantees are also needed that there will be a level playing-pitch. In the UK, a big factor in the debate about PFI has been trade-union fears of a "two-tier workforce", where contractors would employ new workers at poorer terms and conditions than those transferred from the public sector. PPPs have proved significantly less contentious in the republic, partly because of the absence of an effective left-right divide there too, but also because there has been a willingness to accept that industry norms and agreements should apply to all in the context of social partnership. This approach should be endorsed by the devolved administration, which should also maximise the exchange of experience *via* north-south structures.

A broader view of PPPs is however also needed. Any savings secured by value-for-money PFI projects will be marginal to the funding requirements of the devolved administration. There needs to be a willingness to consider new sources of revenue since all borrowing – public or private – has to be paid for in the end, and with interest. European-level public services cannot be delivered without European-level taxation.

In particular, the devolved administration needs to grasp the nettle of seeking regional income-tax varying powers, which would in any event be a fairer way to raise money from domestic payers than the rates. The rates review should be used as an opportunity to remove loopholes for manufacturing and, above an income threshold, agricultural property-owners, while the district rate should be replaced by a local income tax. And, where appropriate, charges need also to be considered – for water and to reduce congestion – albeit with exemptions for those on subsistence benefits.

The most innovative and exciting partnerships, moreover, are those involving policy delivery, where the partner – who may well be drawn from the voluntary sector – can bring specialist expertise or user engagement or may otherwise add "value" to what government does. Ministers are anxious that they make a devolved "difference". A major way to do so would be to open up Northern Ireland's fairly conservative governance arrangements to the fresh winds of wider engagements. In particular, a not-for-profit solution should be explored to the challenge of renewing the water system. This has been successfully tried in Wales and could not only introduce efficiencies into the system but also provide the only way in which the introduction of charges could be legitimised.

FROM BARRIER TO BRIDGE: RECONFIGURING THE IRISH BORDER AFTER THE BELFAST GOOD FRIDAY AGREEMENT

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> "If an institution is to be an institution, it must to some extent break with the past, keep the memory of the past, while inaugurating something absolutely new."[1]

INTRODUCTION

Twenty years ago, John Whyte made what he termed a 'preliminary reconnaissance' of the Irish border's permeability. He noted a multitude of organisations existing on an all-island basis including churches and church related groups, youth and sporting groups, cultural and scientific organizations, charitable and welfare organizations, professional associations, as well as business, banking, media and arts concerns.[2] His extensive inventory of private cross-border organisations was in stark contrast to the absence of a cross-border dimension to public life on the island after partition. Dennis Kennedy has commented that,

> "One of the most remarkable features of the history of the island over the past seventy five years has been, at government level, the near totality of partition, the replacement of a long established single administrative system by two separate administrative systems, which managed, or contrived, to keep all contact to a minimum, which built no new structures, however modest, to take care of common interests in practical matters and which for many decades had no dialogue at all at political level."[3]

However, the absence of cross-border co-operation at the political level for almost eighty years disguises the fact that numerous attempts were made at establishing such co-operation.

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1 J Derrida, *Deconstruction in a Nutshell: A Conversation with Jacques Derrida* (1997) p 6.

2 Whyte also noted that many organizations, particularly charitable and welfare organizations and professional associations are organized on an East-West (British-Irish) basis. For example, the Royal National Lifeboat Institution and the Association of Certified Accountants (in J Whyte, 'The Permeability of the United Kingdom-Irish Border: A Preliminary Reconnaissance', (1983) 31 *Administration* 330).

3 D Kennedy, 'Politics of North-South Relations in post-Partition Ireland' in P J Roche and B Barton (eds), *The Northern Ireland Question: Nationalism, Unionism and Partition* (1999) p 71 at 73.

The Government of Ireland Act (1920) made provision for a cross-border Council of Ireland to act as an institutional bridge between the two devolved parliaments in Ireland, one in the North and one in the South. In the event, political aspirations, political violence and state-building, North and South, took precedence and the Council of Ireland was still-born. The Craig/Collins Pacts of 1922 held out the hope of sustained cross-border political co-operation between Northern Ireland and the Irish Free State.[4] However, the apparent duplicity of Michael Collins, head of the provisional government in the South (with Arthur Griffith), and on-going political and sectarian violence in the North[5] scuttled the pacts.[6] Thereafter, the border became an increasingly entrenched political barrier between North and South.

After the cold war between North and South, which lasted from the 1930s to the 1960s and was stimulated in large part by Eamon de Valera's 1937 Bunreacht na hÉireann (Irish constitution),[7] rumblings of a renewed attempt at cross-border co-operation were felt in the 1960s under the auspices of the Lemass/O'Neill *rapprochement.* However, the initiative of the then Taoiseach Seán Lemass and Northern Ireland Prime Minister Captain Terence O'Neill also foundered. Traditionalist unionist forces mustered successfully to stop O'Neill's attempt at establishing cross-border co-operation for the socio-economic advancement of Northern Ireland. In 1974, the attempted resuscitation of the Council of Ireland model, to complement the power-sharing Northern Ireland Executive, intensified the Ulster unionist/loyalist backlash against power-sharing with Irish nationalists in Northern Ireland. The backlash, in the form of a general strike, was to scupper the second coming of the Council and terminate the life of the Executive after five months operation.

These successive attempts at establishing North/South political co-operation proved to be not only unfruitful, they also served to buttress the border so that it acted as an effective barrier between North and South. Therefore, in light of an eighty-year experience of failed attempts at establishing cross-border co-operation and consequent re-enforcement of the border as a barrier, it is remarkable that the Belfast Good Friday Agreement (1998), whose provisions were given legal force by the Northern Ireland Act (1998), survived the establishment and operation of the North/South Ministerial Council and its Implementation Bodies. It is even more remarkable that these North/South institutions, which facilitate co-operation and co-

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[4] The Irish state has existed in different forms and under different names. The Irish Free State was changed to 'Éire' (Ireland) in de Valera's 1937 constitution which also ended dominion status. Éire became a republic in 1949 with the enactment of the Republic of Ireland Act (1949) and the symbolic declaration of a republic on Easter Monday 1949. More recently, the Republic of Ireland has been referred to simply as 'Ireland', as in *McGimpsey* v *Ireland* [1990] ILRM441, and in the Belfast Good Friday Agreement (1998), suggesting a twenty-six county statist conception of Ireland.

[5] Between December 1921 and May 1922 there were 236 fatalities.

[6] D Fitzpatrick, *The Two Irelands* (1998); P Buckland, 'A Protestant State: Unionists in Government, 1921-39' in D G Boyce and A O'Day (eds), *Defenders of the Union: A Survey of British and Irish Unionism Since 1801* (2001) p 211 at 212.

[7] The 1937 Irish constitution not only ended the Free State's dominion status, it also gave special position to the Catholic Church in Éire and reiterated its territorial claim over the whole island.

ordination between the North and South, have proven to be one of the Agreement's least controversial provisions.

This article examines why efforts made to establish cross-border co-operation failed in the past when such co-operation succeeds, albeit tentatively and intermittently, in the present. The article considers: past failures; the dynamics that have encouraged contemporary North/South co-operation; the processes that have established the architecture for co-operation; the manifestation of the border as a bridge; and the prospects for the development of co-operation by the North/South institutions in a political climate that continues to be inter-communally competitive and highly volatile.

Past Failures

The Government of Ireland Act (1920) provided for a Council of Ireland to promote North/South co-operation. At the second reading of the Bill on 29 March 1920, James Macpherson (Chief Secretary for Ireland) claimed that the Council of Ireland could become 'virtually a Parliament for all Ireland, and from that stage to complete union is but a very slight and very easy transition'.[8] Section 2(1) of the 1920 Act outlined the functions of the Council as: facilitating harmonious action between the two parliaments; promotion of a common approach to all-island matters; and the administration of services which were amenable to an all-island approach.[9] However, the Council was paralysed by its vagueness as constituted in the 1920 Act. The dynamics of divergent political aspirations, violence and state-building on both sides of the border conspired to render its paralysis terminal.[10] Unionist leaders were preoccupied with having to establish a government and parliament in the North that was foisted upon them and for which they had little time to prepare.[11] For the Dublin government, meanwhile, the Council of Ireland was a non-starter because participation would symbolize its recognition of the Northern parliament.

The Craig/Collins Pacts of 1922 represented a more promising initiative for North/South co-operation because of their high-level political nature. The Pacts between Collins and Sir James Craig, the first Prime Minister of Northern Ireland, had the potential to avoid the retreat of Ulster into narrow territorial/cultural confines because they held out the hope of overcoming the creation of the border as a barrier. One of the terms of the first Pact that Collins and Craig agreed was: 'The two governments to endeavour to devise a more suitable system than the Council of Ireland for dealing with problems affecting all Ireland'.[12] Their co-operative objective suggested the possibility of creating the border as a political, economic, cultural and intellectual bridge between Northern Ireland and the Irish Free State.

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[8] *HC Deb*, 127, cols 928-30, 29 March 1920.
[9] B Hadfield, 'The Northern Ireland Constitution' in B Hadfield (ed), *Northern Ireland: Politics and the Constitution* (1992) p 1 at 2.
[10] E Tannam, *Cross-Border Cooperation in the Republic of Ireland and Northern Ireland* (1999).
[11] P Buckland, *op cit* n 6, 212.
[12] *Irish Times*, 22 January 1922.

The creation of an intellectual bridge would have been potentially valuable for Ulster unionism, especially when one considers its ensuing decades of political, intellectual and cultural stagnation after the formation of Northern Ireland.[13] It has been claimed that internal divisions between reformers and hard-liners in Dublin, as much as Northern self-interest, were responsible for the extinction of Southern unionism.[14] Nevertheless, the Irish landed gentry, supplying political reformers like Lord Midleton and Sir Horace Plunkett, as well as intellectuals like William Edward Hartpole Leckey and Edward Dowden at Trinity College, Dublin, were important political and intellectual pillars of unionism. According to Alvin Jackson, 'Irish Toryism supplied much of the organizational infrastructure around which unionism was constructed; and supplied trained advocates to the loyalist cause'.[15] Irish cultural revivalists like Standish O'Grady and Æ were also sympathetic to the cause of Irish unionism. Therefore, the political, intellectual and cultural remnants of Southern Irish unionism remained valuable and worthy of maintenance. Such maintenance, if undertaken, could have provided the new Ulster unionist identity with a rich source of political, intellectual and cultural sustenance.

For a time, the Pacts enabled Collins to become the effective representative of Northern Catholics, especially Belfast Catholics.[16] It is possible that, had they succeeded, the Pacts could also have lead to some form of Northern representation for Southern unionists. Craig's practical incentive for co-operation was the possibility of recognition by the Free State government. Craig believed that co-operation would provide the opportunity for securing the principle of consent in North/South relations, that is, that the consent of the unionist community would be required for 'Ulster' to join the Irish Free State.[17] However, despite the first Pact, Collins continued his pursuit of a non-recognition policy regarding Northern Ireland.[18] Simultaneously, the Irish Republican Army (IRA), with help and encouragement from Collins, continued to engage in violence north of the border. A second Pact was entered into by the two leaders in an attempt to end violence and reform the police in Belfast. That Pact too foundered, primarily because of the failure of the Northern government to investigate the alleged role of policemen in sectarian murder in Belfast.[19]

The manifestation of the border as a bulwark against the Irish Free State won out and came to embody the unionist perception of threat emanating from its Irish nationalist 'Other'. The Boundary Commission (1925), which was

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[13] P Bew, 'The Political History of Northern Ireland Since Partition: The Prospects for North-South Co-operation' in A F Heath, R Breen and C T Whelan (eds), *Ireland North and South* (1999) p 401 at 411.

[14] A Jackson, 'The Failure of Unionism in Dublin, 1900' (1989) 26 *Irish Historical Studies* 377.

[15] A Jackson, 'Irish Unionism, 1879-1922' in D G Boyce and A O'Day (eds), *Defenders of the Union: A Survey of British and Irish Unionism Since 1801* (2001) p 115 at 116.

[16] Kennedy *op cit* n 3, 80.

[17] Bew *op cit* n 13, 407.

[18] *Ibid*, 408.

[19] M Farrell, *Arming the Protestants: The Formation of the Ulster Special Constabulary and the Royal Ulster Constabulary 1920-27* (1983), pp 114-117.

proposed in the Anglo-Irish Treaty (1921), presented Ulster unionists with the immediate threat of losing territory to the Irish Free State, a threat that failed to materialize.[20] However, other threats proved to be more durable and served to buttress the manifestation of the border as a barrier. The Irish state's constitutional claim to the six counties of Northern Ireland persisted until the Belfast Good Friday Agreement (1998) and fuelled the sense of territorial siege in the Ulster unionist communal imagination. That the 1937 constitution reasserted the claim and also recognized the special position of the Catholic Church in the Irish state was hardly an inducement for Ulster unionists to reconsider their attitude to Éire and the border.[21]

The threat from *perfide Albion* also arose periodically. An example of United Kingdom (UK) government perfidy occurred in 1940 when Churchill offered de Valera Irish unity as an incentive for granting Allied troops permission to use Southern ports. Set against the unionist self-perception as a loyal wartime subject community and the reaffirmation of Irish nationalist disloyalty through the declaration of Éire neutrality, knowledge of the offer to de Valera served to heighten the sense of threat experienced by the Ulster unionist community.[22] The violent campaign of the IRA presented a recrudescent physical threat that was intimately associated with the border in ideological and practical terms. Consequently, devoid of political and intellectual adroitness, the combined effect of these constitutional, perfidious and physical threats, emanating from Dublin, Westminster and the IRA respectively, set Ulster unionism on a course characterized by isolationism, defensiveness, vulnerability and insecurity. The cultural chasm that existed between unionists and Éire, especially after the 1937 Irish constitution, helped to reinforce that sense of threat.

In the post-World War II period, occasional verbal broadsides were fired from the North across the border. In 1949, St John Ervine published his 'semi-official' biography of James Craig in which he took the liberty of launching vitriolic diatribes directed at the Republic of Ireland and its citizens.[23] According to Gillian McIntosh, 'Ervine's biography can be seen as having provided a necessary pressure valve, providing unionists with a high-profile outlet for their feelings towards contemporary events, and an articulation of some of their genuinely held but, at the time, politically sensitive beliefs'.[24] For Basil Brooke, the then Prime Minister of Northern Ireland, the transition of Éire to a republic was 'the last stage of that deplorable journey'.[25]

While overt cross-border contact at a political level had proven to be impossible for four decades after the Craig/Collins Pacts, some covert contact did take place, for example, Sean MacBride (the Republic's Minister

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[20] D Kennedy, *The Widening Gulf: Northern Attitudes to the Independent Irish State* (1988) p 73.
[21] Buckland *op cit* n 6, pp 220-1.
[22] G McIntosh, *The Force of Culture: Unionist Identities in Twentieth-Century Ireland* (1999) p 145.
[23] *Ibid*, p 154.
[24] *Ibid*, p 156.
[25] Kennedy *op cit* n 20, p 239.

for External Affairs) met Sir Basil Brooke twice.[26] More concrete practical, low-level co-operation was achieved during the 1950s with: the agreement on the Erne (1950); the creation of the Foyle Fisheries Commission (1952); and the subsequent establishment of the Great Northern Railway Board.[27] However, high-level political talks resumed eventually with two meetings in the 1960s between Republic of Ireland Taoiseach Seán Lemass and Northern Ireland Prime Minister Captain Terence O'Neill.

After becoming Taoiseach in 1958, Seán Lemass embarked on a charm offensive directed at Ulster unionists. His intention was to soften an Irish border that had become a well-fortified barrier after the introduction of the 1937 Irish constitution. A turning point came in July 1963 when, in reference to Northern Ireland, Lemass declared that, 'the government and parliament there exists with the support of the majority in the six counties area, artificial though that area is. We see it functioning within its powers. . . within an all Ireland constitution, for as long as it is desired by them'.[28] This qualified recognition of Northern Ireland was enough to stir the interest of O'Neill in Lemass' call for North/South discussions. However, subsequent anti-partitionist speeches by Lemass in the United States made O'Neill baulk from immediate face-to-face discussions. It wasn't until Brian Faulkner (a minister in O'Neill's cabinet) offered to meet Jack Lynch, Faulkner's opposite number in the Republic of Ireland, that O'Neill moved to meet Lemass at Stormont on 17 January 1965, with a return visit to Dublin on 9 February.[29] Problematically for O'Neill, he failed to inform most of his cabinet colleagues about the first meeting, leaving traditionalists free to suspect or claim double-dealing. Moreover, Lemass tended to link economic co-operation to political co-operation and the ending of partition. While this linkage in itself may not have been a problem for O'Neill, its timing was. Eventually, pressure from the Reverend Ian Paisley and the threat of revolt from within the ruling ranks of the Unionist Party ran aground the Lemass/O'Neill *rapprochement.* Furthermore, the increase in tension with the 1966 commemoration of the 1916 Easter Rising and the rise to prominence of the Civil Rights campaign effectively halted the attempt at bridge-building.[30] Paisley used his skills as a populist communicator to particular effect when, in reference to the dry and aloof O'Neill, he railed: 'he is a bridge builder he tells us. A traitor and a bridge are very much alike for they both go over to the other side'.[31]

The Sunningdale Agreement of December 1973 offered renewed hope for the re-creation of the border as a bridge. A new Council of Ireland was proposed as a supplement to a Northern Ireland power-sharing system of government which had been provided by the Northern Ireland Constitution Act (1973). This Council of Ireland was to comprise of a Council of Ministers with seven members each drawn from the Northern and Southern

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[26] P Arthur, *Special Relationships: Britain, Ireland and the Northern Ireland Problem* (2000) p 8.
[27] Kennedy *op cit* n 3, p 84.
[28] Quoted in M Mulholland, *Northern Ireland at the Crossroads: Ulster Unionism in the O'Neill Years, 1960-9* (2000) p 80.
[29] *Ibid*, p 82.
[30] Kennedy *op cit* n 3, p 85.
[31] Quoted in Mulholland *op cit* n 28, 84.

governments. The Council was to be invested with an executive and harmonizing function as well as a consultative role. Decisions were to be passed by unanimous vote. A Consultative Assembly, comprising thirty members each from the Northern Ireland Assembly and Dáil Éireann was proposed to perform advisory and review functions.[32] For the Irish government, the proposed Council of Ireland represented a means of promoting unification. However, the new cross-border/all-island institution proved to be unpalatable for a majority of unionists who viewed it much as the Irish government did. The Ulster Workers' Council strike of 1974 not only stifled its creation, the strike also collapsed the entire edifice of power-sharing government in Northern Ireland after just five months operation.

Contemporary Dynamics

A year previously, the UK and Republic of Ireland acceded to the European Economic Community (EEC). From their accession to the EEC in 1973, the governments of the Republic of Ireland and UK enjoyed increasing levels of maturity in their relationship, a relationship that was based on increasing mutual respect and partnership. EEC/EC/EU membership created the opportunity for the Irish economy to diversify and expand, thus transcending its reliance on UK markets. EU membership also enabled the Irish state to achieve formal equality with the UK state in an international arena. Consequently, the relationship between the two states shifted from one founded on dominance and dependence to one based on equality and interdependence.[33] Furthermore, the neutral arena of the EC/EU enabled UK and Irish politicians and diplomats to escape the claustrophobic territorial confines of the British Isles and a British-Irish relationship forged in antagonism and conflict. Bilateral meetings became commonplace on the fringes of EU meetings, particularly European Council meetings which involved the Irish Taoiseach and the UK Prime Minister. The recast relationship that developed was especially valuable for the Northern Ireland problem because it became an international partnership of equals that was beyond the destructive grasp of regionally confined Ulster unionists.

The European context facilitated rounds of Anglo-Irish summitry beginning in 1980 and provided the space for the fledgling Anglo-Irish inter-governmental relationship that involved leading politicians and Cabinet officials. The fledgling relationship faltered at times, for example after the Argentinian invasion of the Falklands/Malvinas on 2 April 1982. However, in December 1984, Mrs Thatcher and Irish Taoiseach Garret Fitzgerald met at an EC summit in Dublin. The meeting reopened a line of communication between British and Irish officials responsible for the Anglo-Irish process, a process aided by US political and media interest.[34] The subsequent Anglo-Irish Agreement (1985) gave the Irish government a role in Northern Ireland affairs, a role that has been described as being 'more than consultative, but

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[32] Hadfield *op cit* n 9, p 8; T Hennessey, *A History of Northern Ireland, 1920-1996* (1997) p 221.

[33] P Arthur *op cit* n 26, p 129; C McCall, 'The Production of Space and the Realignment of Identity in Northern Ireland' (2001) 11 *Regional and Federal Studies 1*.

[34] A Guelke, *Northern Ireland: The International Perspective* (1988); Arthur *op cit* n 26, p 217.

less than executive'.[35] Mrs Thatcher's motive for signing the Agreement was undoubtedly heavily influenced by security concerns. However, cabinet colleagues and civil servants impressed upon her the need to place security measures in the context of an overall package that included an Irish dimension.[36] The effect of the Anglo-Irish Agreement was that the Irish government became a minor partner of the UK government in the exercise of joint authority over Northern Ireland. Observing its innovative nature, one Irish academic lawyer commented that 'it will be seen by international lawyers as an important new legal model for consideration, adaptation and possible application in other similar international situations of disputed sovereignty over territory'.[37]

Meanwhile, at the macro-European level, the Single European Act (1987) provided for the completion of the Single European Market by 1992. The ensuing economic, political and cultural processes of Europeanization began to pose serious questions for UK state sovereignty and the manifestation of the Irish border as a barrier. The developing EC presented a challenge to the legal sovereignty of the national/nation-state and threatened an increasing challenge to its political sovereignty. Member states either embraced or acquiesced in this transference or 'pooling' of sovereignty in response to the contemporary economic, political and social challenges of globalization/internationalization. After 1985, there was a dramatic increase in the frequency of Intergovernmental Conferences (IGCs) which translated into a frenetic bout of EU constitution-building. IGC treaty-making resulted in changing the decision-making rules that have enabled the EU to increase its policy-making capacity. Consequently, the entrepreneurial Commission, driven by its federalist President, Jacques Delors, moved the EC/EU into key areas of state activity and highlighted the fact that west European borders were being made more permeable by the process of Europeanization.[38]

The antipathy of unionist political élites to these European developments was compounded by the general Euro-enthusiasm of Irish nationalists. In particular, unionist leaders understood the articulation of 'post-nationalism' and a 'Europe of the Regions', by the then Social Democratic and Labour Party (SDLP) leader, John Hume, as a cunning ploy used to disguise Irish nationalist irredentist ambition. Consequently, Europeanization was regarded by Ulster unionist élites as little more that a supplementary weapon in the Irish nationalist anti-partitionist canon. Furthermore, the Anglo-Irish Agreement (1985), which brought an infringement of sovereignty directly to the Irish border, had traceable Euro-roots which could only strengthen unionist antipathy to the development of the EC/EU.

Unionist anger at the imposition of the Anglo-Irish Agreement, without their consent, was compounded by their powerlessness in the face of its implementation. Moreover, Ulster unionists were presented with an array of inter-related contemporary dynamics which militated against their traditional ideological position of exclusion regarding Irish nationalists/republicans in

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[35] By the then Irish Taoiseach, Garret Fitzgerald.
[36] D Goodhall, 'The Irish Question' (1993) *Ampleforth Journal*, vol. XCVIII, 129.
[37] J O'Conner in the *Irish Times*, 21 November 1985.
[38] J Caporaso, 'The European Union and Forms of State: Westphalian, Regulatory and Post-Modern' (1996) 34 *Journal of Common Market Studies* 29.

the governance of Northern Ireland, and territorialism regarding state borders especially the border between Northern Ireland and the Republic of Ireland. These dynamics included: the loss of state power in 1972 after fifty years of unionist hegemonic rule in Northern Ireland; the transformed British-Irish intergovernmental relationship after 1973; the development of Europeanization and regionalization directly affecting borders in the British Isles; and a further modification in unionist-nationalist power relations after the signing of the Anglo-Irish Agreement in 1985. They required a new unionist approach to the Irish border and Irish nationalists. Eventually, unionist anger, coupled with the failure of subsequent extra-parliamentary 'Ulster Says No' boycotts, gave way to active engagement in political dialogue and political process during the early 1990s, an engagement that signalled a substantive milestone in the political process of reconfiguring the governance of Northern Ireland.

Political Process

After 1991, political talks on the future of Northern Ireland had a three-strand structure featuring Northern Ireland, North/South and British-Irish dimensions. Once again cross-border co-operation and the transformation of the Irish border from a barrier into a bridge was on the political agenda. Leaders of both the Ulster Unionist Party (UUP) and the Reverend Ian Paisley's Democratic Unionist Party (DUP) participated in these talks, which also involved the Irish government in a central co-ordinating role. The limitations of boycott and the importance of engagement in the political process were lessons learned by leaders from across the political spectrum of unionism. However, the idea of a political process clashes with the traditional unionist ideological preference for the *status quo* because 'process' implies change.[39] Therefore, acceptance of the three-strand structure for talks did not necessarily translate into the acceptance of a political process leading to a three-strand structure for the governance of Northern Ireland that included formal North/South co-operation. Paisley was not about to do what he had accused O'Neill of trying to do twenty-five years earlier, namely, 'go over to the other side'. He and his party colleagues staged numerous walkouts during the talks process of the 1990s, exiting permanently on the arrival of Sinn Féin representatives into negotiations leading to the Agreement (1998).[40] Nevertheless, leading representatives from the UUP and the smaller loyalist parties remained in the multi-party negotiations which lead to the Agreement.

The Agreement reflected the three-strand framework of the negotiations that preceded it. The framework encompassed the North/South [cross-border, island of Ireland] relationship, the east-west [or British-Irish] relationship, as well as the relationship between the Irish nationalist and Ulster unionist ethnonational communities within Northern Ireland. The complementary institutions provided by the Agreement included a Northern Ireland Executive, Assembly and Civic Forum, a North/South [cross-border, island

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[39] E Harris,'Why Unionists are not Understood' in A Aughey *et al*, *Selling Unionism* (1995) p 27.

[40] Sinn Féin joined the multi-party negotiations in September, 1994 after the IRA cease-fire.

of Ireland] Ministerial Council and its Implementation Bodies, as well as a British-Irish Council and British-Irish Intergovernmental Conference. The Agreement nominally reaffirmed UK sovereignty over Northern Ireland in the formal-legal sense. However, these multifarious territorial and cross-border institutions helped to spread the political and cultural substance of sovereignty across a British, Northern Ireland, North/South, British-Irish and EU axis because each had autonomy, or potential autonomy in policy-making and administration.[41] Henry Patterson has interpreted these arrangements as a 'constitutional triumph for unionism, combined with a certain political and ideological retreat'.[42]

Throughout the crises in the implementation of the Agreement, cross-border co-operation has remained relatively free from controversy. This is remarkable given the legacy of failed cross-border initiatives and the fact that a fleet of black Mercedes cars, in slow cavalcade, delivered the ministerial cabinet of the Irish government to the inaugural meeting of the North/South Ministerial Council, north of the border. The spectacle caused moderate northern nationalist representatives to blush because, in a region where symbolism has the potential to wreck painstakingly constructed initiatives, the implication of attendance at the wake of the Union was inescapable.

Peter Robinson (DUP, Deputy Leader) has, on occasion, attempted to inject a note of controversy on the issue of post-Agreement North/South co-operation. For example, in remarks to the 2002 annual conference of the Young Democrats, the DUP's youth wing, he claimed that the North/South bodies posed the 'greatest long-term threat' to the Union.[43] However, the cross-border institutions stirred little controversy in the unionist community because issues of police reform and IRA decommissioning were more pressing concerns. The active involvement of leading Sinn Féin figures in the post-Agreement (1998) administration of Northern Ireland precluded a comparison with Collins' non-recognition policy. However, the IRA's retention of its arsenal and its continued intelligence gathering and training, as well as violent acts by dissident republicans, invited unionists to conclude some acquiescence by Sinn Féin in post-Agreement IRA activity that was reminiscent of Collins' support for an on-going IRA campaign north of the border while simultaneously agreeing pacts with Craig.

Pro-Agreement unionists may also have had some success in their presentation of the North/South institutions as being strictly under the control of the Northern Ireland Assembly and limited to practical low-level cross-border matters. Somewhat contrary to the pro-Agreement unionist interpretation, the North/South Ministerial Council was allocated a measure of autonomy in pursuit of its goals of co-operation and co-ordination providing agreement was reached among participants that include Ulster unionist representatives. However, decisions reached in the Council that are

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[41] J Ruane and J Todd, 'The Politics of Transition? Explaining Political Crises in the Implementation of the Belfast Good Friday Agreement' (2001) 49 *Political Studies* 923 at 936.

[42] 'From Insulation to Appeasement: The Major and Blair Governments Reconsidered' in R Wilford (ed), *Aspects of the Belfast Agreement* (2001) p 166 at 182.

[43] *Irish Times*, 18 February, 2002.

'beyond the authority of those attending' require the consent of both the Oireachtas (Irish Parliament) and the Northern Ireland Assembly.[44] Moreover, the refusal of UUP ministers to attend any North/South Ministerial Council meeting that included Sinn Féin members, which was announced on 21 September 2002, highlights the power of veto exercised by UUP élites over the recreation of the border as a bridge.

The Border as a Bridge

The North/South Ministerial Council represents the main architectural feature of the bridge between the Northern Ireland and the Republic of Ireland. It provides a forum for functional co-operation on aspects of transport, agriculture, education, health, the environment and tourism. In the Northern Ireland Programme for Government (2001) some of these aspects were identified, for example, in the area of education – educational under-achievement, the mobility of teachers, and university co-operation were highlighted; in the area of health – cancer research, cross-border emergency planning and rapid response schemes were areas specified.[45] European Structural Funds were singled out as a particularly important area for cross-border co-operation. Overtly Euro-federalist language was used in support of this co-operation – section 6.4, sub-priority 2 states: 'borders should not be barriers to balanced development across the European Territory'. In this regard, a 'Common Chapter' focusing on the development of North/South co-operation was agreed and is common to both the Structural Funds Plan for Northern Ireland and the National Development Plan for the Republic of Ireland.[46]

The North-South Ministerial Council has also begun to address the potentially important issue of opening a vertical line of communication to the European Commission regarding North/South interests. The Northern Ireland Assembly is bound by its devolved status from entering into international relations. However, the Northern Ireland Act (1998) does not withhold 'the exercise of legislative powers so far as required for giving effect to any agreement or arrangement entered into' (Section 55) in the North/South Ministerial Council or by or in relation to the North/South Implementation Bodies.[47] Thus, the North/South institutions are free to conduct their transterritorial operations on an all-island and EU-wide basis. Such an exercise begins to address the ambiguous article in the Agreement (1998) which states: 'Arrangements to be made to ensure that the views of the [North/South Ministerial] Council are taken into account and represented appropriately at relevant EU meetings'.[48]

The other feature of North/South architecture is the North/South Implementation Bodies which concentrate on the specifics of co-operation regarding trade and business development, inland waterways, food safety, the Irish and Ulster-Scots languages, agriculture and marine matters, and

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[44] Agreement, 1998, strand 2, para 6
[45] 6.3, Sub-priority 1.
[46] www.northernireland.gov.uk/press/dfp/010620g-dfp.htm
[47] B Hadfield, 'Seeing it Through? The Multifaceted Implementation of the Belfast Agreement' in R Wilford (ed), *Aspects of the Belfast Agreement* (2001) p 84 at 97.
[48] Strand 2, para 17.

special EU programmes. Some or all of these Implementation Bodies have the potential to become important nodes for cross-border and island of Ireland co-operation. However, mindful of the emphasis placed by the Northern Ireland Programme of Government on EU Structural Funds as an important area for North/South co-operation, special consideration is given below to this area and the role of the Special EU Programmes Body (SEUPB). As one of the North/South Implementation Bodies, SEUPB is charged with responsibility for the management of the EU PEACE II (2000-4) programme[49] and Community Initiatives such as INTERREG III (2000-6).[50] It has also been made responsible for the monitoring, promoting and implementation of the Common Chapter on cross-border co-operation.[51]

PEACE II forms part of a 'special package' under the Community Support Framework for Northern Ireland, which also includes the Transitional Objective 1 Structural Funds Programme worth €890m (stg£575m).[52] PEACE II allocates approximately €740m to Northern Ireland and the border counties of the Republic of Ireland. The EU allocates €530m between 2000-4 with a further €176m coming from public sector funds and €33m from the private sector.[53] PEACE II has five priority areas including economic renewal, social inclusion, locally based regeneration, the creation of an outward and forward-looking region, and cross-border co-operation. The cross-border co-operation priority has been allocated €39.72m (stg£24.45m) or 9.3 per cent of the total package in Northern Ireland and €39.72m in the border region of the Republic of Ireland. Between 2000-6, at least €400m (stg£240m) is envisaged for cross-border co-operation from the Northern Ireland and Republic of Ireland Community Support Frameworks.[54]

With its wide-ranging and complex mandate regarding Structural Funds and Community Initiatives, as well as limited staff and resources, SEUPB faces a number of challenges concerning its ability to balance management and development, all-island and cross-border aspects, as well as its novel position in a multilevel network stretching from the local, grassroots level to the supranational level.[55] Perhaps because of administrative difficulties and structural complexity, thus far, SEUPB has relied on the Department of Finance and Personnel at Stormont for support in the exercise of its managerial authority, suggesting that an innovative body like SEUPB is more suited to a development role on a cross-border and all-Ireland basis.

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[49] PEACE II aims to build upon the creative cross-community approaches to funding adopted under PEACE I. Intermediary Funding Bodies (IFBs), which are voluntary and community sector based, continue to play a key role under PEACE II and are projected to be made responsible for the allocation of 34 per cent (approximately stg£100m) of total funds (www.cec.org.uk/ni/funding.pdf).

[50] INTERREG III, which is an EU-wide Community Initiative aimed at encouraging indigenous cross-border co-operation in an attempt to off-set the negative effects of EU economic integration for peripheral regions, makes €170m (approximately stg£104m) of funding available for Northern Ireland and the border region of the Republic of Ireland.

[51] www.northernireland.gov.uk/press/dfp/010620g-dfp.htm

[52] www.europe-dfpni.gov.uk

[53] www.cec.org.uk

[54] Programme for Government 2001.

[55] B Laffan and D Payne, *Creating Living Institutions: EU Cross-Border Co-operation after the Good Friday Agreement* (2001) pp 14-15.

The operation of the North/South Ministerial Council and Implementation Bodies generally, alongside the other institutions, has been interrupted periodically by major difficulties experienced in the implementation of the Agreement (1998). Indeed, the North/South Ministerial Council has emerged as a first port of call for the exercise of the UUP veto when difficulties are experienced. There have also been inevitable problems involving staff and resource transfer, and the shift of responsibility from central administrations to the novel Implementation Bodies.[56] These problems have been a factor in the funding gap that has emerged with the delayed implementation of PEACE II and INTERREG III. Although bridging support in the region of stg£5m was provided by a number of Northern Ireland departments, this support did not avert a crisis in the voluntary sector including in the sustainability of many of the voluntary networks and local groups funded through the IFBs under PEACE I.[57] Consequently, political and institutional change and a shortage of funds posed a major challenge to the future role of the voluntary sector in cross-border development.

Despite the substantial problems, 'live' North/South institutions hold out the prospect of transforming the border from a barrier into a bridge. This is made manifest through ministers and civil servants engaging in the North/South Ministerial Council for the promotion of cross-border co-operation. Consensual decision-making, involving North and South, nationalists and unionists, is understood to be the underlying principle for the operation of the border as a political, economic, social and cultural bridge. One practical application of this principle involves the attendance of two Northern ministers, one with sectoral responsibility and a 'shadow minister' from the other (nationalist or unionist) community, at every sectoral North/South Ministerial Council meeting.[58] Of course, most Irish nationalists still understand the North/South structures to be important institutional nodes that provide the basis for a fledgling all-Ireland structural framework. Meanwhile, the low-key practical operation of North/South institutions, relatively free from political symbolism, has enabled pro-Agreement unionists to accept cross-border bodies as necessary institutions for political, economic, social and cultural well-being in Northern Ireland, as well as improved relations between unionists and the Republic of Ireland. The sufficient easing of conflict between unionist and nationalist 'truths', resulting from ideological shift on the part of nationalist/republican and pro-Agreement unionist elites, has been fundamental to the functioning of the border as a bridge between North and South.

Development Prospects

When one considers past failures and ongoing unionist-nationalist conflict in political and cultural mode, it is something of an achievement that the complicated architecture for cross-border co-operation was established and has operated successfully, even if sometimes in a state of partial shutdown or

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[56] A Pollak,'The Policy Agenda for Cross-Border Co-operation: A View from the Centre for Cross-Border Studies' (2001) 49 *Administration* 15.

[57] www.niassembly.gov.uk/finance/reports/report3-99rl.htm

[58] Pollak *op cit* n 56, 16.

suspended animation. However, it is the on-going unionist-nationalist political and cultural conflict that weakens the architecture fundamentally, and elements of the unionist political élite in particular that threaten to re-establish the border as a barrier. Development prospects are also affected by the mundane politics of centre-periphery (Belfast/Dublin-North/South) bureaucratic machinations. Another important factor that should not be underestimated in any consideration of development prospects is the relationship between the Ulster unionist community and the Irish state.

The Ulster unionist approach to cross-border co-operation is intimately linked to their political, economic, social and cultural understanding of the Republic of Ireland. In turn, the yardstick of this interpretation is the perceived sense of threat emanating from the South. In 1995, the then UUP MP John D Taylor (now Lord Kilclooney) embarked on a campaign to secure the leadership of his party. Although he was beaten to the leadership by David Trimble, Taylor's campaign marked a significant milestone in the relationship between the Ulster unionist community and the Republic of Ireland. Significantly, Taylor talked at venues throughout the Republic, as well as in Northern Ireland. In his speeches he concentrated on the remit of proposed North/South institutions. Drawing a distinction between 'cross-border' and 'all-Ireland' references[59] in this context, Taylor argued that the former were acceptable whereas the latter were anathema to unionists.[60] He also emphasised the need for unionists to embark upon a co-operative relationship with the SDLP and the Dublin government. Significantly, Taylor sought to challenge the unionist interpretation of the Republic of Ireland as exclusively Catholic and Gaelic when noting 'significant progress towards the creation of a pluralist society free from church control'.[61] Such a challenge signalled the possibility of downgrading the perceived cultural threat emanating from the South.

The 1998 amendment of Articles 2 and 3 of the Irish constitution had the effect of neutralizing the complementary territorial threat for the Ulster unionist community. While unity remains 'the firm will of the Irish nation', 'respect for diversity of . . . identities and traditions'[62] suggests that unity does not necessarily imply a unitary state should consent for a 'united Ireland' be forthcoming in the North.[63] The UUP leader, David Trimble, appeared to recognise this changing Irish state when he endorsed a co-operative North/South approach with the Agreement (1998). However, Trimble has, in political speeches, displayed regressive tendencies in his perception of the Republic of Ireland. For example, in March, 2002, at the annual meeting of the UUP's ruling council in Belfast he exclaimed:

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[59] The Northern Ireland Programme for Government (2001) settled for the term 'all-island' and used it in conjunction with 'cross-border' to describe the work of the North/South Ministerial Council and Implementation Bodies. (www.pfgni.gov.uk/dec2001pfg/ch6.htm). Here, 'cross-border' may refer solely to 'the border region'.

[60] J Cash, *Identity, Ideology and Conflict: The Structuration of Politics in Northern Ireland* (1996) p 216.

[61] *Irish Times*, 28 March 1995.

[62] From the new Article 3.1, Constitution of Ireland, 1998.

[63] B O'Leary, 'The Character of the 1998 Agreement: Results and Prospects' in R Wilford (ed), *Aspects of the Belfast Agreement* (2001) p 47 at 67.

'Contrast the United Kingdom state – a vibrant multi-ethnic, multinational liberal democracy, the fourth largest economy in the world, the most reliable ally of the United States in the fight against international terrorism – with the pathetic sectarian, mono-ethnic, mono-cultural state to our south'.[64] With their cultural references and supremacist overtones, Trimble's remarks suggest that the Catholic, Gaelic-Irish, barbarous and backward stereotype of Ireland and Irishness, as well as the Protestant, reformist, civil and progressive stereotype of the UK and Britishness, still has some currency among pro-Agreement unionists.

Ironically, the leading UUP MP Jeffery Donaldson, who is an equivocal sceptic of the Agreement (1998), was more in sync with the shifting perceptions of Taylor when, in December 2001, he commented:

> "You will find today, more so than in 1974 with Sunningdale and the Council of Ireland, that there is less resistance to North/South institutionalized co-operation. That is heavily influenced by changes that have taken place in the Irish Republic. It is seen today as being much less dominated by the Roman Catholic Church, with changes to the constitution that reflect this. It has become a more open society; a more modern society; economically, it is doing very well: all of those things have had an impact here in Northern Ireland and amongst unionists. [We], therefore, feel that perhaps we can do business with the Irish Republic in a manner that will be mutually beneficial. So long as there is recognition of the principle of consent, then the border is going to be there as long as that is the wish of the majority of the population here, but that should not prevent co-operation between two areas that are part of the European Union. It is true that Europe has had an influence here in creating a context within which greater co-operation can take place without people feeling that their sovereignty and identity is being threatened. There is a very delicate balance. If the North/South Ministerial Council and the Implementation Bodies are about co-operation between both parts of this island then I think unionists rest easy."[65]

These antithetical remarks suggest that the attitude of UUP élites to cross-border co-operation and the Republic of Ireland is in a state of flux. As Donaldson's comment indicates, the UUP, across both pro- and anti-Agreement lines, is the primary site for changing unionist attitudes towards the border. The long-term success of this shift depends on a number of factors, not least, the absence of political and violent threat from Irish nationalism/republicanism and the continuing development of unionist interpretations of a rapidly changing Irish state and society. Meanwhile, DUP élites continue to pay ideological observance to the traditional unionist principles of exclusion regarding Irish nationalists and republicans in

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[64] *Observer*, 10 March 2002. Lord Laird of Artigarvan, joint chair of the Languages Implementation Body supported Trimble's assertion claiming: 'There are 25,000 Ulster-Scots people in the Republic who have not had their cultural identity recognized' (*Irish News*, 11 March 2002).

[65] Interview with author, 3 December 2001.

governance, and the manifestation of the border as a barrier. While this did not preclude their practical involvement in some of the institutions of the Agreement, notably, the Northern Ireland Assembly and Executive, they maintained their boycott of North/South institutions.[66]

CONCLUSION

Before the 1998 Belfast Good Friday Agreement all efforts directed at creating, or re-creating the border as a bridge to facilitate North/South co-operation were in vain. After the early failures unionists were anxious to maintain the border as a barrier between Northern Ireland and the Republic of Ireland. Constitutional, perfidious and violent threats emanating from the Irish government, the UK government and the IRA respectively, were largely responsible for this preference. The cultural chasm that existed between Ulster unionists and the Irish state also played a significant underlying role. However, contemporary changes in the European state-system, in the British-Irish intergovernmental relationship, and in the power relationship with Irish nationalists in Northern Ireland are dynamic contemporary factors that have influenced a shift in the ideological position of pro-Agreement unionists. This shift has entailed the inclusion of nationalists and republicans in the governance of Northern Ireland. It has also resulted in the acquiescence of pro-Agreement unionists to institutionalized North/South co-operation and the transformation of the border from barrier to bridge. In no small part, constitutional and cultural changes in the Republic of Ireland have made possible this cross-border co-operation involving pro-Agreement unionists, and to some degree, have neutralized unionist opposition to such co-operation. Nevertheless, four years after the signing of the Agreement their ideological shift remains in a transitional phase and is, therefore, by no means definitive. Consequently, the contemporary political and institutional bridge between North and South exists precariously.

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[66] R Wilford, 'The Assembly and the Executive' in R Wilford (ed), *Aspects of the Belfast Agreement* (2001) p 107 at 120.