

THE DAVID HUME INSTITUTE



THE DEVICE OF DEVOLUTION

Alan Peacock

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FOREWORD

This is one of two Occasional Papers on the subject of devolution which The David Hume Institute is publishing simultaneously. The first contains the proceedings of a seminar on the subject mounted by the Institute on 28 May 1996 in conjunction with The Constitution Unit, London; the second is a personal response by Sir Alan Peacock to the proposals of the Unit for Scottish devolution as discussed in the seminar and published on 25 June 1996.

The point of departure of Sir Alan Peacock's paper is The Constitution Unit's proposals. His commentary has all the weight and thought-provoking quality to be expected from one who has been much involved in the constitutional debate for over quarter of a century. His starting point is the Memorandum of Dissent from the conclusions of the Kilbrandon Report on the Constitution published in 1973, which he co-authored with the late Norman Hunt. That dissent argued that devolution could not be confined to Scotland and Wales but should be made general for the whole of the United Kingdom. Sir Alan eloquently re-states that argument but goes on to suggest that the form of devolution currently proposed for Scotland not only ignores the case for general devolution but may also endanger the widening of individual choice and the "rolling back of the frontiers of the state" which has been taking place since the 1970s. There is also what Sir Alan terms "the European spectre", suggesting that the real concern of constitutional reform should be the reversal of centralisation towards Brussels and the reduction of the Community's "democratic deficit".

As ever The David Hume Institute is delighted to be able to put forward a serious contribution to a debate which has an importance extending far beyond the parish pumps and kailyards of Scotland. It is a particular pleasure that this fiftieth Occasional Paper should have been written by Sir Alan Peacock, without whose input the Institute must have long ago foundered. But publication in this case, as always in the Institute's various series, is not to be seen as carrying with it any endorsement of the views expressed, which are those of their distinguished author alone.

*Hector L MacQueen and Brian G M Main
Directors of The David Hume Institute
August 1996*

Background: personal testimony

The late Norman Hunt (later Lord Crowther Hunt) and I produced the first fully-worked out scheme for the devolution of government in the UK in modern times (see Royal Commission on the Constitution, Memorandum of Dissent, 1973). Our case for devolution on a grand scale was based on two general propositions :

1. growing centralisation of government worked counter to a perceived desire for more control by individuals over their own affairs. Devolution in a form which encouraged more direct political participation by individuals would be a preferable alternative to the continuation of a system by which those who wished to change policy relied on pressure group action. Such action entailed the development of an elaborate and costly system of bargaining between politicians, government departments and cartels of unions and industrial interest;
2. such opportunities for participation should be as far as possible equal for all, implying that devolution had to be general and not confined to Scotland and Wales.

In any case, one could predict that partial devolution would be unstable for what would be available initially as a privilege of the few would soon be demanded by the many.

The Constitution Unit in *Scotland's Parliament : Fundamentals for a New Scotland Act* (June 1996) describes Norman Hunt as the "prime mover behind the Memorandum of Dissent". In one sense this is true, because he announced his intention to dissent before I did and set to work on the mechanics of devolution before I had made up my mind whether to join him or to issue a separate dissenting note. However, once we joined forces, I played a full part in the discussion of the principles that should determine the nature and extent of devolution, in the presentation of a system of public finance for intermediate levels of government (Appendix A) and even in helping with the drafting of the financial sections of the Majority Report. Nevertheless, the working out of the constitutional implications of

what we labelled as “the interlocking principle” of government was entirely Norman’s doing.

After the publication of the Report, I was precluded from taking part in the ensuing debate because of a totally unexpected call to become Chief Economic Adviser and a Deputy Secretary (now called a G2) in the Department of Trade and Industry. It was made clear to me that on a sensitive matter such as devolution I could neither publish any further thoughts of my own, nor would I be involved in the “internal” discussion and formulation of any government proposals. When Norman became the constitutional adviser to the Labour Government, which came to power in February 1974, I met him occasionally informally in the Cabinet Office Mess when he gave me some idea of his progress in trying to make sense of a scheme of partial devolution. That induced me to circulate the following piece of doggerel round Whitehall:

Defection on the devolution of our time

Alas! your proposal’s clearly meant
To maim our Memorandum of Dissent
Which makes the case none should oppose -
What suits the Thistle likewise suits the Rose.

E’en if the Dales seem now content
With centralised Imperial Government
The moment Scotia makes her Laws
Will be the sign for rioting in Hawes!

So when Northumbria’s hordes advance
With clenched fist and Solemn Remonstrance
Haunted you’ll be in your Affliction
By Peacock’s pellucid Prediction

MORAL

Time still remains to repel Revolution
By Uniformity in Devolution.

From somewhere in the depths of Whitehall an anonymous reply came:

Perk up, pale Peacock, ease your Cassandra frown
The dreadful hordes will stay away from town.
The fact is every northern Union
Well knows which side its bread is buttered on

If squires for autonomy worked up a rage
Working class interest would hoot them off the stage.
Scotia is different : it dreams of the Oil;
The Geordie relies on his (subsidised) toil.

All-England will get him a juicier share
Of unctuous lucre that Scotia can spare
Than would Dissenters' regional assembly
Competing for benefits pumped from the sea.

MORAL

What e'er devolutions come north of the Tweed
Unions back Unions for Northumbria's need

To which my rejoinder was:

Foolhardy they who purvey political prognoses
Only the Gods know who will have bloody noses.

It was only some three years later, when I left government, that I could exchange this kind of badinage for an attempt to examine more closely what kind of decentralised government fitted with my liberalist tendencies, remembering that, in the end, one's views on any governmental system depend on one's political philosophy. A careful reader of the Memorandum of Dissent would have detected that I parted company with Norman Hunt on two vital issues which are highly relevant to my attitude to the present devolution debate. It was this which led to each of us prefacing the Memorandum with separate Notes.

The first issue arose from a difference of view about the effect of devolution, and therefore more decision-taking independent of central government, on the pursuit of national economic objectives. My professional judgement at the time was that the Treasury had

produced no conclusive evidence to show that devolution would make it more difficult to preserve economic stability and would have sufficient control over the fiscal system to achieve overall "fairness" in distribution (see further Peacock 1976a). Hunt, while in general agreement with this position, envisaged a much more extensive system of regional economic planning, entailing close co-operation between the national and devolved governments, and commissioned a separate memorandum which I could not accept.

Much more important was the issue as to whether the allocation of resources to government in order to conduct policies believed to be in the interests of individual citizens was a sensible one. The Report of the Commission and the Memorandum of Dissent proceed on the assumption that the relative size of the public sector in the economy, whatever the distribution of tasks between the centre and subordinate levels of government, would remain as it was at the time. I went along with this procedure on the grounds that we had sufficient problems to grapple without arguing about whether our terms of reference extended to this highly contentious matter, but, as I made clear in my Prefatory Note, I was uneasy about this procedure. I stated my position as follows:

I recognise and accept that government has a crucial role to play in providing common services, in regulating the economy, in helping the unfortunate, and in regulating the conduct of the unscrupulous, but these important functions must not interfere with the rights of individuals to make the major decisions which affect the conduct of their lives, which is the essence of democracy. Increased regional participation will do something to promote this ideal, but I believe that governments seriously interested in preserving democracy need to do much more to make it possible for citizens to rely less on its support. It follows that the size and composition of the public sector in relation to the private sector needs to be kept under continuous review, and should not therefore be regarded as sacrosanct.

In short, the left-over issue, so to speak, for serious consideration was the relative roles of devolution of government and a reduction in the influence of government on individual decision-making as appropriate means for expanding individual freedom. This is for me

the essential issue in deciding one's position on devolution of government today, which I shall now address.

The dimensions of devolution

At first sight, devolution seems the right road to follow in expanding the opportunities for individuals to have more control over their own affairs. There is an additional opportunity to vote in members of a legislature who more directly reflect individual preferences. As Crick and Miller (1995) have indicated, devolution of government to Scotland affords the opportunity to introduce procedural changes in the devolved legislature designed to reduce the monopoly of political power and to increase efficiency in law-making. With equal enthusiasm, I suggested some years ago (Peacock 1976b) a number of ways in which members of the voting public could exercise more control over their representatives. These included:

- (a) referenda and official opinion polls might be used as a matter of course to sound out views and even to decide on specific policy issues;
- (b) members of the public might as a matter of right be able to ballot for time (of necessity, strictly limited!) to address the legislature, in addition to the invitation to distinguished outsiders to address members as well as to give evidence to specialist committees;
- (c) members of the legislature should have their attendance officially recorded;
- (d) the venue of the legislature's deliberations and/or committees might be held from time to time outside the capital;
- (e) members might issue an annual written official report to be made available to their constituents;
- (f) an official handbook should be available which explains to the ordinary citizen the mode of access to political participation.

I was well aware that these and other similar suggestions involve a trade-off between the utility of speed in political decision-making and that of fuller participation in how decisions are arrived at.

These are only illustrations of the ways in which devolution can capture the imagination of those of a libertarian persuasion as well as those who have more faith in our political "servants". But elaboration of such details is a waste of time at the moment, because devolution fulfilling the minimum conditions for the creation of a net expansion in individual freedom is simply not in prospect and, even if it were, there are pre-conditions for its institution which are at present not fulfilled, and which may in reality not be fulfilled at all.

This argument is supported in the first instance by the relevant assumptions underlying the Scottish Constitutional Convention. These are:

- (a) a separate Scottish Parliament, whether or not there is devolution elsewhere in the UK
- (b) the continuation of the Barnett/Goschen formula which determines the calculation of government expenditure assigned to Scotland.
- (c) the power to vary the basic rate of income tax for Scottish taxpayers by up to 3p in the pound.

The bland suggestion that such arrangements would further one of the principal objectives of the scheme, "to remove a source of tension between Scotland and other parts of the UK", is naive in the extreme. Consider the problems that would have to be resolved if partial devolution were to be instituted by a Labour Government and at the top of its legislative programme. I need not dwell on the West Lothian Question, which, whatever one's views on the alleged "over-representation" of Scotland at Westminster, will give rise to heated debate. Second, as David Bell (1996) points out, the Barnett/Goschen formula is now under attack because it appears to favour Scotland unduly. Of course, the principle behind the formula, i.e. equalisation of expenditure per head throughout the UK, may be contested, and a reasonable case might be made for modifications which would take into account relative "needs" of different parts of the UK. The only

point that needs to be made here is that, once again, an issue has to be resolved which is of prime importance in the formulation of legislation required to give effect to a devolved scheme of government.

It will take time to resolve these matters, which will raise the awareness of other parts of the UK to the perceived advantages of devolution and the extent to which these may be "paid for" by regions denied these advantages. A way out of this difficulty proposed by David Bell (1996) is the creation of a standing Commission, with representation of both central government and the Scottish Assembly, which would keep the mode of allocation of expenditure under review. It would devise the mode of assessment and translate these into explicit expenditure allocations, but these would reflect relative and not absolute needs, which would leave overall expenditure control in the hands of Westminster. A more transparent system of expenditure allocation will certainly be necessary, whether or not devolution takes place; but the confining of regional representation on the Commission to a Scottish Parliament will only bring home to the rest of the UK that Scotland has established a power base which would enhance its bargaining strength vis-a-vis central government. At the very least, this will lead to demands for extensive Parliamentary debate and add to the accumulation of issues that presage a much longer time scale for the passage of sensible legislation.

Apart from the influence of contentious issues on the length of the "period of production" of a devolved Scottish Assembly, The Constitution Unit's Report (1996) has drawn from the previous attempt a set of important lessons which emphasise the formidable technical problems to be encountered in drafting legislation (see pp 31-32). The 1978 Scotland Act took 23 days of Parliamentary time in the Commons and the same period in the Lords. The size of the task is paralleled by the need for thorough preparation in the design of legislation. The institutional machinery will take time to prepare, and the full constitutional implications need to be carefully examined and explained.

Perhaps "Peacock's pellucid prediction" of the inevitability of some form of general devolution because of the growing realisation that partial devolution would result in inequality of political rights may

be open to doubt. But the Hunt/Peacock Memorandum of Dissent put its finger on a problem that will not go away. As the Constitution Unit recognizes, one must see "devolution to Scotland as part of a coherent programme of constitutional change embracing all parts of the UK".

But having discussed the feasibility of devolution, the important question remains as to whether devolution at this stage in our political history is desirable in the first place. As I have emphasised, this depends on one's political philosophy and the touchstone for the author is whether or not devolution will expand the opportunities for individuals to make their own decisions about the things which affect them most in life, while recognizing that this expansion of such opportunities requires cooperation between individuals through community and/or political institutions. The author's short answer to this question is "no".

Privatisation as an alternative to devolution

The debate over devolution is still conducted largely in terms of the re-allocation of powers between the central and devolved government(s). However, in the course of the last two decades, the more fundamental question of the division of powers between the public and private sector has come into prominence. Successive governments from 1979 onwards have pledged themselves both to the privatisation of public corporations and to the reduction in the size of the public budget relative to the annual output of resources (Gross Domestic Product). In principle, such a policy should be a more direct and more effective way of devolving power to individuals. It is supposed to increase the extent of private ownership of capital and reduce collective ownership, leaving individuals with more power but also more responsibility for the conduct of their affairs. Additionally, the liquidation of government monopolies of a wide range of services offers the prospect of harnessing the initiative of private individuals and companies to supply directly what individuals as buyers of goods and services wish to enjoy, and for such individuals to have the benefit of alternative sources of supply. In contrast devolution *per se* still leaves the individual citizen with a high opportunity cost in trying to induce legislators to arrange for the efficient provision of collective

services so that they conform to his perception of what he will be forced, through taxation, to pay for them. I have no political affiliations, but I am proud to have been closely involved with attempts by these governments to extend individual choice through the design of voucher schemes, through the introduction of personal pensions, by radical reform of a system of broadcasting which put producer interests before that of the listener and viewer, and by persistent advocacy of a cultural policy designed to improve communication between performing and creative artists and their public.

Many things have gone wrong in the attempt to "roll back the state". Its ideology has often been presented in a form which seems to promote naked materialism rather than how individuals can help each other as well as themselves through voluntary effort. In contrast, it promotes a conspiratorial view of legislators and civil servants and in consequence it regards government at most as a necessary evil instead of recognizing that what Adam Smith called the "system of natural liberty" can identify a distinct role for government, albeit one kept continuously under review.

A litany of failure to make the extension of the market economy conform with the expansion of individual freedom is easily drawn up. Overall government expenditure as a proportion of GDP has remained static instead of declining as the Conservative Government planned (see Flemming and Oppenheimer, 1996). Preventing privatisation from turning public into private monopolies has been beset by major difficulties. Where competition would prevent this, it has emerged at a slower rate than envisaged and where competition is inherently difficult to establish because of technical economies of scale, consistent attempts have been made by large companies supplying gas, electricity and water to subvert the regulatory regimes designed to control their costs and prices so that consumers would benefit. The attempts to improve efficiency in public services, such as education, health and provision of justice, have met with determined opposition from professional pressure groups whose established practices are called into question. Although the data are difficult to interpret, the hope of a "trickle down" effect which would result in the benefits of change being more equally distributed has been perceived as a chimera.

Nevertheless, there appears to be a widespread if reluctant acceptance of the fact that the growth in the economy necessary to expand individual opportunity can only be achieved if we can improve our competitiveness in the world economy on which we increasingly depend. That being the case, then the first priority for any government, whatever its political complexion, is to concentrate its efforts on the formidable task of creating a general economic climate which encourages enterprise and innovation. However, reluctant acceptance can only be transformed into approval if the benefits of growth are clearly available to all.

This statement may have the stale odour of routine political exhortation, but it has the distinct and valid purpose of emphasising that any future government seriously interested in pursuing these tasks will have to assign high priority in its legislative programme and its implementation by the executive to areas of governance in which devolution can play no part. Therefore, apart from the inherent difficulties in pushing through legislation designed to meet the aspirations of the supporters of the Claim of Right, which make it doubtful if a Scottish Assembly could be in place within the life of one Parliament, there is the high opportunity cost of diverting scarce governmental and administrative resources away from the task of creating the economic conditions which are simply being taken for granted.

But even if unilateral devolution for Scotland were placed at the top of the agenda and pushed through Parliament in its first session, there is no complementarity between the perceived improvements it is meant to bestow on Scots and the object of expanding individual opportunity. There are two reasons for this. First, as Gavin McCrone (1996) demonstrates, "devolution is unlikely to mean very much on the economic front". No considered judgement of its effects, such as that of McCrone, places much emphasis on the positive effects of devolution on economic prosperity. Second, if the main objective is to cure a "democratic deficit" by giving Scots more direct control over both the size and pattern of government expenditure, it is closely tied in with the presumption that Scots will wish to *increase* rather than *decrease* the size of the public sector as the proposed power to adjust the rate of income tax indicates. Now enhancing the role of the individual citizen in the democratic process is part of a

liberalist philosophy, but this is not to say that the best and only way of achieving this is by unilateral devolution. Even if it were, those who like the author oppose the further expansion of the public sector, while they would not wish to oppose a democratic decision which produced the opposite result, are not obliged to like it.

The European spectre

Unilateral devolution requires clarification of the relations between a Scottish Parliament and the European Union, and the issues are thoroughly discussed by the Constitution Unit (1996). Here again, there are sufficient bones of contention between Scotland and other regions to raise further doubts about the assertion that devolution will reduce "tension" between England and Scotland. Scotland has direct representation both in the European Parliament and the Committee of Regions and population-wise this representation is generous in the latter institution. Understandably, a Scottish Parliament would press for the formalisation of representation on both bodies as well as explicit recognition within the UK for its role in examining all European legislation likely to affect Scotland in particular. It would be a short step from this position to seek close liaison with other European Parliaments and administrations, quite independently of Westminster. This would be all the more necessary if the UK Government devolved control over environmental, health and safety and cultural policies to a Scottish Parliament when these matters are simultaneously falling within the competence of the EU. Apart from the care and attention needed in drafting the appropriate clauses in devolution legislation, one cannot believe that, once these matters become transparent, there will not be further attempts made to extend such powers and opportunities for direct links with the EU to other parts of the UK, though it emphasises once again that it would only be sensible to conduct the debate within a wider constitutional context. This is even more obvious when, as everyone knows, it is very far from certain that the UK, and indeed other countries within EC, will implement the Maastricht Treaty to the extent that it would mean creating what would amount to a Federal Europe. It would be foolish to attempt a prediction as to what will be the outcome, but it is worth exploring the place of devolution within an interventionist system, such as would inevitably follow from the full implementation of the Treaty, and the "liberal alternative" which

many of us thought we were voting for when we first entered the EEC in 1973.

The full implementation of Maastricht would require:

- (i) Extension of existing powers to intervene in social and industrial policy, technology, consumer protection, environment and education, and eventually intervention to enforce those parts of collective bargaining agreements that deal with working conditions.
- (ii) Common policies covering foreign affairs and defence.
- (iii) Full monetary union within a definite timetable.

All these policy developments suggest a reinforcement of the centralising tendencies already apparent in the complicated apparatus of decision-making in EC. A disturbing feature of this development lies in the strong vested interests that politicians, administrators and lawyers, not to speak of powerful interest groups, must have in supporting this extension in the scope of EC activities. This is because such an expansion increases the demand for their services and enhances their job prospects. To take but one example, the Commission's staff has increased ten-fold since 1960, salaries of top officials are frequently in excess of 50 per cent above comparable national levels, and after-tax salaries are much more attractive than other international institutions such as OECD or IMF. Already in 1995 the EC Budget exceeded the national budgets of nine of the fifteen Member States. Greater control of the growth of this bureaucracy, whose administration is not supervised by the Council of Ministers and which plays a major part in the formulation of legislation, seems a remote prospect. (For details, see Vaubel 1995.) The members of the European Parliament share this interest in centralisation, as is clear from their voracious demands for funding. Their quarrel with the Commission is over the division of the spoils rather than over the effectiveness of control over bureaucracy.

So far as the devolution issue is concerned, it is supposed that the interests of regional and, indeed, national governments will be protected by the famous "subsidiarity" principle (Maastricht Treaty, Article 3B.). The meaning of this Article is far from clear. If what is

really meant is that where a central or devolved government could perform some function assigned to government better than the EC, power will remain with the former, will this permit the re-negotiation of some of the powers already assumed by the Commission and approved by the Council of Ministers? The present procedure requires the Commission to take the initiative and to have the Council of Ministers rubber stamp their proposals. Ultimately in cases of dispute, the European Court of Justice plays a crucial role and there is no appeal from its judgments.

Of course, as a classical liberal, this centralisation of power in the EC runs completely counter to the objective of expanding individual opportunity, and the recognition that individual preferences may differ markedly from each other. However, it does not take a commitment to this doctrine to accept that a pre-condition for any sensible scheme of devolution must be clarification of Britain's future role in the EC, which is a subject of dispute not only between the EC and Britain, but also within each of the main political parties. The more it is accepted that the main legislation affecting our lives emanates from Brussels, the more controversy is generated about the division of the remaining powers between our central and devolved government(s). The more we follow through with the provisions of the Maastricht Treaty, the greater the need to concentrate on reducing the "democratic deficit" at the EC level before creating another layer of government whose powers cannot be determined.

Conclusion

The conclusion which follows from this analysis is that if unilateral devolution for Scotland is pushed through in the first post-election Parliament, then it is likely to result in a constitutional shambles. This is the inevitable conclusion to be drawn from the analysis provided by the Constitution Unit. Additionally, there will be considerable uncertainty surrounding the division of powers between the central and devolved government until the UK has cleared its lines with the EC about the extent to which the Maastricht Treaty will apply to the UK and until the definition and interpretation of subsidiarity is clarified. In any case, any delay in making legislative provision, which could be the result of taking fuller account of the constitutional implications as well of the

uncertainties presented by the future of the EC, will make even more apparent how Scotland will be endowed with political rights which exceed those of English regions. This will in turn increase the likelihood that there will be pressure for full devolution, perhaps along the lines proposed in the Memorandum of Dissent to the Kilbrandon Commission. At the very least, it will put pressure on the Government of the day to revise the Barnett/Goschen formula which is taken as a datum by the promoters of Scots devolution.

The argument for devolution can be viewed from another angle, which is how far it expands individual economic freedom and choice. The preferred method for doing this is to reduce the role of the public sector in our daily lives without disadvantaging the poor and unfortunate. There is much work to be done in selecting the right measures to promote this end and in improving their application, particularly in regard to privatisation and liberalisation programmes designed to improve our competitiveness. Such programmes should take precedence in the legislative "queue" over those which are concerned with constitutional changes whose full implications are not even yet apparent. In any case, a classical liberal economist will wish to see a constitutional safeguard which will limit the growth of public spending at all levels of government. A provision such as that which enables a Scottish Parliament to raise rather than lower the rate of public spending runs counter to this philosophy.

In short, while still very much in favour of decentralisation of government, I reaffirm my belief in uniformity of devolution combined with the associated constitutional reforms which both improve methods of representation in all national legislative bodies and which embody provisions which limit the growth in the public sector. Inevitably this places me firmly in the camp of those seeking a considerable reduction in the powers of the EC and in favour of control over the exercise of remaining powers being placed firmly in the hands of national governments. Concern at the "democratic deficit" is at present much better directed towards the erosion of democratic control by the EC Commission, i.e. towards the "top" layer of government, than towards what is alleged to be the case at the grass roots.

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